

# Federal Register

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- FOR: Any person who uses the Federal Register and Code of Federal Regulations.
- WHO: Sponsored by the Office of the Federal Register.
- WHAT: Free public briefings (approximately 3 hours) to present:
  1. The regulatory process, with a focus on the Federal Register system and the public's role in the development of regulations.
  2. The relationship between the Federal Register and Code of Federal Regulations.
  3. The important elements of typical Federal Register documents.
  4. An introduction to the finding aids of the FR/CFR system.
- WHY: To provide the public with access to information necessary to research Federal agency regulations which directly affect them. There will be no discussion of specific agency regulations.

WASHINGTON, DC

[Three Sessions]

- WHEN: June 18, 1996 at 9:00 am,  
July 9, 1996 at 9:00 am, and  
July 23, 1996 at 9:00 am.
- WHERE: Office of the Federal Register Conference Room, 800 North Capitol Street, NW., Washington, DC (3 blocks north of Union Station Metro)
- RESERVATIONS: 202-523-4538



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Title 3—

Proclamation 6903 of June 7, 1996

The President

Flag Day and National Flag Week, 1996

By the President of the United States of America

## A Proclamation

There is no better symbol of our country's values and traditions than the Flag of the United States of America. Chosen by the Continental Congress in 1777, it continues to exemplify the profound commitment to freedom, equality, and opportunity made by our founders more than two centuries ago. Our flag's proud stars and stripes have long inspired our people, and its beautiful red, white, and blue design is known around the world as a beacon of liberty and justice.

Today, America's flag graces classrooms, statehouses, courtrooms, and churches, serving as a daily reminder of this Nation's past accomplishments and ongoing dedication to safeguarding individual rights. The brave members of our Armed Forces carry "Old Glory" with them as they fulfill their mission to defend the blessings of democracy and peace across the globe; our banner flies from public buildings as a sign of our national community; and its folds drape the tombs of our distinguished dead. The flag is a badge of honor to all—a sign of our citizens' common purpose.

This week and throughout the year let us do all we can to teach younger generations the significance of our flag. Its 13 red and white stripes represent not only the original colonies, but also the courage and purity of our Nation, while its 50 stars stand for the separate but united States of our Union. Let us pledge allegiance to this flag to declare our patriotism and raise its colors high to express our pride and respect for the American way of life.

To commemorate the adoption of our flag, the Congress, by joint resolution approved August 3, 1949 (63 Stat. 492), designated June 14 of each year as "Flag Day" and requested the President to issue an annual proclamation calling for its observance and for the display of the Flag of the United States on all Federal Government buildings. The Congress also requested the President, by joint resolution approved June 9, 1966 (80 Stat. 194), to issue annually a proclamation designating the week in which June 14 falls as "National Flag Week" and calling upon all citizens of the United States to display the flag during that week.

NOW, THEREFORE, I, WILLIAM J. CLINTON, President of the United States of America, do hereby proclaim June 14, 1996, as Flag Day and the week beginning June 9, 1996, as National Flag Week. I direct the appropriate officials to display the flag on all Federal Government buildings during that week, and I urge all Americans to observe Flag Day and National Flag Week by flying the Stars and Stripes from their homes and other suitable places.

I also call upon the people of the United States to observe with pride and all due ceremony those days from Flag Day through Independence Day, also set aside by Congress (89 Stat. 211), as a time to honor our Nation, to celebrate our heritage in public gatherings and activities, and to publicly recite the Pledge of Allegiance to the Flag of the United States of America.

IN WITNESS WHEREOF, I have hereunto set my hand this seventh day of June, in the year of our Lord nineteen hundred and ninety-six, and of the Independence of the United States of America the two hundred and twentieth.

*William Clinton*

[FR Doc. 96-15028

Filed 6-11-96; 8:45 am]

Billing code 3195-01-P

# Rules and Regulations

Federal Register

Vol. 61, No. 114

Wednesday, June 12, 1996

This section of the FEDERAL REGISTER contains regulatory documents having general applicability and legal effect, most of which are keyed to and codified in the Code of Federal Regulations, which is published under 50 titles pursuant to 44 U.S.C. 1510.

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

## DEPARTMENT OF AGRICULTURE

### Agricultural Marketing Service

#### 7 CFR Part 948

[Docket No. FV96-948-11FR]

#### Irish Potatoes Grown in Colorado; Assessment Rate

**AGENCY:** Agricultural Marketing Service, USDA.

**ACTION:** Interim final rule with request for comments.

**SUMMARY:** This interim final rule establishes an assessment rate for the Colorado Potato Administrative Committee, Northern Colorado Office (Area III) (Committee) under Marketing Order No. 948 for the 1996-97 and subsequent fiscal periods. The Committee is responsible for local administration of the marketing order which regulates the handling of Irish potatoes grown in Colorado. Authorization to assess potato handlers enables the Committee to incur expenses that are reasonable and necessary to administer the program.

**DATES:** Effective on July 1, 1996. Comments received by July 12, 1996, will be considered prior to issuance of a final rule.

**ADDRESSES:** Interested persons are invited to submit written comments concerning this rule. Comments must be sent in triplicate to the Docket Clerk, Fruit and Vegetable Division, AMS, USDA, P.O. Box 96456, room 2523-S, Washington, DC 20090-6456, FAX 202-720-5698. Comments should reference the docket number and the date and page number of this issue of the Federal Register and will be available for public inspection in the Office of the Docket Clerk during regular business hours.

**FOR FURTHER INFORMATION CONTACT:** Martha Sue Clark, Marketing Order Administration Branch, Fruit and Vegetable Division, AMS, USDA, P.O.

Box 96456, room 2523-S, Washington, DC 20090-6456, telephone 202-720-9918, FAX 202-720-5698, or Dennis L. West, Northwest Marketing Field Office, Fruit and Vegetable Division, AMS, USDA, Green-Wyatt Federal Building, room 369, 1220 Southwest Third Avenue, Portland, OR 97204, telephone 503-326-2724, FAX 503-326-7440.

**SUPPLEMENTARY INFORMATION:** This rule is issued under Marketing Agreement No. 97 and Order No. 948, both as amended (7 CFR part 948), regulating the handling of Irish potatoes grown in Colorado, hereinafter referred to as the "order." The order is effective under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601-674), hereinafter referred to as the "Act."

The Department of Agriculture (Department) is issuing this rule in conformance with Executive Order 12866.

This rule has been reviewed under Executive Order 12778, Civil Justice Reform. Under the marketing order now in effect, Colorado potato handlers are subject to assessments. Funds to administer the order are derived from such assessments. It is intended that the assessment rate as issued herein will be applicable to all assessable potatoes beginning July 1, 1996, and continuing until amended, suspended, or terminated. This rule will not preempt any State or local laws, regulations, or policies, unless they present an irreconcilable conflict with this rule.

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

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

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

There are approximately 85 producers of Colorado Area III potatoes in the production area and approximately 15 handlers subject to regulation under the marketing order. Small agricultural producers have been defined by the Small Business Administration (13 CFR 121.601) as those having annual receipts of less than \$500,000, and small agricultural service firms are defined as those whose annual receipts are less than \$5,000,000. The majority of Colorado Area III potato producers and handlers may be classified as small entities.

The Colorado potato marketing order provides authority for the Committee, with the approval of the Department, to formulate an annual budget of expenses and collect assessments from handlers to administer the program. The members of the Committee are producers and handlers of Colorado Area III potatoes. They are familiar with the Committee's needs and with the costs for goods and services in their local area and are thus in a position to formulate an appropriate budget and assessment rate. The assessment rate is formulated and discussed in a public meeting. Thus, all directly affected persons have an opportunity to participate and provide input.

In Colorado, both a State and a Federal marketing order operate simultaneously. The State order authorizes promotion, including paid advertising, which the Federal order does not. All expenses in this category are financed under the State order. The jointly operated programs consume about equal administrative time and the two orders continue to split administrative costs equally.

The Committee met on April 11, 1996, and unanimously recommended 1996–97 expenditures of \$24,462.50 and an assessment rate of \$0.01 per hundredweight of potatoes. In comparison, last year's budgeted expenditures were \$27,362.50. The assessment rate of \$0.01 is \$0.01 less than last year's established rate. Major expenditures recommended by the Committee for the 1996–97 year include \$11,500 for the manager's salary, \$2,400 for rent, and \$1,500 for office supplies, the same as in 1995–96.

The assessment rate recommended by the Committee was derived by dividing anticipated expenses by expected shipments of Colorado Area III potatoes. Potato shipments for the year are estimated at 1,450,750 hundredweight which should provide \$14,507.50 in assessment income. Income derived from handler assessments, interest, and rent from the sublease of office space to the State inspection service, along with funds from the Committee's authorized reserve, will be adequate to cover budgeted expenses. Funds in the reserve at the beginning of the 1996–97 fiscal period are estimated at \$36,551. Funds in the reserve will be kept within the maximum permitted by the order.

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

The assessment rate established in this rule will continue in effect indefinitely unless modified, suspended, or terminated by the Secretary upon recommendation and information submitted by the Committee or other available information.

Although this assessment rate is effective for an indefinite period, the Committee will continue to meet prior to or during each fiscal period to recommend a budget of expenses and consider recommendations for modification of the assessment rate. The dates and times of Committee meetings are available from the Committee or the Department. Committee meetings are open to the public and interested persons may express their views at those meetings. The Department will evaluate Committee recommendations and other available information to determine whether modification of the assessment rate is needed. Further rulemaking will be undertaken as

necessary. The Committee's 1996–97 budget and those for subsequent fiscal periods will be reviewed and, as appropriate, approved by the Department.

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

Pursuant to 5 U.S.C. 553, it is also found and determined upon good cause that it is impracticable, unnecessary, and contrary to the public interest to give preliminary notice prior to putting this rule into effect, because: (1) The Committee needs to have sufficient funds to pay its expenses which are incurred on a continuous basis; (2) the 1996–97 fiscal period begins on July 1, 1996, and the marketing order requires that the rate of assessment for each fiscal period apply to all assessable potatoes handled during such fiscal period; (3) handlers are aware of this action which was unanimously recommended by the Committee at a public meeting and is similar to other assessment rate actions issued in past years; and (4) this interim final rule provides a 30-day comment period, and all comments timely received will be considered prior to finalization of this rule.

#### List of Subjects in 7 CFR Part 948

Marketing agreements, Potatoes, Reporting and recordkeeping requirements.

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

#### **PART 948—IRISH POTATOES GROWN IN COLORADO**

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

Authority: 7 U.S.C. 601–674.

2. A new § 948.215 is added to read as follows:

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

#### **§ 948.215 Assessment rate.**

On and after July 1, 1996, an assessment rate of \$0.01 per hundredweight is established for Colorado Area III potatoes.

Dated: June 3, 1996.

Sharon Bomer Lauritsen,  
*Acting Director, Fruit and Vegetable Division.*  
[FR Doc. 96–14756 Filed 6–11–96; 8:45 am]

BILLING CODE 3410–02–P

## **NUCLEAR REGULATORY COMMISSION**

### **10 CFR Parts 30, 40, 70, 72**

RIN 3150–AF50

#### **Minor Amendments to Miscellaneous Cross-References**

**AGENCY:** Nuclear Regulatory Commission.

**ACTION:** Final rule.

**SUMMARY:** The Nuclear Regulatory Commission (NRC) is amending its regulations to achieve consistency in the cross-references associated with several recent changes to the NRC's regulations affecting decommissioning. This notice is necessary to inform the public of these corrections.

**EFFECTIVE DATE:** June 12, 1996.

**FOR FURTHER INFORMATION CONTACT:** Jayne M. McCausland, Office of Nuclear Regulatory Research, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, telephone (301) 415–6219, email JMM2@nrc.gov.

**SUPPLEMENTARY INFORMATION:** To achieve consistency in the NRC's regulations affecting decommissioning, the following cross-reference revisions in 10 CFR Parts 30, 40, 70, and 72 are being made:

(1) In §§ 30.36(d) and 30.36(g)(3), the cross-references to paragraph “(f)(1)” are revised to read “(g)(1).”

(2) In §§ 30.36(g)(3)(vi) and 30.36(h)(1) and (h)(2), the cross-references to paragraph “(h)” are revised to read “(i).”

(3) In §§ 40.42(d) and 40.42(g)(3), the cross-references to paragraph “(f)(1)” are revised to read “(g)(1).”

(4) In §§ 40.42(g)(4)(vi) and 40.42(h)(1) and (h)(2), the cross-references to paragraph “(h)” are revised to read “(i).”

(5) In §§ 70.38(d) and 70.38(g)(3), the cross-references to paragraph “(f)(1)” are revised to read “(g)(1).”

(6) In §§ 70.38(g)(4)(vii) and 70.38(h)(1) and (h)(2), the cross-references to “(h)” are revised to read “(i).”

(7) In §§ 72.54(j)(1) and (j)(2), the cross-references to “(j)” are revised to read “(k).”

Because the changes are minor administrative amendments, the NRC has determined that good cause exists to dispense with the notice and comment provisions of the Administrative Procedure Act (APA) pursuant to 5 U.S.C. 553(b)(B). For the same reasons, the NRC has determined that good cause exists to waive the 30-day deferred effective date provisions of the APA (5 U.S.C. 553(d)).

### Environmental Impact: Categorical Exclusion

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

### Paperwork Reduction Act Statement

This final rule does not contain a new or amended information collection requirement subject to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). Existing requirements were approved by the Office of Management and Budget, approval numbers 3150-0009, 3150-0017, 3150-0020, and 3150-0132.

### Public Protection Notification

The NRC may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

### Regulatory Analysis

This final rulemaking does not impose any new requirements or additional costs to licensees because it is administrative in that it achieves consistency in cross-references in existing regulations and does not result in any substantive change. This constitutes the regulatory analysis for this final rule.

### Backfit Analysis

The NRC has determined that the backfit rule, 10 CFR 50.109, does not apply to this final rule and, therefore, that a backfit analysis is not required for this rulemaking because these amendments do not involve any provision that would impose backfits as defined in 10 CFR 50.109(a)(1).

### List of Subjects

#### 10 CFR Part 30

Byproduct material, Criminal penalties, Government contracts, Intergovernmental relations, Isotopes, Nuclear materials, Radiation protection, Reporting and recordkeeping requirements.

#### 10 CFR Part 40

Criminal penalties, Government contracts, Hazardous materials transportation, Nuclear materials, Reporting and recordkeeping requirements, Source material, Uranium.

#### 10 CFR Part 70

Criminal penalties, Hazardous materials transportation, Material

control and accounting, Nuclear materials, Packaging and containers, Radiation protection, Reporting and recordkeeping requirements, Scientific equipment, Security measures, Special nuclear material.

#### 10 CFR Part 72

Manpower training programs, Nuclear materials, Occupational safety and health, Reporting and recordkeeping requirements, Security measures, Spent fuel.

For the reasons set out in the preamble and under the authority of the Atomic Energy Act of 1954, as amended; the Energy Reorganization Act of 1974, as amended; and 5 U.S.C. 552 and 553; the Nuclear Regulatory Commission is adopting the following amendments to 10 CFR Parts 30, 40, 70, and 72.

### PART 30—RULES OF GENERAL APPLICABILITY TO DOMESTIC LICENSING OF BYPRODUCT MATERIAL

1. The authority citation for Part 30 continues to read as follows:

Authority: Secs. 81, 82, 161, 182, 183, 186, 68 Stat. 935, 948, 953, 954, 955, as amended, sec. 234, 83 Stat. 444, as amended (42 U.S.C. 2111, 2112, 2201, 2232, 2233, 2236, 2282); secs. 201, as amended, 202, 206, 88 Stat. 1242, as amended, 1244, 1246 (42 U.S.C. 5841, 5842, 5846).

Section 30.7 also issued under Pub. L. 95-601, sec. 10, 92 Stat. 2951 as amended by Pub. L. 102-485, sec. 2902, 106 Stat. 3123 (42 U.S.C. 5851). Section 30.34(b) also issued under sec. 184, 68 Stat. 954, as amended (42 U.S.C. 2234). Section 30.61 also issued under sec. 187, 68 Stat. 955 (42 U.S.C. 2237).

#### § 30.36 [Amended]

2. In § 30.36(d), the cross-reference to “paragraph (f)(1)” is revised to read “paragraph (g)(1).”

3. In § 30.36(g)(3), the cross-reference to “paragraph (f)(1)” is revised to read “paragraph (g)(1).”

4. In § 30.36(g)(4)(vi), the cross-reference to “paragraph (h)” is revised to read “paragraph (i).”

5. In § 30.36 (h)(1), the cross-reference to “paragraph (h)” is revised to read “paragraph (i).”

6. In § 30.36(h)(2), the cross-reference to “paragraph (h)” is revised to read “paragraph (i).”

### PART 40—DOMESTIC LICENSING OF SOURCE MATERIAL

7. The authority citation for Part 40 continues to read as follows:

Authority: Secs. 62, 63, 64, 65, 81, 161, 182, 183, 186, 68 Stat. 932, 933, 935, 948, 953, 954, 955, as amended, secs. 11e(2), 83, 84, Pub. L. 95-604, 92 Stat. 3033, as amended, 3039, sec. 234, 83 Stat. 444, as

amended (42 U.S.C. 2014(e)(2), 2092, 2093, 2094, 2095, 2111, 2113, 2114, 2201, 2232, 2233, 2236, 2282); sec. 274, Pub. L. 86-373, 73 Stat. 688 (42 U.S.C. 2021); secs. 201, as amended, 202, 206, 88 Stat. 1242, as amended, 1244, 1246 (42 U.S.C. 5841, 5842, 5846); sec. 275, 92 Stat. 3021, as amended by Pub. L. 97-415, 96 Stat. 2067 (42 U.S.C. 2022).

Section 40.7 also issued under Pub. L. 95-601, sec. 10, 92 Stat. 2951, as amended by Pub. L. 102-486, sec. 2902, 106 Stat. 3123 (42 U.S.C. 5851). Section 40.31(g) also issued under sec. 122, 68 Stat. 939 (42 U.S.C. 2152). Section 40.46 also issued under sec. 184, 68 Stat. 954, as amended (42 U.S.C. 2234). Section 40.71 also issued under sec. 187, 68 Stat. 955 (42 U.S.C. 2237).

#### § 40.42 [Amended]

8. In § 40.42(d) introductory text, the cross-reference to “paragraph (f)(1)” is revised to read “paragraph (g)(1).”

9. In § 40.42(g)(3), the cross-reference to “paragraph (f)(1)” is revised to read “paragraph (g)(1).”

10. In § 40.42(g)(4)(vi), the cross-reference to “paragraph (h)” is revised to read “paragraph (i).”

11. In § 40.42(h)(1), the cross-reference to “paragraph (h)” is revised to read “paragraph (i).”

12. In § 40.42(h)(2), the cross-reference to “paragraph (h)” is revised to read “paragraph (i).”

### PART 70—DOMESTIC LICENSING OF SPECIAL NUCLEAR MATERIAL

13. The authority citation for Part 70 continues to read as follows:

Authority: Secs. 51, 53, 161, 182, 183, 68 Stat. 929, 930, 948, 953, 954, as amended, sec. 234, 83 Stat. 444, as amended, sec. 1701, 106 Stat. 2951, 2952, 2953 (42 U.S.C. 2071, 2073, 2201, 2232, 2233, 2282, 2297f), secs. 201, as amended, 202, 204, 206, 88 Stat. 1242, as amended, 1244, 1245, 1246 (42 U.S.C. 5841, 5842, 5845, 5846).

Sections 70.1(c) and 70.20a(b) also issued under secs. 135, 141, Pub. L. 97-425, 96 Stat. 2232, 2241 (42 U.S.C. 10155, 10161). Section 70.7 also issued under Pub. L. 95-601, sec. 10, 92 Stat. 2951 (42 U.S.C. 5851). Section 70.21(g) also issued under sec. 122, 68 Stat. 939 (42 U.S.C. 2152). Section 70.31 also issued under sec. 57d, Pub. L. 93-377, 88 Stat. 475 (42 U.S.C. 2077). Sections 70.36 and 70.44 also issued under sec. 184, 68 Stat. 954, as amended (42 U.S.C. 2234). Section 70.61 also issued under secs. 186, 187, 68 Stat. 955 (42 U.S.C. 2236, 2237). Section 70.62 also issued under sec. 108, 68 Stat. 939, as amended (42 U.S.C. 2138).

#### § 70.38 [Amended]

14. In § 70.38(d) introductory text, the cross-reference to “paragraph (f)(1)” is revised to read “paragraph (g)(1).”

15. In § 70.38(g)(3), the cross-reference to “paragraph (f)(1)” is revised to read “paragraph (g)(1).”

16. In § 70.38(g)(4)(vii), the cross-reference to "paragraph (h)" is revised to read "paragraph (i)."

17. In § 70.38(h)(1), the cross-reference to "paragraph (h)" is revised to read "paragraph (i)."

18. In § 70.38(h)(2), the cross-reference to "paragraph (h)" is revised to read "paragraph (i)."

## PART 72—LICENSING REQUIREMENTS FOR THE INDEPENDENT STORAGE OF SPENT FUEL AND HIGH-LEVEL RADIOACTIVE WASTE

19. The authority citation for Part 72 continues to read as follows:

Authority: Secs. 51, 53, 57, 62, 63, 65, 69, 81, 161, 182, 183, 184, 186, 187, 189, 68 Stat. 929, 930, 932, 933, 934, 935, 948, 953, 954, 955, as amended, sec. 234, 83 Stat. 444, as amended (42 U.S.C. 2071, 2073, 2077, 2092, 2093, 2095, 2099, 2111, 2201, 2232, 2233, 2234, 2236, 2237, 2238, 2282); sec. 274, Pub. L. 86-373, 73 Stat. 688, as amended (42 U.S.C. 2021); sec. 201, as amended, 202, 206, 88 Stat. 1242, as amended, 1244, 1246 (42 U.S.C. 5841, 5842, 5846); Pub. L. 95-601, sec. 10, 92 Stat. 295 as amended by Pub. L. 102-486, sec. 7902, 106 Stat. 3123 (42 U.S.C. 5851); sec. 102, Pub. L. 91-190, 83 Stat. (42 U.S.C. 4332); secs. 131, 132, 133, 135, 137, 141, Pub. L. 97-425, 96 Stat. 2229, 2230, 2232, 2241, sec. 148, Pub. L. 100-203, 101 Stat. 1330-235 (42 U.S.C. 10151, 10152, 10153, 10155, 10157, 10161, 10168).

Section 72.44(g) also issued under secs. 142(b) and 148(c), (d), Pub. L. 100-203, 101 Stat. 1330-232, 1330-236 (42 U.S.C. 10162(b), 10168(c), (d)). Section 72.46 also issued under sec. 189, 68 Stat. 935 (42 U.S.C. 2239); sec. 134, Pub. L. 97-425, 96 Stat. 2230 (42 U.S.C. 10154). Section 72.96(d) also issued under sec. 145(g), Pub. L. 100-203; 101 Stat. 1330-235 (42 U.S.C. 10165(g)). Subpart J also issued under secs. 2(2), 2(15), 2(19), 117(a), 141(h), Pub. L. 97-425, 96 Stat. 2202, 2203, 2204, 2222, 2244 (42 U.S.C. 10101, 10137(a), 10161(h)). Subparts K and L are also issued under sec. 133, 96 Stat. 2230 (42 U.S.C. 10153) and 218(a), 96 Stat. 2252 (42 U.S.C. 10198).

### § 72.54 [Amended]

20. In § 72.54(j)(1), the cross-reference to "paragraph (j)" is revised to read "paragraph (k)."

21. In § 72.54(j)(2), the cross-reference to "paragraph (j)" is revised to read "paragraph (k)."

Dated at Rockville, Maryland, this 29th day of May, 1996.

For the Nuclear Regulatory Commission,  
James M. Taylor,  
*Executive Director for Operations.*

[FR Doc. 96-14897 Filed 6-11-96; 8:45 am]

BILLING CODE 7590-01-P

## FEDERAL RESERVE SYSTEM

### 12 CFR Part 219

[Regulation S; Docket No. R-0906]

## Reimbursement for Providing Financial Records; Recordkeeping Requirements for Certain Financial Records

AGENCY: Board of Governors of the Federal Reserve System.

ACTION: Final rule.

**SUMMARY:** The Board of Governors of the Federal Reserve System (Board) has approved amendments to Subpart A of Regulation S, which implements the requirement under the Right to Financial Privacy Act (RFPA) that the Board establish the rates and conditions under which payment shall be made by a government authority to a financial institution for assembling or providing financial records pursuant to RFPA. These amendments update the fees to be charged and streamline the subpart generally.

**EFFECTIVE DATE:** July 12, 1996.

**FOR FURTHER INFORMATION CONTACT:** Elaine M. Boutilier, Senior Counsel (202/452-2418), Legal Division, Board of Governors of the Federal Reserve System, Washington, DC 20551. For users of the Telecommunication Device for the Deaf (TDD), please contact Dorothea Thompson (202/452-3544).

### SUPPLEMENTARY INFORMATION:

#### Background

Section 1115 of the RFPA (12 U.S.C. 3415) requires the Board to establish, by regulation, the rates and conditions under which payment is made by a Government authority to a financial institution for searching for, reproducing, or transporting data required or requested under the RFPA. Shortly after the RFPA was adopted, the Board issued Regulation S (12 CFR 219) to implement this provision (44 FR 55812, September 28, 1979). In January 1995, the Board adopted a new Subpart B of Regulation S<sup>1</sup> and designated this part of Regulation S as Subpart A (60 FR 231, January 3, 1995). No substantive changes were made in that rulemaking to the newly designated Subpart A.

Pursuant to section 303 of the Riegle Community Development and Regulatory Improvement Act of 1994, Pub. L. 103-325 (12 U.S.C. 4803), the Board reviewed Subpart A of Regulation S and issued for comment proposed amendments to update it (60 FR 65599,

December 20, 1995). The proposed amendments eliminated unnecessary provisions and updated the rates to be paid and the exceptions to the provisions of this Subpart.

**Summary of comments:** The Board received 21 comments on the proposed revisions—19 from banks or bank holding companies, one from a trade association, and one from a Federal Reserve Bank. All comments supported updating and streamlining the provisions of the regulation. Several comments, however, requested further changes in the proposed regulation. These requests for additional changes covered two categories—the proposed fee structure, and the exemptions from the fees.

**Fees.** Ten of the 21 comments requested further changes in the fee schedule. The current fees are \$10.00 per hour for search and processing time, and \$.15 per page for reproduction. The proposed fees provided for two levels of reimbursement for search and processing time: clerical time at \$11.00 per hour, and managerial time at \$17.00 per hour. Proposed fees for reproduction were left at \$.15 per page. Of the nine comments that specifically discussed the reimbursement rate for search and processing, six supported the proposed fees and three requested increased fees. Of the ten comments that focused on the proposed reproduction fees, two supported the proposed fees and eight requested that they be raised. The suggested reproduction fees ranged from \$.25 to \$3.00 per page for paper copies, and \$.25 to \$3.00 for microfiche copies.

Other miscellaneous comments on the fee schedule included two comments requesting that fees be periodically adjusted to account for inflation, a request for a definition of the terms "clerical/technical" and "manager/supervisory", a request that a new category be added for reimbursement for legal advice, and a request that the regulation specify that search/processing time should be billed in 15-minute increments.

**Exceptions.** The proposed regulation updated the list of statutory exceptions wherein a financial institution is not entitled to reimbursement under the RFPA. Eight of the 21 commenters objected to these exceptions, stating that they cover the vast majority of the searches required. These objections focused primarily on the exception for requests from the IRS, and requests for a corporation's banking records. The American Bankers Association, while acknowledging that the exceptions are set by statute, not the Board, stated that these exceptions "effectively exclude

<sup>1</sup>In a rulemaking issued on April 1, 1996 (61 FR 14382), the effective date of Subpart B was delayed until May 28, 1996.

98% of all situations in which banks gather such records.”

Based upon the comments received, the Board has made some adjustments to the reimbursement schedule.

#### I. Definitions

The definitions in Subpart A reiterate the statutory definitions from the RFPA for the applicable terms of this Subpart. The definition for “directly incurred costs” has been removed and incorporated into the section concerning cost reimbursement.

#### II. Cost Reimbursement

This section has been streamlined and reorganized to place the rates in a separate Appendix A for clarity and ease of amendment when updating the rates. The amendments also recognize that courts issuing orders or subpoenas in connection with grand jury proceedings must pay the rates set by Subpart A.

#### III. Rates

The Board has established uniform rates for all depository institutions, regardless of size or location, in the belief that administration of a complex fee schedule would be difficult.

##### A. Reproduction

The rates for reproduction set forth in Appendix A to § 219.3 have been increased based upon the comments received. Eight out of ten comments on the duplication rates stated that they were too low. There was not a consensus, however, among the commenters on the appropriate amount of the increase: two suggested \$.25 per page, two suggested \$.50 per page, two suggested \$1.00 or more per page, and two just requested a minimal increase in the rate. The comments recommending significantly higher fees did not provide supporting information on the direct costs of duplication, and the statute provides for reimbursement of “costs \* \* \* directly incurred in \* \* \* reproducing \* \* \*.” A plurality of the comments, however, recommended a minimal increase in the fees, and some provided supporting information on costs. Therefore, the Board has raised the reimbursement rate for photocopying to \$.25 per page. Other commenters suggested that the reimbursement rate for duplication of microfiche also was inadequate, based upon the costs to the bank. Accordingly, the Board modified the reimbursement schedule to increase the rate for reproduction of paper copies of microfiche from \$.15 to \$.25 to match the photocopying rate, and increase the

rate for duplication of microfiche from \$.30 to \$.50 per microfiche.

##### B. Search and Processing

The fees for search and processing have not been changed from those issued for comment. These rates are separated into two categories—clerical/technical and manager/supervisory. Any search for sensitive customer records is likely to involve both clerical staff and managerial staff, who are paid at different levels. The rates set for this reimbursement were calculated using the 1994 Bank Cash Compensation Survey done by the Bank Administration Institute (BAI). Based upon the job descriptions in the Cash Compensation Survey, the position of Supervisor, Bookkeeping<sup>2</sup> was used to calculate the managerial rate. The calculation was made based upon the total compensation (with bonus) for all banks on a national average (\$27,600) divided by 2080 hours, adjusted up by 25% to cover benefits, and further adjusted by 3% for inflation since 1994. The clerical rate was calculated in the same way, but using an average of the two job positions of Clerk II<sup>3</sup> (Bookkeeping and Operations @ \$18,100) and Clerk I<sup>4</sup> (Bookkeeping and Operations @ \$15,100).

#### IV. Exceptions

This section has been updated to reflect changes in the exceptions listed by the RFPA. Although many comments were critical of the listed exceptions, the Board cannot change or eliminate them, because they are set by statute. They are merely set forth in the regulation to assist depository institutions in correctly applying the reimbursement schedule.

#### V. Conditions for Payment and Payment Procedures

One commenter suggested that the rule require time to be billed in 15-

<sup>2</sup> BAI describes this position as follows: “Direct supervision of assigned *nonexempt* staff in the bookkeeping area with particular emphasis on work flow to meet time deadlines. Includes training staff, planning work schedules, recommending and implementing staff needs, pay raises, etc. Coordinates the section’s activities with other areas of the bank. Handles the more involved problems and calls from dissatisfied customers.”

<sup>3</sup> BAI describes this position as follows: “Performs a variety of clerical duties in the bookkeeping department. Duties may include filing checks, overdrafts and stop payments, reconciling, computerized operations, preparing statements and reports, etc. May do exclusively DDA, adjustments, reconciling, etc. or a combination of activities. Handles more complex and difficult customer problems; requires *minimal* supervision.”

<sup>4</sup> BAI describes this position as follows: “Performs the same duties of a Bookkeeping and Operations Clerk II only may have less experience. Requires *direct* supervision.”

minute increments, as the existing regulation does. Accordingly, the Board has amended the section on itemized billing to state that the time should be billed in 15-minute increments. No other changes have been made to these two sections.

#### Regulatory Flexibility Act

Pursuant to 5 U.S.C. 605, the Board certifies that this rule will not have a significant economic impact on a substantial number of small entities. The final rule confers a benefit on financial institutions, including small financial institutions, by providing for reimbursement of certain costs incurred in complying with a requirement to assemble and produce financial records.

#### Paperwork Reduction Act

In accordance with section 3506 of the Paperwork Reduction Act of 1995 (44 U.S.C. Ch. 35; 5 CFR 1320 Appendix A.1), the Board reviewed the rule under the authority delegated to the Board by the Office of Management and Budget.

The Right to Financial Privacy Act mandates that each financial institution maintain a record of instances in which it releases a consumer’s financial information to a government agency. Generally, the institution may not release records until the government agency has notified the consumer of its intent to request the record, together with the reason for the request. Normally, the agency may not obtain records unless it has a subpoena, a search warrant, or an authorization from the consumer.

The Federal Reserve may not conduct or sponsor, and an organization is not required to respond to, this information collection unless it displays a currently valid OMB control number. The OMB control number for the Recordkeeping and Disclosure Requirements in Connection with the Right to Financial Privacy Act is 7100-0203.

Because the records would be maintained at banks, no issue of confidentiality under the Freedom of Information Act arises.

This final regulation, 12 CFR part 219, has no effect upon the paperwork burden associated with the Recordkeeping and Disclosure Requirements in Connection with the Right to Financial Privacy Act. That hour burden is estimated to be 22 minutes per response. It is estimated that the frequency of response at state member banks is 30 responses per year. Thus the annual hour burden across the 1,042 state member banks is estimated to be 11,462 hours. Based on an hourly cost of \$20, the annual cost to the public is estimated to be \$229,240.

Send comments regarding the burden estimate, or any other aspect of this collection, including suggestions for reducing the burden, to Mary M. McLaughlin, Federal Reserve Board Clearance Officer, Division of Research and Statistics, Mail Stop 97, Board of Governors of the Federal Reserve System, Washington, DC 20551 and to the Office of Management and Budget, Paperwork Project (7100-0203), Washington, DC 20503.

#### List of Subjects in 12 CFR Part 219

Banks, banking, Currency, Federal Reserve System, Reporting and recordkeeping requirements.

For the reasons set out in the preamble, 12 CFR Part 219, as amended at 60 FR 231 and 44144, and 61 FR 14382, effective May 28, 1996, is amended as set forth below.

### **PART 219—REIMBURSEMENT FOR PROVIDING FINANCIAL RECORDS; RECORDKEEPING REQUIREMENTS FOR CERTAIN FINANCIAL RECORDS (REGULATION S)**

#### **Subpart A—Reimbursement to Financial Institutions for Providing Financial Records**

1. The authority citation for Subpart A continues to read as follows:

Authority: 12 U.S.C. 3415.

2. Subpart A is amended by revising §§ 219.2 through 219.6 to read as follows:

#### **§ 219.2 Definitions.**

For the purposes of this subpart, the following definitions shall apply:

*Customer* means any person or authorized representative of that person who uses any service of a financial institution, or for whom a financial institution acts or has acted as a fiduciary in relation to an account maintained in the person's name. Customer does not include corporations or partnerships comprised of more than five persons.

*Financial institution* means any office of a bank, savings bank, card issuer as defined in section 103 of the Consumers Credit Protection Act (15 U.S.C. 1602(n)), industrial loan company, trust company, savings association, building and loan, or homestead association (including cooperative banks), credit union, or consumer finance institution, located in any State or territory of the United States, the District of Columbia, Puerto Rico, Guam, American Samoa, or the Virgin Islands.

*Financial record* means an original or copy of, or information known to have been derived from, any record held by

a financial institution pertaining to a customer's relationship with the financial institution.

*Government authority* means any agency or department of the United States, or any officer, employee or agent thereof.

*Person* means an individual or a partnership of five or fewer individuals.

#### **§ 219.3 Cost reimbursement.**

(a) *Fees payable.* Except as provided in § 219.4, a government authority, or a court issuing an order or subpoena in connection with grand jury proceedings, seeking access to financial records pertaining to a customer shall reimburse the financial institution for reasonably necessary costs directly incurred in searching for, reproducing or transporting books, papers, records, or other data as set forth in this section.

The reimbursement schedule for a financial institution is set forth in Appendix A to this section. If a financial institution has financial records that are stored at an independent storage facility that charges a fee to search for, reproduce, or transport particular records requested, these costs are considered to be directly incurred by the financial institution and may be included in the reimbursement.

(b) *Search and processing costs.* (1) Reimbursement of search and processing costs shall cover the total amount of personnel time spent in locating, retrieving, reproducing, and preparing financial records for shipment. Search and processing costs shall not cover analysis of material or legal advice.

(2) If itemized separately, search and processing costs may include the actual cost of extracting information stored by computer in the format in which it is normally produced, based on computer time and necessary supplies; however, personnel time for computer search may be paid for only at the rates specified in Appendix A to this section.

(c) *Reproduction costs.* The reimbursement rates for reproduction costs for requested documents are set forth in Appendix A to this section. Copies of photographs, films, computer tapes, and other materials not listed in Appendix A to this section are reimbursed at actual cost.

(d) *Transportation costs.* Reimbursement for transportation costs shall be for the reasonably necessary costs directly incurred to transport personnel to locate and retrieve the requested information, and to convey such material to the place of examination.

#### **Appendix A to § 219.3—Reimbursement Schedule**

##### **Reproduction:**

Photocopy, per page—\$.25

Paper copies of microfiche, per frame—\$.25

Duplicate microfiche, per microfiche—\$.50

Computer diskette—\$.50

##### **Search and Processing:**

Clerical/Technical, hourly rate—\$11.00

Manager/Supervisory, hourly rate—\$17.00

#### **§ 219.4 Exceptions.**

A financial institution is not entitled to reimbursement under this subpart for costs incurred in assembling or providing financial records or information related to:

(a) *Security interests, bankruptcy claims, debt collection.* Any financial records provided as an incident to perfecting a security interest, proving a claim in bankruptcy, or otherwise collecting on a debt owing either to the financial institution itself or in its role as a fiduciary.

(b) *Government loan programs.* Financial records that are necessary to permit the appropriate government authority to carry out its responsibilities under a government loan, loan guaranty or loan insurance program.

(c) *Nonidentifiable information.* Financial records that are not identified with or identifiable as being derived from the financial records of a particular customer.

(d) *Financial supervisory agencies.* Financial records disclosed to a financial supervisory agency in the exercise of its supervisory, regulatory, or monetary functions with respect to a financial institution.

(e) *Internal Revenue summons.* Financial records disclosed in accordance with procedures authorized by the Internal Revenue Code.

(f) *Federally required reports.* Financial records required to be reported in accordance with any federal statute or rule promulgated thereunder.

(g) *Government civil or criminal litigation.* Financial records sought by a government authority under the Federal Rules of Civil or Criminal Procedure or comparable rules of other courts in connection with litigation to which the government authority and the customer are parties.

(h) *Administrative agency subpoenas.* Financial records sought by a government authority pursuant to an administrative subpoena issued by an administrative law judge in an adjudicatory proceeding subject to 5 U.S.C. 554, and to which the government authority and the customer are parties.

(i) *Investigation of financial institution or its noncustomer.* Financial

records sought by a government authority in connection with a lawful proceeding, investigation, examination, or inspection directed at the financial institution in possession of such records, or at an entity that is not a customer as defined in § 219.2 of this part.

(j) *General Accounting Office requests.* Financial records sought by the General Accounting Office pursuant to an authorized proceeding, investigation, examination, or audit directed at a government authority.

(k) *Federal Housing Finance Board requests.* Financial records or information sought by the Federal Housing Finance Board (FHFB) or any of the Federal home loan banks in the exercise of the FHFB's authority to extend credit to financial institutions or others.

(l) *Department of Veterans Affairs.* The disclosure of the name and address of any customer to the Department of Veterans Affairs where such disclosure is necessary to, and used solely for, the proper administration of benefits programs under laws administered by that Department.

#### § 219.5 Conditions for payment.

(a) *Direct costs.* Payment shall be made only for costs that are both directly incurred and reasonably necessary to provide requested material. Search and processing, reproduction, and transportation costs shall be considered separately when determining whether the costs are reasonably necessary.

(b) *Compliance with legal process, request, or authorization.* No payment may be made to a financial institution until it satisfactorily complies with the legal process, the formal written request, or the customer authorization. When the legal process or formal written request is withdrawn, or the customer authorization is revoked, or where the customer successfully challenges disclosure to a grand jury or government authority, the financial institution shall be reimbursed for the reasonably necessary costs incurred in assembling the requested financial records prior to the time the financial institution is notified of such event.

(c) *Itemized bill or invoice.* No reimbursement is required unless a financial institution submits an itemized bill or invoice specifically detailing its search and processing, reproduction, and transportation costs. Search and processing time should be billed in 15-minute increments.

#### § 219.6 Payment procedures.

(a) *Notice to submit invoice.* Promptly following a service of legal process or request, the court or government authority shall notify the financial institution that it must submit an itemized bill or invoice in order to obtain payment and shall furnish an address for this purpose.

(b) *Special notice.* If a grand jury or government authority withdraws the legal process or formal written request, or if the customer revokes the authorization, or if the legal process or request has been successfully challenged by the customer, the grand jury or government authority shall promptly notify the financial institution of these facts, and shall also notify the financial institution that it must submit an itemized bill or invoice in order to obtain payment of costs incurred prior to the time of the notice to the financial institution receives this notice.

#### § 219.7 [Removed]

3. Section 219.7 is removed.

By order of the Board of Governors of the Federal Reserve System, June 5, 1996.

William W. Wiles,

Secretary of the Board.

[FR Doc. 96-14688 Filed 6-11-96; 8:45 am]

BILLING CODE 6210-01-P

## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

#### 14 CFR Part 39

[Docket No. 94-ANE-30; Amendment 39-9646; AD 96-12-04]

RIN 2120-AA64

#### Airworthiness Directives; Superior Air Parts, Inc. Pistons Installed on Teledyne Continental Motors O-470 Series Reciprocating Engines

**AGENCY:** Federal Aviation Administration, DOT.

**ACTION:** Final rule.

**SUMMARY:** This amendment adopts a new airworthiness directive (AD), applicable to certain Superior Air Parts, Inc. Parts Manufacturer Approval (PMA) pistons installed on Teledyne Continental Motors O-470 series reciprocating engines, that requires removal from service of certain pistons. This amendment is prompted by piston failures. The actions specified by this AD are intended to prevent piston failure, which can result in engine power loss, engine failure and loss of the aircraft.

**DATES:** Effective August 12, 1996.

**FOR FURTHER INFORMATION CONTACT:** Richard Karanian, Aerospace Engineer, Special Certification Office, FAA, Rotorcraft Directorate, 2601 Meacham Blvd., Fort Worth, TX 76137-4298; telephone (817) 222-5195, fax (817) 222-5959.

**SUPPLEMENTARY INFORMATION:** A proposal to amend part 39 of the Federal Aviation Regulations (14 CFR part 39) to include an airworthiness directive (AD) that is applicable to Superior Air Parts, Inc. Parts Manufacturer Approval (PMA) pistons installed on Teledyne Continental Motors O-470 series reciprocating engines was published in the Federal Register on February 22, 1995 (60 FR 9800). That action proposed to require removal from service of Superior Air Parts, Inc. pistons, Part Number (P/N) SA626992, at the next access to the piston, top overhaul, or major overhaul. The affected pistons can be identified by either a stamped-in P/N on the piston dome (SA626992 or SA626992P15) or, by a raised casting number (SA632932) along one of the piston pin bosses on the underside of the piston.

Interested persons have been afforded an opportunity to participate in the making of this amendment. No comments were received on the proposal or the FAA's determination of the cost to the public. The FAA has determined that air safety and the public interest require the adoption of the rule as proposed.

The manufacturer has informed the FAA that 5,585 pistons were shipped between December 1976 and June 1981 and will be affected by this AD. The FAA estimates that it will take approximately 2 work hours per piston to accomplish the required actions, and that the average labor rate is \$60 per work hour. Required parts will cost approximately \$156 per piston. Based on these figures, the total cost impact of the AD on U.S. operators is estimated to be \$1,541,460.

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

For the reasons discussed above, I certify that this action (1) is not a "significant regulatory action" under Executive Order 12866; (2) is not a "significant rule" under DOT

Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and (3) will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act. A final evaluation has been prepared for this action and it is contained in the Rules Docket. A copy of it 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, 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. 106(g), 40113, 44701.

#### **§ 39.13 [Amended]**

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

96-12-04 Superior Air Parts, Inc.:

Amendment 39-9646. Docket 94-ANE-30.

*Applicability:* Superior Air Parts, Inc. Parts Manufacturer Approval (PMA) pistons, Part Numbers (P/N's) SA626992 and SA626992P15, installed on Teledyne Continental Motors Model O-470-K, -L, -R reciprocating engines. These engines are installed on but not limited to Cessna 182 series aircraft.

Note: This airworthiness directive (AD) applies to each piston 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 pistons 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 Federal Aviation Administration (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 piston from the applicability of this AD.

*Compliance:* Required as indicated, unless accomplished previously.

To prevent piston failure, which can result in engine power loss, engine failure and loss of the aircraft, accomplish the following:

(a) At the next access to the piston, top overhaul, or major overhaul after the effective date of this AD, whichever occurs first, remove pistons, P/N SA626992, from service and replace with a serviceable part.

Note: The affected pistons can be identified by either a stamped-in P/N on the piston dome (SA626992 or SA626992P15) or, by a raised casting number (SA632932) along one of the piston pin bosses on the underside of the piston.

(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, Fort Worth Special Certification Office. The request should be forwarded through an appropriate FAA Maintenance Inspector, who may add comments and then send it to the Manager, Fort Worth Special Certification Office.

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

(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 aircraft to a location where the requirements of this AD can be accomplished.

(d) This amendment becomes effective on August 12, 1996.

Issued in Burlington, Massachusetts, on May 29, 1996.

Robert E. Guyotte,

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

[FR Doc. 96-14870 Filed 6-11-96; 8:45 am]

**BILLING CODE 4910-13-U**

### **14 CFR Part 39**

[Docket No. 96-NM-104-AD; Amendment 39-9667; AD 96-12-24]

**RIN 2120-AA64**

### **Airworthiness Directives; Lockheed Model L-1011-385 Series Airplanes**

**AGENCY:** Federal Aviation Administration, DOT.

**ACTION:** Final rule; request for comments.

**SUMMARY:** This amendment adopts a new airworthiness directive (AD) that is applicable to all Lockheed Model L-1011-385 series airplanes. This action requires inspections to detect cracking and other discrepancies of certain web-to-cap fasteners of the rear spar between inner wing stations (IWS) 310 and 343, and of the web area around those fasteners; and various follow-on actions. This AD also provides for an optional modification which, if accomplished, will defer the initiation of the

inspections for a certain period of time. This amendment is prompted by a report of fatigue cracking in the web of the rear spar of the wing. The actions specified in this AD are intended to prevent such fatigue cracking, which could result in failure of the rear spar of the wing and consequent fuel spillage.

**DATES:** Effective June 27, 1996.

The incorporation by reference of certain publications listed in the regulations is approved by the Director of the Federal Register as of June 27, 1996.

Comments for inclusion in the Rules Docket must be received on or before August 12, 1996.

**ADDRESSES:** Submit comments in triplicate to the Federal Aviation Administration (FAA), Transport Airplane Directorate, ANM-103, Attention: Rules Docket No. 96-NM-104-AD, 1601 Lind Avenue, SW., Renton, Washington 98055-4056.

The service information referenced in this AD may be obtained from Lockheed Aeronautical Systems Support Company, Field Support Department, Dept. 693, Zone 0755, 2251 Lake Park Drive, Smyrna, Georgia 30080. This information may be examined at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington; or at the FAA, Atlanta Aircraft Certification Office, Small Airplane Directorate, 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:** Thomas Peters, Aerospace Engineer, Branch, ACE-116A, FAA, Atlanta Aircraft Certification Office, Small Airplane Directorate, Campus Building, 1701 Columbia Avenue, Suite 2-160, College Park, Georgia 30337-2748; telephone (404) 305-7367; fax (404) 305-7348.

**SUPPLEMENTARY INFORMATION:** The FAA received a report indicating that fatigue cracking was found on the web of the rear spar of the wing on a Lockheed Model L-1011-385 series airplane that had accumulated approximately 18,900 total landings. The crack, which was 24 inches long, grew rapidly in a downward direction at a 45-degree angle and stopped behind the trunnion fitting of the main landing gear. Consequently, the airplane began leaking fuel during final taxi.

Fatigue cracking in the web of the rear spar of the wing can originate in the fasteners common to the web and the vertical leg of the upper cap. Such cracking can grow and remain undetected for a significant period of

time because the crack can propagate on the interior (fuel side) of the web before it breaches the aft side (flap side) of the web. Such fatigue cracking, if not detected and corrected in a timely manner, could result in failure of the rear spar of the wing and consequent fuel spillage.

#### Other Relevant Rules

The FAA previously issued AD 96-07-13, amendment 39-9563 (61 FR 16379, April 15, 1996), which requires various X-ray, eddy current, and ultrasonic inspections to detect fatigue cracking of certain areas of the rear spar caps, web, skin, and certain fastener holes; and repair or modification, if necessary. The inspections are required to be repeated at intervals of 2,000 flight cycles. That AD was prompted by reports of fatigue cracks in the caps, web, and skin of the wing rear spar inboard of inner wing station 346. The actions specified by that AD are intended to prevent rupture of the rear spar, which could result in extensive damage to the wing and fuel spillage.

The fatigue cracking that was the subject of the recent in-service incident, described above, indicates that fatigue cracking in the area of the web of the rear spar of the wing apparently can occur and propagate at a faster rate and at a reduced threshold than previously realized. In light of this, the FAA is considering revising AD 96-07-13 to reduce the repetitive inspection intervals to ensure that fatigue cracking can be found in a more timely manner. (The FAA indicated this in the preamble to that AD.)

#### Explanation of Relevant Service Information

The FAA has reviewed and approved Lockheed L-1011 Service Bulletin 093-57-218, dated April 11, 1996. Part I of the service bulletin describes procedures for repetitive visual inspections to detect fatigue cracking and other discrepancies (i.e., corrosion, fastener looseness, nicks, scratches, or other surface damage) of certain web-to-cap fasteners of the rear spar between inner wing stations (IWS) 310 and 343, and of the web area around those fasteners; and various follow-on actions. The follow-on actions include repetitive visual inspections, eddy current surface scan (ECSS) inspections, bolt hole eddy current (BHEC) inspections, and repair.

Part II of the service bulletin describes procedures for an optional modification that will allow the initiation of the visual inspections to be deferred for a period of time. The modification involves removing certain web-to-cap fasteners, verifying that the subject

fastener holes are free of cracks, cold working the fastener holes, and replacing the fasteners with oversize fasteners.

#### Explanation of the Requirements of the Rule

Since an unsafe condition has been identified that is likely to exist or develop on other Model L-1011-385 series airplanes of the same type design, this AD is being issued to prevent fatigue cracking in the web of the rear spar of the wing, which could result in failure of the rear spar of the wing and consequent fuel spillage. This AD requires repetitive visual inspections to detect cracking and other discrepancies of certain web-to-cap fasteners of the rear spar between IWS 310 and IWS 343, and of the web area around those fasteners; and various follow-on actions. This AD also provides for an optional modification which, if accomplished, will allow the initiation of the visual inspections to be deferred for a certain period of time. The actions are required to be accomplished in accordance with the Lockheed service bulletin described previously.

The inspections that are required by this AD are in addition to—not in lieu of—those currently required by AD 96-07-13, amendment 39-9563.

#### Differences between the Rule and the Referenced Service Information

Operators should note that, although the Lockheed service bulletin specifies that the manufacturer must be contacted for disposition of certain conditions, this AD requires that the repair of those conditions be accomplished in accordance with a method approved by the Manager, Atlanta Aircraft Certification Office (ACO), FAA, Small Airplane Directorate.

#### Determination of Rule's Effective Date

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 96-NM-104-AD." The postcard will be date stamped and returned to the commenter.

#### Regulatory Impact

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. 106(g), 40113, 44701.

**§ 39.13 [Amended]**

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

96-12-24 Lockheed: Amendment 39-9667.  
Docket 96-NM-104-AD.

*Applicability:* All Model L-1011-385 series airplanes, certificated in any category.

Note 1: This AD applies to each airplane identified in the preceding applicability provision, regardless of whether it has been otherwise 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 request approval for an alternative method of compliance in accordance with paragraph (e) of this AD. The request should include an assessment of the effect of the modification, alteration, or repair on the unsafe condition addressed by this AD; and, if the unsafe condition has not been eliminated, the request should include specific proposed actions to address it.

*Compliance:* Required as indicated, unless accomplished previously.

To prevent fatigue cracking on the web of the rear spar of the wing, which could result in failure of the rear spar of the wing and consequent fuel spillage, accomplish the following:

(a) Perform a visual inspection to detect signs of cracking and other discrepancies (i.e., corrosion, fastener looseness, nicks, scratches, or other surface damage) of the web-to-cap fasteners of the rear spar between inner wing stations (IWS) 310 and 343, as specified in Figure 2 of Lockheed Service Bulletin 093-57-218, dated April 11, 1996; and of the web area around those fasteners; in accordance with Part I of the Accomplishment Instructions of that service bulletin. Perform the inspection at the applicable time specified in paragraph (a)(1) or (a)(2) of this AD:

(1) Except as provided by paragraph (a)(2) of this AD: Perform the initial inspection prior to the accumulation of the number of landings specified as the "inspection threshold" in Table I of Lockheed Service

Bulletin 093-57-218, dated April 11, 1996, or within 10 days after the effective date of this AD, whichever occurs later.

(2) For airplanes on which the wing rear spar has been modified prior to the effective date of this AD in accordance with one of the Lockheed service bulletins listed in paragraph (a)(2)(ii) of this AD, accomplish the inspection as follows:

(i) Perform the initial inspection prior to the accumulation of the number of landings specified as the "inspection threshold" in Table I of Lockheed Service Bulletin 093-57-218, dated April 11, 1996, calculated from the time the wing rear spar was modified (rather than from the date of manufacture of the airplane), or within 10 days after the effective date of this AD, whichever occurs later.

(ii) This paragraph applies to airplanes on which the wing rear spar has been modified in accordance with one of the following service bulletins:

- Lockheed Service Bulletin 093-57-184, Revision 6, dated October 28, 1991, or Revision 7, dated December 6, 1994; or
- Lockheed Service Bulletin 093-57-196, Revision 5, dated October 28, 1991, or Revision 6, dated December 6, 1994; or
- Lockheed Service Bulletin 093-57-203, Revision 3, dated October 28, 1991, or Revision 4, dated March 27, 1995; or
- Lockheed Service Bulletin 093-57-215, dated April 11, 1996.

(b) If no sign of cracking or other discrepancy is found during the inspection required by paragraph (a) of this AD, repeat that inspection thereafter at intervals not to exceed the number of landings specified as the "repeat visual inspection interval" in Table I of Lockheed Service Bulletin 093-57-218, dated April 11, 1996.

(c) If any sign of cracking is found during an inspection required by paragraph (a) or (b) of this AD, prior to further flight, perform either eddy current surface scan (ECSS) inspections, or bolt hole eddy current (BHEC) inspections, as appropriate, to confirm cracking, in accordance with Lockheed Service Bulletin 093-57-218, dated April 11, 1996.

(1) If no cracking is confirmed, repeat the inspection specified in paragraph (a) of this AD at intervals not to exceed the number of landings specified as the "repeat visual inspection interval" in Table I of the service bulletin.

(2) If any cracking is confirmed, prior to further flight, repair it in accordance with the service bulletin.

(d) Accomplishment of the modification specified in Part II of the Accomplishment Instructions of Lockheed Service Bulletin 093-57-218, dated April 11, 1996, and in accordance with that service bulletin, allows the visual inspections required by paragraph (a) of this AD to be deferred for the period specified in paragraph (d)(2) of this AD.

(1) If any condition (i.e., number of fasteners per stiffener bay, or cracking) is identified during the accomplishment of the modification that exceeds the limits specified in paragraph B.3. of Part II of the Accomplishment Instructions of the service bulletin, prior to further flight, repair in accordance with a method approved by the Manager, Atlanta Aircraft Certification Office (ACO), FAA, Small Airplane Directorate.

(2) Within 5,000 landings following accomplishment of the modification, perform the visual inspection required by paragraph (a) of this AD. Thereafter, repeat that inspection at intervals not to exceed the number of landings specified as the "repeat visual inspection interval" in Table I of the service bulletin.

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

Note 2: Information concerning the existence of approved alternative methods of compliance with this AD, if any, may be obtained from the Atlanta ACO.

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

(g) The actions shall be done in accordance with Lockheed L-1011 Service Bulletin 093-57-218, dated April 11, 1996. 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 Lockheed Aeronautical Systems Support Company, Field Support Department, Dept. 693, Zone 0755, 2251 Lake Park Drive, Smyrna, Georgia 30080. Copies may be inspected at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington; or at the FAA, Atlanta Aircraft Certification Office, Small Airplane Directorate, 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.

(h) This amendment becomes effective on June 27, 1996.

Issued in Renton, Washington, on June 5, 1996.

James V. Devany,

*Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.*

[FR Doc. 96-14692 Filed 6-11-96; 8:45 am]

BILLING CODE 4910-13-U

#### 14 CFR Part 71

[Airspace Docket No. 96-ANM-001]

#### Amendment of Class E Airspace; Baker, Montana

**AGENCY:** Federal Aviation Administration (FAA), DOT.

**ACTION:** Final rule.

**SUMMARY:** This action modifies the Baker, Montana, Class E airspace to provide additional controlled airspace necessary to accommodate a revised Global Positioning System (GPS) standard instrument approach procedure (SIAP) to the Baker Municipal Airport.

**EFFECTIVE DATE:** 0901 UTC, August 15, 1996.

**FOR FURTHER INFORMATION CONTACT:** James C. Frala, Operations Branch, ANM-532.4, Federal Aviation Administration, Docket No. 96-ANM-001, 1601 Lind Avenue SW., Renton, Washington 98055-4056; telephone number: (206) 227-2535.

#### SUPPLEMENTARY INFORMATION:

##### History

On April 22, 1996, the FAA proposed to amend part 71 of the Federal Aviation Regulations (14 CFR part 71) to amend Class E airspace at Baker, Montana, to accommodate a revised GPS SIAP to the Baker Municipal Airport (61 FR 17607). Interested parties were invited to participate in the rulemaking proceeding by submitting written comments on the proposal. No comments were received.

The coordinates for this airspace docket are based on North American Datum 83. Class E airspace areas extending upward from 700 feet or more above the surface of the earth are published in paragraph 6005 of FAA Order 7400.9C dated August 17, 1995, and effective September 16, 1995, which is incorporated by reference in 14 CFR 71.1. The Class E airspace listed in this document will be published subsequently in the Order.

##### The Rule

This amendment to part 71 of Federal Aviation Regulations amends Class E airspace at Baker, Montana. The FAA has determined that this regulation only

involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. It, therefore, (1) is not a "significant regulatory action" under Executive Order 12866; (2) is not a "significant rule" under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. Since this is a routine matter that will only affect air traffic procedures and air navigation, it is certified that this rule will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

#### List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

#### Adoption of the Amendment

In consideration of the foregoing, the FAA amends 14 CFR part 71 as follows:

#### PART 71—[AMENDED]

1. The authority citation for 14 CFR part 71 continues to read as follows:

Authority: 49 U.S.C. 106 (g), 40103, 40113, 40120; E.O. 10854, 24 FR 9565, 3 CFR, 1959-1963 Comp., p. 389; 14 CFR 11.69.

#### § 71.1 [Amended]

2. The incorporation by reference in 14 CFR 71.1 of the Federal Aviation Administration Order 7400.9C, Airspace Designations and Reporting Points, dated August 17, 1995, and effective September 16, 1995, is amended as follows:

*Paragraph 6005 Class E airspace areas extending upward from 700 feet or more above the surface of the earth.*

\* \* \* \* \*

ANM MT E5 Baker, MT [Revised]

Baker Municipal Airport, MT  
lat. 46°20'52" N, long. 104°15'34" W)

That airspace extending upward from 700 feet above the surface within a 8.9-mile radius of the Baker Municipal Airport; that airspace extending upward from 1,200 feet above the surface bounded by a line beginning at lat. 46°20'00" N, long. 104°45'00" W; to lat. 46°30'30" N, long. 104°31'00" W; to lat. 46°37'00" N, long. 104°31'00" W; to lat. 46°37'00" N, long. 103°59'40" W; to lat. 46°37'55" N, long. 103°53'45" W; to lat. 46°25'45" N, long. 103°37'30" W; to lat. 46°17'30" N, long. 103°48'15" W; to lat. 45°40'00" N, long. 103°00'50" W; to lat. 45°35'30" N, long. 103°01'45" W; to lat. 45°55'20" N, long. 103°53'15" W; to lat. 46°00'00" N, long. 104°13'00" W; to lat. 46°04'20" N, long. 104°10'45" W; to the point of beginning; excluding that portion within the Bowman

Municipal Airport, ND, 1,200-foot Class E airspace area.

\* \* \* \* \*

Issued in Seattle, Washington, on May 28, 1996.

Richard E. Prang,

*Acting Assistant Manager, Air Traffic Division, Northwest Mountain Region.*

[FR Doc. 96-14878 Filed 6-11-96; 8:45 am]

BILLING CODE 4910-13-M

#### Office of the Secretary

#### 14 CFR Part 399

RIN 2105-AC43

#### Editorial Changes to Policies Relating to Accounts and Reports

**AGENCY:** Office of the Secretary, DOT.

**ACTION:** Final rule.

**SUMMARY:** The Department of Transportation amends its regulations in order to remove redundant provisions. This rule makes no substantive changes to current regulations. This action is taken in response to the President's Regulatory Reinvention Initiative.

**EFFECTIVE DATE:** This rule is effective on July 12, 1996.

**FOR FURTHER INFORMATION CONTACT:** Bernie Stankus, Regulations Division, Office of Airline Information, K-25, U.S. Department of Transportation, 400 Seventh Street SW., Washington, DC 20590, (202) 366-4387, or M. Clay Moritz, (202) 366-4385.

#### SUPPLEMENTARY INFORMATION:

##### Background and Purpose

Subpart D of 14 CFR Part 399 is being removed as superfluous. Section 399.50 is redundant to section 241.22(c); section 399.51 is redundant to section 241.22(b)(3); and section 399.52 is redundant to section 241.2-4(d). The policies regarding extensions of time for filing reports, confidential treatment of unaudited preliminary year-end reports, and retroactive adjustments of expenses remain unchanged.

##### Notice and Opportunity for Public Comment Unnecessary

Since this change relates to departmental management, organization, procedure, and practice, notice and comment are unnecessary. The changes made in this document are ministerial, removing redundant material.

##### Regulatory Evaluation

This rule is not a significant regulatory action under section 3(f) of Executive Order 12866. 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). As this rule removes redundant provisions, it will not impose any costs on the public.

#### Regulatory Flexibility Act

The Department certifies that this rule will not have a significant economic impact on a substantial number of small entities. It is editorial in nature and will not change the underlying Departmental policy.

#### Paperwork Reduction Act

This rule contains no reporting or recordkeeping requirements.

#### Federalism

The Department of Transportation has analyzed this rule under the principles and criteria in Executive Order 12612 and has determined that this rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

#### National Environmental Protection Act

The Department of Transportation has also analyzed the proposed amendments for the purpose of the National Environmental Protection Act. The amendments will not have any impact on the quality of the human environment.

#### List of Subjects in 14 CFR Part 399

Administrative practice and procedure, Air carriers, Air rates and fares, Air taxis, Consumer protection, Small businesses.

For the reasons set out in the preamble, the Department of Transportation amends 14 CFR Part 399 as set forth below.

#### **PART 399—STATEMENTS OF GENERAL POLICY**

1. The authority citation for part 399 continues to read as follows:

Authority: 49 U.S.C. chapters 401, 411, 413, 415, 417, 419, 461.

#### **§ 399.50 [Removed]**

2. Section 399.50 is removed.

#### **§ 399.51 [Removed]**

3. Section 399.51 is removed.

#### **§ 399.52 [Removed]**

4. Section 399.52 is removed.

Issued in Washington, DC, on March 31, 1996.

Charles Hunnicutt,

*Assistant Secretary for Aviation and International Affairs.*

[FR Doc. 96-14730 Filed 6-11-96; 8:45 am]

BILLING CODE 4910-62-P

#### **14 CFR Part 399**

**RIN 2105-AC54**

#### **Interlocking Relationships Between an Air Carrier and a Person Controlling Another Air Carrier**

**AGENCY:** Office of the Secretary, DOT.

**ACTION:** Final rule; removal.

**SUMMARY:** This action removes an outdated policy statement of the Civil Aeronautics Board concerning interlocking agreements between an air carrier and a person controlling an air carrier. The action is in response to the President's Regulatory Reinvention Initiative and is designed to eliminate an obsolete provision.

**EFFECTIVE DATE:** July 12, 1996.

#### **FOR FURTHER INFORMATION CONTACT:**

Alexander J. Millard, Office of the General Counsel, Room 4102, U.S. Department of Transportation, 400 Seventh Street, S.W., Washington, D.C. 20590, or by telephone at (202) 366-9285.

**SUPPLEMENTARY INFORMATION:** This regulation was promulgated by the now-defunct Civil Aeronautics Board in 1967 (32 FR 3818, March 8, 1967). The Civil Aeronautics Board issued this regulation to make it clear that section 409 was to be interpreted as prohibiting interlocking relationships between an air carrier and a person controlling an air carrier. Section 409, however, along with the authority of the Secretary of Transportation under this section, ceased to be effective on January 1, 1989. See Civil Aeronautics Board Sunset Act of 1984, Public Law 98-443, 98 Stat. 1703, section 3(c)(7). Consequently, the instant regulation is obsolete and should be removed.

This final rule is considered to be a nonsignificant rulemaking under DOT's regulatory policies and procedures, 44 FR 11034. The final rule was not subject to review by the Office of Information and Regulatory Affairs pursuant to Executive Order 12866. The rule will have no economic impact, and accordingly no regulatory evaluation has been prepared. The final rule has been analyzed in accordance with the principles and criteria contained in Executive Order 12612, and it has been determined that it does not have

sufficient federalism implications to warrant the preparation of a Federalism Assessment. The rule has also been reviewed under the Regulatory Flexibility Act. I certify that this rule would not have a significant economic impact on a substantial number of small entities under the meaning of the Regulatory Flexibility Act. There are no paperwork burdens associated with this rule under the Paperwork Reduction Act. Because this rule simply removes an obsolete provision, notice and comment are unnecessary and contrary to the public interest.

#### List of Subjects in 14 CFR Part 399

Administrative practice and procedure, Air carriers, Air rates and fares, Air taxis, Consumer protection, Small business.

For the reasons set forth above, the Department of Transportation is amending 14 CFR part 399 to read as follows:

#### **PART 399—[AMENDED]**

1. The authority citation for part 399 continues to read as follows:

Authority: 49 U.S.C. Chapters 401, 411, 413, 415, 417, 419, 161.

#### **§ 399.92 [Removed]**

2. Section 399.92 is removed.

Issued this 31st day of May 1996 at Washington, DC.

Charles A. Hunnicutt,

*Assistant Secretary for Aviation and International Affairs.*

[FR Doc. 96-14616 Filed 6-11-96; 8:45 am]

BILLING CODE 4910-62-P

#### **CONSUMER PRODUCT SAFETY COMMISSION**

#### **16 CFR Parts 1010 and 1019**

#### **Noncomplying, Misbranded, or Banned Products: Recodification of Statement of Policy Concerning Export and Procedures for Export**

**AGENCY:** Consumer Product Safety Commission.

**ACTION:** Amendment of rules.

**SUMMARY:** The Commission is recodifying and consolidating its regulations governing Procedures for Export of Noncomplying Products and policy statement concerning Exportation of Noncomplying, Misbranded, or Banned Products. The regulations governing procedures for export of noncomplying products, originally codified as 16 CFR part 1019, are recodified as 16 CFR part 1019, subpart

A. The policy statement, originally codified at 16 CFR part 1010, is recodified as 16 CFR part 1019, subpart B. Because both the regulations and the policy statement are applicable to export of noncomplying, misbranded, or banned products, the Commission is combining them in one place in the Code of Federal Regulations for the convenience of people interested in the export of such products. The substantive provisions of the regulations and policy statement are unchanged.

**EFFECTIVE DATE:** This amendment is effective June 12, 1996.

**FOR FURTHER INFORMATION CONTACT:** Dennis C. Kacoyanis, Trial Attorney, Consumer Product Safety Commission, Division of Administrative Litigation, Washington, DC 20207; telephone (301) 504-0262, extension 1346.

**SUPPLEMENTARY INFORMATION:**

**A. Notification of Proposed Export of Noncomplying Products**

The Consumer Product Safety Authorization Act of 1978 (Pub. L. 95-631, November 10, 1978) amended the Consumer Product Safety Act (CPSA), the Federal Hazardous Substances Act (FHSA) and the Flammable Fabrics Act (FFA) by adding certain export notification requirements to those statutes. In particular, persons and firms who intend to export products that do not comply with applicable requirements of those statutes or regulations issued under their authority must notify the Commission at least 30 days before the proposed exportation. The 1978 amendments also require the Commission to transmit any notification of proposed export of noncomplying products to the country of intended destination. The export notification requirements are codified in section 18(b) of the CPSA (15 U.S.C. 2067(b)), in section 14(d) of the FHSA (15 U.S.C. 1273(d)), and in section 15(c) of the FFA (15 U.S.C. 1202(c)).

In 1980, the Commission issued regulations to implement the export notification provisions of the 1978 amendments. 45 FR 5306 (August 8, 1980). These regulations set forth the procedures to be used (i) by persons and firms to give notice of proposed exportation of noncomplying products, and (ii) by the Commission to notify the government of the country of intended destination. 16 CFR part 1019.

**B. Policy Statement on Export of Noncomplying Products**

In 1984, the Commission published a statement of policy concerning the circumstances where the CPSA, FHSA, and FFA permit export of products that

fail to comply with an applicable statute, standard, or regulation. 49 FR 39663 (October 10, 1984). 16 CFR part 1010.

**C. Recodification**

For the convenience of people interested in exporting noncomplying products, the Commission is combining and recodifying parts 1010 and 1019 into part 1019 of Title 16 of the Code of Federal Regulations. The regulations governing procedures for export of noncomplying products, originally codified at 16 CFR part 1019, are recodified as 16 CFR part 1019, subpart A. The policy statement, originally codified at 16 CFR part 1010, is recodified as 16 CFR part 1019, subpart B. The substantive provisions of the regulations and policy statement are unchanged. However, references in the export notification regulations to the "Associate Executive Director for Compliance and Enforcement" have been changed to "Assistant Executive Director for Compliance," to reflect recent changes to the organization of the Commission staff.

Generally, the Administrative Procedure Act (APA) requires agencies to publish a notice of proposed rulemaking and provide opportunity for public comment before issuing, amending, or revoking a regulation. 5 U.S.C. 553. However, the APA provides that the requirement for notice of proposed rulemaking is not applicable when the agency finds for good cause that notice of proposed rulemaking and public participation are "impracticable, unnecessary, or contrary to the public interest." 5 U.S.C. 553(b)(B).

The Commission finds for good cause that notice of proposed rulemaking and public participation are unnecessary because the only purpose of this amendment is to recodify the regulations and policy statement for ease of reference. No substantive changes are being made.

The APA also requires that a substantive rule must be published at least 30 days before its effective date unless the agency finds for good cause that such delay is not needed. 5 U.S.C. 553(d). For the reasons stated above, the Commission finds good cause not to delay the effective date of the recodification and amendment. Consequently, they shall become effective immediately.

**D. Conclusion**

Under the authority of section 553 of the Administrative Procedure Act, the Consumer Product Safety Act (15 U.S.C. 2067), the Federal Hazardous Substances Act (15 U.S.C. 1263, 1264,

and 1273), and the Flammable Fabrics Act (15 U.S.C. 1202) the Commission hereby amends title 16 of the Code of Federal Regulations, Chapter II, Subchapter A to read as follows:

**PART 1010—[REMOVED AND RESERVED]**

1. Part 1010 is removed and reserved.
2. Part 1019 is revised to read as follows:

**PART 1019—EXPORT OF NONCOMPLYING, MISBRANDED, OR BANNED PRODUCTS**

**Subpart A—Procedures for Export of Noncomplying, Misbranded, or Banned Products**

Sec.

- 1019.1 Purpose, applicability, and exemptions.
- 1019.2 Definitions.
- 1019.3 General requirements for notifying the Commission.
- 1019.4 Procedures for notifying the Commission; content of notification.
- 1019.5 Time notification must be made to Commission; reductions of time.
- 1019.6 Changes to notification.
- 1019.7 Commission notification of foreign governments.
- 1019.8 Confidentiality.

**Subpart B—Statement of Policy and Interpretation Concerning Export of Noncomplying, Misbranded, or Banned Products**

- 1019.31 Purpose and scope.
- 1019.32 Statutory provisions.
- 1019.33 Statement of policy and interpretation.

Authority: 15 U.S.C. 1196, 1202, 1263, 1264, 1273, 2067, 2068.

**Subpart A—Procedures for Export of Noncomplying, Misbranded, or Banned Products**

**§ 1019.1 Purpose, applicability, and exemptions.**

(a) *Purpose.* The regulations in this subpart A of this part 1019 establish the procedures exporters must use to notify the Consumer Product Safety Commission of their intent to export from the United States products which are banned or fail to comply with an applicable safety standard, regulation, or statute. These regulations also set forth the procedures the Commission uses in transmitting the notification of export of noncomplying products to the country to which those products will be sent. The Consumer Product Safety Act Authorization Act of 1978 (Pub. L. 95-631), which became effective November 10, 1978, established these notification requirements and authorizes the Commission to issue regulations to implement them.

(b) *Applicability.* These regulations apply to any person or firm which exports from the United States and item which is:

(1) A consumer product that does not conform to an applicable consumer product safety rule issued under sections 7 and 9 of the Consumer Product Safety Act (15 U.S.C. 2056, 2058), or which has been declared to be a banned hazardous product under provisions of sections 8 and 9 of that Act (15 U.S.C. 2057, 2058); or

(2) A misbranded hazardous substance or a banned hazardous substance within the meaning of sections 2(p) and 2(q) of the Federal Hazardous Substances Act (15 U.S.C. 1261); or

(3) A fabric or related material or an item of wearing apparel or interior furnishing made of fabric or related material which fails to conform with an applicable flammability standard or regulations issued under section 4 of the Flammable Fabrics Act (15 U.S.C. 1191, 1193).

(c) *Exemption for certain items with noncomplying labeling.* The exporter of an item that fails to comply with a standard or regulation only because it is labeled in a language other than English need not notify the Commission prior to export if the product is labeled with the required information in the language of the country to which the product will be sent.

(d) *Exemption for samples.* The exporter of an item that fails to comply with a standard or regulation, but which is intended for use only as a sample and not for resale, need not notify the Commission prior to export, if the item is conspicuously and labeled in English with the statement: "Sample only. Not for resale." (The Commission encourages exporters to provide this label, in addition, in the language of the importing country, but does not require the foreign language labeling.) To qualify as a sample shipment under this exemption, the quantity of goods involved must be consistent with prevalent trade practices with respect to the specific product.

(e) *Exemption for items not in child-resistant packaging.* The exporter of an item which is a "misbranded hazardous substance" within the meaning of section 2(p) of the Federal Hazardous Substances Act (15 U.S.C. 1261(p)) only because it fails to comply with an applicable requirement for child-resistant packaging under the Poison Prevention Packaging Act of 1970 (15 U.S.C. 1471 *et seq.*) need not notify the Commission prior to export.

#### § 1019.2 Definitions.

As used in this subpart A of this part 1019:

(a) *Consignee* means the person, partnership, corporation or entity in a foreign country to whom noncomplying goods are sent;

(b) *Export* means to send goods outside the United States or United States possessions for purposes of trade, except the term does not apply to sending goods to United States installations located outside the United States or its possessions;

(c) *Exporter* means the person, partnership, corporation or entity that initiates the export of noncomplying goods;

(d) *Noncomplying goods* means any item described in § 1019.1(b), except for those items excluded from the requirements of these regulations by § 1019.1 (c), (d), and (e).

#### § 1019.3 General requirements for notifying the Commission.

Not less than 30 days before exporting any noncomplying goods described in § 1019.1(b), the exporter must file a statement with the Consumer Product Safety Commission, as described in §§ 1019.4 and 1019.5 of this subpart A. The exporter need not notify the Commission about the export of items described in § 1019.1 (c), (d), or (e). As described in § 1019.5, the exporter may request the Commission to allow the statement to be filed between 10 and 29 days before the intended export, and the request may be granted for good cause.

#### § 1019.4 Procedures for notifying the Commission; content of the notification.

(a) *Where notification must be filed.* The notification of intent to export shall be addressed to the Assistant Executive Director for Compliance, Consumer Product Safety Commission, Washington, DC 20207.

(b) *Coverage of notification.* An exporter must file a separate notification for each country to which noncomplying goods are to be exported. Each notification may include a variety of noncomplying goods being shipped to one country. The notification may include goods intended to be shipped to one country in any one year, unless the Assistant Executive Director of Compliance directs otherwise in writing.

(c) *Form of notification.* The notification of intent to export must be in writing and must be entitled: "Notification of Intent to Export Noncomplying Goods to [indicate name of country]." The Commission has no notification forms, but encourages exporters to provide the required

information in the order listed in paragraphs (d) and (e) of this section.

(d) *Content of notification; required information.* The notification of intent to export shall contain the information required by this subsection. If the notification covers a variety of noncomplying goods the exporter intends to export to one country, the information required below must be clearly provided for each class of goods, and may include an estimate of the information required in paragraphs (d) (3) and (5) of this section. The required information is:

(1) Name, address and telephone number of the exporter;

(2) Name and address of each consignee;

(3) Quantity and description of the goods to be exported to each consignee, including brand or trade names or model or other identifying numbers;

(4) Identification of the standards, bans, regulations and statutory provisions applicable to the goods being exported, and an accurate description of the manner in which the goods fail to comply with applicable requirements; and

(5) Anticipated date of shipment and port of destination.

(e) *Optional information.* In addition to the information required by paragraph (d) of this section, the notification of intent to export may contain, at the exporter's option, the following information:

(1) Copies of any correspondence from the government of the country of destination of the goods indicating whether the noncomplying goods may be imported into that country; and

(2) Any other safety-related information that the exporter believes is relevant or useful to the Commission or to the government of the country of intended destination.

(f) *Signature.* The notification of intent to export shall be signed by the owner of the exporting firm if the exporter is a sole-proprietorship, by a partner if the exporter is a partnership, or by a corporate officer if the exporter is a corporation.

#### § 1019.5 Time notification must be made to Commission; reductions of time.

(a) *Time of notification.* The notification of intent to export must be received by the Commission's Assistant Executive Director for Compliance at least 30 days before the noncomplying goods are to leave the customs territory of the United States. If the notification of intent to export includes more than one shipment of noncomplying goods to a foreign country, the Assistant Executive Director for Compliance must

receive the notification at least 30 days before the first shipment of noncomplying goods is to leave the customs territory of the United States.

(b) *Incomplete notification.* Promptly after receiving notification of intent to export, the Assistant Executive Director will inform the exporter if the notification of intent to export is incomplete and will describe which requirements of § 1019.4 are not satisfied. The Assistant Executive Director may inform the exporter that the 30-day advance notification period will not begin until the Assistant Executive Director receives all the required information.

(c) *Requests for reduction in 30-day notification requirement.* Any exporter may request an exemption from the requirement of 30-day advance notification of intent to export by filing with the Commission's Assistant Executive Director for Compliance (Washington, DC 20207) a written request that the time be reduced to a time between 10 and 30 days before the intended export. The request for reduction in time must be received by the Assistant Executive Director for Compliance at least 3 working days before the exporter wishes the reduced time period to begin. The request must:

- (1) Be in writing;
- (2) Be entitled "Request for Reduction of Time to File Notification of Intent to Export Noncomplying Goods to [indicate name of country]";
- (3) Contain a specific request for the time reduction requested to a time between 10 and 30 days before the intended export); and
- (4) Provide reasons for the request for reduction in time.

(d) *Response to requests for reduction of time.* The Assistant Executive Director for Compliance has the authority to approve or disapprove requests for reduction of time. The Assistant Executive Director shall indicate the amount of time before export that the exporter must provide the notification. If the request is not granted, the Assistant Executive Director shall explain the reasons in writing.

#### § 1019.6 Changes to notification.

If the exporter causes any change to any of the information required by § 1019.4, or learns of any change to any of that information, at any time before the noncomplying goods reach the country of destination, the exporter must notify the Assistant Executive Director for Compliance within two working days after causing or learning of such change, and must state the reason for any such change. The

Assistant Executive Director will promptly inform the exporter whether the 30-day advance notification period will be discontinued, and whether the exporter must take any other steps to comply with the advance notification requirement.

#### § 1019.7 Commission notification of foreign governments.

After receiving notification from the exporter, or any changes in notification, the Assistant Executive Director for Compliance shall inform on a priority basis the appropriate government agency of the country to which the noncomplying goods are to be sent of the exportation and the basis on which the goods are banned or fail to comply with Commission standards, regulations, or statutes, and shall send all information supplied by the exporter in accordance with § 1019.4(d). The Assistant Executive Director shall also enclose any information supplied in accordance with § 1019.4(e), but he or she may also state that the Commission disagrees with or takes no position on its content, including its relevance or accuracy. The Assistant Executive Director shall take whatever other action is necessary to provide full information to foreign countries and shall also work with and inform the U.S. State Department and foreign embassies and international organizations, as appropriate. The Assistant Executive Director shall also seek acknowledgment of the notification from the foreign government. Foreign governments intending to prohibit entry of goods that are the subject of a notification from the Commission should initiate action to prevent such entry and should notify the exporter directly of that intent.

#### § 1019.8 Confidentiality.

If the exporter believes any of the information submitted should be considered trade secret or confidential commercial or financial information, the exporter must request confidential treatment, in writing, at the time the information is submitted or must indicate that a request will be made within 10 working days. The Commission's regulations under the Freedom of Information Act, 16 CFR part 1015, govern confidential treatment of information submitted to the Commission.

### Subpart B—Statement of Policy and Interpretation Concerning Export of Noncomplying, Misbranded, or Banned Products

#### § 1019.31 Purpose and scope.

(a) This subpart B of this part 1019 states the policy of the Consumer Product Safety Commission and its interpretation of the Consumer Product Safety Act and the Federal Hazardous Substances Act with regard to exportation of products which have been sold, offered for sale, or distributed in commerce for use in the United States which:

(1) Fail to comply with an applicable consumer product safety standard or banning rule issued under provisions of the Consumer Product Safety Act (15 U.S.C. 2051 *et seq.*); or

(2) Are "misbranded hazardous substances" or "banned hazardous substances" as those terms are used in the Federal Hazardous Substances Act (15 U.S.C. 1261 *et seq.*).

(b) The policy expressed in this subpart B of part 1019 does not apply to any of the following products:

(1) Products which could be regulated only under provisions of the Consumer Product Safety Act but which are not subject to a consumer product safety standard or banning rule issued under that Act.

(2) Consumer products which are subject to and fail to comply with an applicable standard or banning rule issued under provisions of the Consumer Product Safety Act but which have never been distributed in commerce for use in the United States. See section 18(b) of the Consumer Product Safety Act 15, U.S.C. 2067(b), and subpart A of this part 1019 for requirements governing export of such products.)

(3) Products which could be regulated under one or more sections of the Federal Hazardous Substances Act but which are neither "misbranded hazardous substances" nor "banned hazardous substances" as those terms are used in the Act.

(4) Products which are "misbranded hazardous substances" or "banned hazardous substances" as those terms are used in the Federal Hazardous Substances Act but which have never been sold or offered for sale in domestic commerce. (See sections 5(b) and 14(d) of the Federal Hazardous Substances Act (15 U.S.C. 1264(b) and 1273(d) and subpart A of this part 1019 for requirements governing export of such products.)

(5) Products for which the Commission has granted an exemption from an applicable standard, ban, or

labeling requirement under the CPSA, FHSA, or FFA, in accordance with provisions of 16 CFR 1009.9. (These products remain subject to the notification requirements of subpart A of this part 1019.)

(6) Products which fail to comply with an applicable standard of flammability issued under provisions of the Flammable Fabrics Act (15 U.S.C. 1191 *et seq.*). The Commission's policy regarding export of such products is set forth in the Commission's Memorandum Decision and Order *In the Matter of Imperial Carpet Mills, Inc.*, CPSC Docket No. 80-2, July 7, 1983, and allows export without regard to whether the products have been distributed in domestic commerce. (See section 15 of the Flammable Fabrics Act, 15 U.S.C. 1202, and subpart A of this part 1019 for requirements governing export of such products.)

#### **§ 1019.32 Statutory provisions.**

(a) Section 18(a) of the Consumer Product Safety Act (15 U.S.C. 2057(a)) states:

This Act [the Consumer Product Safety Act] shall not apply to any consumer product if: (1) It can be shown that such product is manufactured, sold, or held for sale for export from the United States (or that such product was imported for export), unless (A) such consumer product is in fact distributed in commerce for use in the United States, or (B) the Commission determines that exportation of such product presents an unreasonable risk of injury to consumers within the United States, and (2) such consumer product when distributed in commerce, or any container in which it is enclosed when so distributed, bears a stamp or label stating that such consumer product is intended for export; except that this Act shall apply to any consumer product manufactured for sale, offered for sale, or sold for shipment to any installation of the United States located outside of the United States.

(b) Section 4 of the Federal Hazardous Substances Act (15 U.S.C. 1263) states in part:

The following acts and the causing thereof are hereby prohibited: (a) The introduction or delivery for introduction into interstate commerce of any misbranded hazardous substance or banned hazardous substance. \* \* \* (c) The receipt in interstate commerce of any misbranded hazardous substance or banned hazardous substance and the delivery or proffered delivery thereof for pay or otherwise.

(c) Section 5(b) of the Federal Hazardous Substances Act (15 U.S.C. 1264(b)) provides in part:

No person shall be subject to the penalties of this section \* \* \* (3) for having violated subsection (a) or (c) of section 4 with respect to any hazardous substance shipped or

delivered for shipment for export to any foreign country, in a package marked for export on the outside of the shipping container and labeled in accordance with the specifications of the foreign purchaser and in accordance with the laws of the foreign country, but if such hazardous substance is sold or offered for sale in domestic commerce, or if the Consumer Product Safety Commission determines that exportation of such substance presents an unreasonable risk of injury to persons residing within the United States, this clause shall not apply.

#### **§ 1019.33 Statement of policy and interpretation.**

(a) In its enforcement of the Consumer Product Safety Act, the Commission interprets the provisions of that Act to prohibit the export of products which fail to comply with an applicable consumer product safety standard or banning rule issued under that Act if those products have at any time been distributed in commerce for use in the United States.

(b) In its enforcement of the Federal Hazardous Substances Act, the Commission interprets the provisions of the Act to prohibit the export of products which are misbranded substances or banned hazardous substances as those terms are used in that Act if those products have at any time been sold or offered for sale in domestic commerce.

Dated: June 6, 1996.

Sadye E. Dunn,

*Secretary, Consumer Product Safety Commission.*

[FR Doc. 96-14760 Filed 6-11-96; 8:45 am]

BILLING CODE 6355-01-P

## **DEPARTMENT OF HEALTH AND HUMAN SERVICES**

### **Food and Drug Administration**

#### **21 CFR Part 189**

[Docket No. 91N-0326]

RIN 0910-AA06

#### **Tin-Coated Lead Foil Capsules for Wine Bottles; Correction**

**AGENCY:** Food and Drug Administration, HHS.

**ACTION:** Final rule; correction.

**SUMMARY:** The Food and Drug Administration (FDA) is correcting a final rule that appeared in the Federal Register of February 8, 1996 (61 FR 4816). The document announced that FDA was amending its regulations to prohibit the use of tin-coated lead foil capsules on wine bottles. The document was published with some inadvertent

errors. This document corrects those errors.

**EFFECTIVE DATE:** February 8, 1996.

**FOR FURTHER INFORMATION CONTACT:** Cristina R. Ford, Center for Food Safety and Applied Nutrition (HFS-726), Food and Drug Administration, 200 C St. SW., Washington, DC 20204, 202-205-5268.

In FR Doc. 96-2665, appearing on page 4816 in the Federal Register of Thursday, February 8, 1996, the following corrections are made:

1. On page 4819, in the second column, in the seventh line, "\$4.6 million" is corrected to read "\$0.4 million" and in the same column, in the first full paragraph, in the fourth line, "\$5.7 million" is corrected to read "\$0.8 million."

2. On page 4819, in the text at the bottom of the page, below Table 2, in the third column, beginning in the second line, "\$97,000 to \$8.7 million" is corrected to read "\$111,000 to \$3.8 million."

Dated: June 5, 1996.

William K. Hubbard,

*Associate Commissioner for Policy Coordination.*

[FR Doc. 96-14891 Filed 6-11-96; 8:45 am]

BILLING CODE 4160-01-F

## **21 CFR Part 520**

### **Oral Dosage Form New Animal Drugs; Praziquantel, Pyrantel Pamoate, and Febantel Tablets**

**AGENCY:** Food and Drug Administration, HHS.

**ACTION:** Final rule.

**SUMMARY:** The Food and Drug Administration (FDA) is amending the animal drug regulations to reflect approval of a supplemental new animal drug application (NADA) filed by Bayer Corp., Agriculture Div., Animal Health Products. The supplement provides for oral prescription use of Drontal Plus™ for removal and control of the tapeworm *Echinococcus multilocularis* in dogs.

**EFFECTIVE DATE:** June 12, 1996.

**FOR FURTHER INFORMATION CONTACT:** Sandra K. Woods, Center for Veterinary Medicine (HFV-114), Food and Drug Administration, 7500 Standish Pl., Rockville, MD 20855, 301-594-0614.

**SUPPLEMENTARY INFORMATION:** Bayer Corp., Agriculture Div., Animal Health Products, P.O. Box 390, Shawnee Mission, KS 66201, filed supplemental NADA 141-007, which provides for oral prescription use of Drontal Plus™ tablet for small dogs containing 22.7 milligrams (mg) praziquantel, 22.7 mg pyrantel base (as pyrantel pamoate), and

113.4 mg febantel, and Drontal Plus™ tablet for medium and large dogs containing 68 mg praziquantel, 68 mg pyrantel base (as pyrantel pamoate), and 340.2 mg febantel. The supplement provides for use of the tablet for removal and control of the cestode *E. multilocularis* in dogs in addition to the previously approved use for removal of other tapeworms (cestodes), hookworms, ascarids, and whipworms. Approval is based on data and information in previously approved NADA's 111-607 (Droncit injectable solution) and 111-798 (Droncit tablets). The supplement is approved as of March 28, 1996, and the regulations are amended in § 520.1872(c)(1)(ii) to reflect the approval. The basis of approval is discussed in the freedom of information summary.

In accordance with the freedom of information provisions of part 20 (21 CFR part 20) and § 514.11(e)(2)(ii) (21 CFR 514.11(e)(2)(ii)), a summary of data and information submitted to support approval of this application may be seen in the Dockets Management Branch (HFA-305), Food and Drug Administration, 12420 Parklawn Dr., rm. 1-23, Rockville, MD 20857, from 9 a.m. to 4 p.m., Monday through Friday.

Under section 512(c)(2)(F)(iii) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 360b(c)(2)(F)(iii)), this supplemental approval does not qualify for marketing exclusivity because no new clinical or field investigations (other than bioequivalence studies), essential to the approval, were conducted or sponsored by the applicant.

The agency has determined under 21 CFR 25.24(d)(1)(i) that this action is of a type that does not individually or cumulatively have a significant effect on the human environment. Therefore, neither an environmental assessment nor an environmental impact statement is required.

#### List of Subjects in 21 CFR Part 520

Animal drugs.

Therefore, under the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner of Food and Drugs and redelegated to the Center for Veterinary Medicine, 21 CFR part 520 is amended as follows:

#### **PART 520—ORAL DOSAGE FORM NEW ANIMAL DRUGS**

1. The authority citation for 21 CFR part 520 continues to read as follows:

Authority: Sec. 512 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 360b).

#### **§ 520.1872 [Amended]**

2. Section 520.1872 *Praziquantel, pyrantel pamoate, and febantel tablets* is amended in paragraph (c)(1)(ii) by adding the phrase "and for the removal and control of tapeworm *Echinococcus multilocularis*" before the words "in dogs".

Dated: May 17, 1996.  
Stephen F. Sundlof,  
Director, Center for Veterinary Medicine.  
[FR Doc. 96-14893 Filed 6-11-96; 8:45 am]  
BILLING CODE 4160-01-F

### **DEPARTMENT OF STATE**

#### **Bureau of Consular Affairs**

#### **22 CFR Part 50**

[Public Notice 2383]

#### **Nationality Procedures**

**AGENCY:** Bureau of Consular Affairs, Department of State.

**ACTION:** Final rule.

**SUMMARY:** The Bureau of Consular Affairs is amending its regulations concerning Nationality Procedures. Obsolete sections containing references to statutes which have been repealed, or contain inaccurate information, will be deleted. Several sections are being added which address recently enacted laws. Current State Department policies regarding loss of citizenship/nationality are added. These amendments, as general statements of longstanding State Department policy, are published as final rules.

**EFFECTIVE DATE:** May 22, 1996.

**ADDRESSES:** Interested persons are invited to submit any questions to the Director of Policy Review and Interagency Liaison, Overseas Citizens Services, Bureau of Consular Affairs, Room 4811, U.S. Department of State, Washington, DC 20520; Fax: (202) 647-6201.

#### **FOR FURTHER INFORMATION CONTACT:**

Carmen A. DiPlacido, or Michael Meszaros, Overseas Citizens Services, Department of State, 202-647-3666 or 202-647-4994.

**SUPPLEMENTARY INFORMATION:** This proposed rule implements changes which have occurred in State Department policy regarding nationality procedures and as a result of recent amendments to the Immigration and Nationality Act (INA). (Pub. L. 103-416, 108 Stat. 4308, 10/25/94). It also removes obsolete provisions from subpart B and subpart C of part 50 Nationality Procedures.

#### **Loss of Nationality/Citizenship**

Section 349 of the Immigration and Nationality Act (8 U.S.C. 1481) states that U.S. nationals are subject to loss of nationality if they perform certain acts voluntarily and with the intention of relinquishing U.S. nationality. (Note that for purposes of determining loss of nationality the words citizenship and nationality are synonymous.) These potentially expatriating acts include: (1) Obtaining naturalization in a foreign state; (2) taking an oath, affirmation or other formal declaration to a foreign state or its political subdivisions; (3) entering or serving in the armed forces of a foreign state engaged in hostilities against the United States or serving as a commissioned or non-commissioned officer in the armed forces of a foreign state; (4) accepting employment with a foreign government if (a) one has the nationality of that foreign state or (b) a declaration of allegiance is required in accepting the position; (5) formally renouncing U.S. citizenship before a U.S. consular officer outside the United States; (6) formally renouncing U.S. citizenship within the United States (but only "in time of war"); and (7) conviction for an act of treason.

In 1990, the Bureau of Consular Affairs adopted an administrative presumption in determining whether or not a U.S. citizen has performed a potentially expatriating act with the intention of relinquishing U.S. nationality in three classes of loss of citizenship cases. Specifically, when a U.S. citizen obtains naturalization in a foreign state, subscribes to routine declarations of allegiance to a foreign state, or accepts non-policy level employment with a foreign state, the intent to retain U.S. nationality will be presumed. U.S. citizens who naturalize in a foreign country; take a routine oath of allegiance; or accept non-policy level employment with a foreign government need not, therefore, submit evidence of their intent to retain U.S. nationality. A person who affirmatively asserts to a consular officer after he or she has committed a potentially expatriating act that it was his or her intention to relinquish U.S. citizenship will, however, lose his or her U.S. citizenship. In all other loss of nationality cases, the consular officer will ascertain whether or not there is evidence of intent to relinquish U.S. nationality.

#### **Retroactive Application of the Administrative Presumption in Certain Loss of Nationality/Citizenship Cases**

Persons who previously were held to have lost citizenship are provided the

opportunity to regain their U.S. citizenship. Citizenship will be reinstated if, at the time the loss of nationality was determined, the person did not attest in writing that it was his/her intention to relinquish U.S. citizenship. The Department of State's Office of Overseas Citizens Services will administratively review all cases submitted to it, even cases which previously were before the Department of State's Board of Appellate Review (L/BAR). Claimants need not be represented by an attorney. Individual claims may be submitted to the following address: Department of State, Bureau of Consular Affairs, Office of Policy Review and Interagency Liaison, Overseas Citizens Services, 2201 C Street NW., Washington, DC 20520-4817.

#### Statutory Changes

**Section 324(d) INA:** Section 324 of the INA has been amended to allow former U.S. citizens who lost their nationality due to noncompliance with U.S. residency requirements under the 1940 Nationality Act or the 1952 Immigration and Nationality Act, to regain citizenship by taking a specific oath of allegiance. Section 324(d) applies to persons born between May 24, 1934 and December 24, 1952. Former U.S. citizens may take the oath of allegiance as provided in section 324(d) if they are not otherwise ineligible under section 313 INA for advocating totalitarian forms of government. Persons qualifying regain U.S. citizenship as of the date the oath is taken but not retroactively to the date upon which it was lost. Because this amendment does not restore citizenship, persons subject to section 324(d) will be unable to transmit citizenship to their children born during the period between loss and resumption of U.S. citizenship. Persons eligible to take advantage of this provision may do so before the officers of the Immigration and Naturalization Service (INS) or U.S. consular officers abroad. The amendments to section 324 became effective on March 1, 1995.

The Department supported this legislation because it eliminates the need to adjudicate the three complicated affirmative defenses of unawareness, impossibility of performance, and misinformation as defenses to failure to fulfill retention requirements. The Department notes that these affirmative defenses may still be relied upon for citizenship retention purposes.

**Section 340(d) INA:** Section 340(d) of the Immigration and Nationality Act has been repealed by section 104(b) of the Immigration and Nationality Technical

Corrections Act of 1994 (Pub. L. 103-416, 108 Stat. 4308, 10/25/94). Section 340(d) provided that any naturalized citizen who, within one year of naturalization, returned to his or her native country, or to any other foreign country, and took up permanent residence there, could have his or her certificate of naturalization revoked by a court.

**Section 350 INA:** Section 350 of the Immigration and Nationality Act was repealed by Section One of the Immigration and Nationality Technical Corrections Act of 1978 (Pub. L. 95-432, 92 Stat. 1046, 10/10/78). Section 350 had provided that any person born as a dual national who sought any benefit from any foreign country, lost U.S. citizenship if he or she was over the age of 21 and had resided in the country of his or her other nationality for 3 years. "Benefits" was defined broadly to include the use of a foreign passport, the holding of an identification card issued by a foreign state or the obtaining of a special license or scholarship available only to nationals of the foreign state. Persons who previously were held to have lost citizenship under Section 350 INA may have their citizenship reinstated if they can show that they did not intend to relinquish U.S. citizenship.

These regulations are not expected to have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act, 5 U.S.C. 605(b). In addition, they will not impose information collection requirements under the provisions of the Paperwork Reduction Act of 1980 44 U.S.C. Chapter 35. Nor do these final rules have federalism implications warranting the preparation of a Federalism Assessment in accordance with E.O. 12612. These final rules have been reviewed as required by E.O. 12778 and certified to be in compliance therewith. These rules are not exempt from review under E.O. 12866 but have been reviewed and found to be consistent with the objectives thereof. Pursuant to 5 U.S.C. Section 553(b)(A), these rules are general statements of previously implemented policy not subject to the general notice requirement of 5 U.S.C. Section 553(b).

#### List of Subjects in 22 CFR Part 50

##### Nationality Procedures.

For the reasons set out in the preamble, 22 CFR Part 50 is amended as follows:

## PART 50—[AMENDED]

### Subpart B—Retention and Resumption of Nationality

1. The authority citation for 22 CFR Part 50 continues to read as follows:

Authority: Sec. 4, 63 Stat. 111, as amended, secs. 104, 360, 66 Stat. 174, 273; 22 U.S.C. 2658, 8 U.S.C. 1104, 1503.

#### § 50.20 [Amended]

1A. Section 50.20(a) is removed; § 50.20(b) is redesignated as § 50.20(a).

\* \* \* \* \*

#### § 50.30 [Amended]

2. Section 50.30(d) is added to read as follows:

\* \* \* \* \*

(d) *Section 324(d)(1) of the Immigration and Nationality Act.* (1) A former citizen of the United States who did not retain U.S. citizenship by failure to fulfill residency requirements as set out in Section 201(g) of the 1940 Nationality Act or former 301(b) of the 1952 Immigration and Nationality Act, may regain his/her U.S. citizenship pursuant to Section 324(d) INA, by applying abroad at a diplomatic or consular post, or in the U.S. at any Immigration and Naturalization Service office in the form and manner prescribed by the Department of State and the Immigration and Naturalization Service (INS).

(2) The applicant shall submit documentary evidence to establish eligibility to take the oath of allegiance, which includes proof of birth abroad to a U.S. citizen parent between May 24, 1934 and December 24, 1952. If the diplomatic, consular, INS, or passport officer determines that the applicant is ineligible to regain citizenship under section 313 INA, the oath shall not be administered.

### Subpart C—Loss of Nationality

#### § 50.40 [Removed]

3. Section 50.40 is removed.

#### § 50.41 [Redesignated as § 50.40 and amended]

4. Section 50.41 is redesignated as § 50.40 and in redesignated § 50.40, paragraphs (a), (b), (c), and (d) are redesignated as paragraphs (c), (d), (b) and (e); paragraph (a) is added; and newly redesignated paragraph (b) is revised to read as follows:

(a) *Administrative presumption.* In adjudicating potentially expatriating acts pursuant to INA 349(a), the Department has adopted an administrative presumption regarding certain acts and the intent to commit them. U.S. evidence of intent to retain

U.S. nationality. In these three classes of cases, intent to retain U.S. citizenship will be presumed. A person who affirmatively asserts to a consular officer, after he or she has committed a potentially expatriating act, that it was his or her intent to relinquish U.S. citizenship will lose his or her U.S. citizenship. In other loss of nationality cases, the consular officer will ascertain whether or not there is evidence of intent to relinquish U.S. nationality.

(b) Whenever a person admits that he or she had the intent to relinquish citizenship by the voluntary and intentional performance of one of the acts specified in Section 349(a) of the Immigration and Nationality Act, and the person consents to the execution of an affidavit to that effect, the diplomatic or consular officer shall attach such affidavit to the certificate of loss of nationality.

\* \* \* \* \*

**§ 50.42 [Removed]**

5. Section 50.42 is removed.

6. Section 50.50 is amended by revising the first sentence to read as follows:

**§ 50.50 Renunciation of nationality.**

(a) A person desiring to renounce U.S. nationality under section 349(a)(5) of the Immigration and Nationality Act shall appear before a diplomatic or consular officer of the United States in the manner and form prescribed by the Department. \* \* \*

**§ 50.51 [Removed]**

7. Section 50.51 is removed.

**§ 50.52 [Redesignated as § 50.51]**

8. Section 50.52 is redesignated as § 50.51.

**§§ 50.20 and 50.40 [Amended]**

9. Sections 50.20(a), 50.20(a)(2), 50.40(b) and 50.40(d) are amended by removing the words "his" and "he" as applicable, and adding the words listed below:

Section	Add
50.20(a)(1) .....	"a".
50.20(a)(2) .....	"the person's".
50.40(d) .....	"the person".

Dated: April 30, 1996.

Mary A. Ryan,

Assistant Secretary for Consular Affairs.

[FR Doc. 96-13402 Filed 6-11-96; 8:45 am]

BILLING CODE 4710-06-M

**DEPARTMENT OF THE TREASURY**

**Internal Revenue Service**

**26 CFR Parts 26, 301, and 602**

[TD 8644]

RIN 1545-AJ11; 1545-AL75; 1545-AO89

**Generation-Skipping Transfer Tax; Correction**

**AGENCY:** Internal Revenue Service (IRS), Treasury.

**ACTION:** Correction to final regulations.

**SUMMARY:** This document contains corrections to final regulations [TD 8644] which were published in the Federal Register for Wednesday, December 27, 1995 (60 FR 66898). The final regulations relate to generation-skipping transfer tax.

**EFFECTIVE DATE:** December 27, 1995.

**FOR FURTHER INFORMATION CONTACT:** Jim Hogan (202) 622-3090 (not a toll-free number).

**SUPPLEMENTARY INFORMATION:**

**Background**

The final regulations that are subject to these corrections are under chapter 13 of the Internal Revenue Code.

**Need for Correction**

As published, the final regulations [TD 8644] contain errors that are in need of clarification.

**Correction of Publication**

Accordingly, the publication of final regulations which are the subject of FR Doc. 95-30873 is corrected as follows:

1. On page 66899, column 1, in the preamble under the paragraph heading "Uniform Statutory Rule Against Perpetuities", line 13, the language "alienation of a interest in property for a" is corrected to read "alienation of an interest in property for a".

2. On page 66902, column 1, in the preamble under the paragraph heading "Division of a Single Trust Into Separate Trusts", paragraph 3, line 3 from the bottom, the language "for under the original trusts. Thus, a" is corrected to read "for under the original trust. Thus, a".

**§ 26.2601-1 [Corrected]**

2a. On page 66907, column 2, § 26.2601-1, paragraph (b)(1)(v)(D), *Example 2*, eighth line from the bottom of the paragraph, the language, "of the first addition), \$200,000 (.2+)" is corrected to read "of the first addition), \$200,000 (.2×)".

3. On page 66907, column 2, § 26.2601-1, paragraph (b)(1)(v)(D),

*Example 4*, eighth line from the bottom of the column, the language "GGC, for life. Upon GGC's death the" is corrected to read "GGC, for life. Upon GGC's death, the".

4. On page 66907, column 3, § 26.2601-1, paragraph (b)(1)(v)(D), *Example 5*, line 3, the language "Assume the same facts as in *Example 3*," is corrected to read "Assume the same facts as in *Example 4*,".

5. On page 66909, column 2, § 26.2601-1, paragraphs (b)(3)(iii) introductory text, (b)(3)(iii)(A), (b)(3)(iii)(A)(1), (b)(3)(iii)(A)(2), (b)(3)(iii)(B), (b)(3)(iii)(C) are correctly designated (b)(3)(iii)(A) introductory text, (b)(3)(iii)(A)(1), (b)(3)(iii)(A)(1)(i), (b)(3)(iii)(A)(1)(ii), (b)(3)(iii)(A)(2), and (b)(3)(iii)(A)(3), respectively.

6. On page 66909, column 2, § 26.2601-1, newly designated paragraph (b)(3)(iii)(A)(3) is corrected and paragraph (b)(3)(iii)(B) is added to read as follows:

**§ 26.2601-1 Effective dates.**

\* \* \* \* \*

- (b) \* \* \*
- (3) \* \* \*
- (iii) \* \* \*
- (A) \* \* \*

(3) Any judgement or decree relating to the decedent's incompetency that was made after October 22, 1986.

(B) Such items in paragraphs (b)(3)(iii)(A), (B), and (C) of this section will be considered relevant, but not determinative, in establishing the decedent's state of competency.

7. On page 66909, column 3, § 26.2601-1, paragraph (b)(4)(i), line 5, the language "rules in paragraph (b) (2) or (3) of this" is corrected to read "rules in paragraph (b) (1), (2) or (3) of this".

8. On page 66910, column 2, § 26.2601-1, paragraph (c), line 5 from the top of the column, the language "on or after [December 27, 1995]." is corrected to read "on or after December 27, 1995.".

**§ 26.2612-1 [Corrected]**

9. On page 66910, column 3, § 26.2612-1, paragraph (a)(2)(ii), lines 5 and 6, the language "the transferor would be assigned to a lower generation by reason of that" is corrected to read "the lineal descendant would be assigned to a higher generation by reason of that".

10. On page 66910, column 3, § 26.2612-1, paragraph (b)(1)(i), last 3 lines are corrected by removing the language "(i.e., a new transferor is determined with respect to the property)".

**§ 26.2632-1 [Corrected]**

11. On page 66914, column 3, § 26.2632-1, paragraph (d)(1), line 3 from the top of the column, the language "706 or Form 706NA and is effective as" is corrected to read "706, Form 706NA or Form 709 (filed on or before the due date of the transferor's estate tax return) and is effective as".

**§ 26.2642-2 [Corrected]**

12. On page 66916, column 2, § 26.2642-2, paragraph (b)(3)(ii)(B), line 6, the language "date of death and the date of" is corrected to read "valuation date and the date of".

**§ 26.2642-4 [Corrected]**

13. On page 66917, column 3, § 26.2642-4, paragraph (a)(3), lines 5 through 9 from the top of the column, the language "not allocated to the trust, the applicable fraction immediately before death is not changed, if the trust was not subject to an ETIP at the time GST exemption was allocated to the trust. The denominator" is corrected to read "not allocated to the trust, then, except as provided in this paragraph (a)(3), the applicable fraction immediately before death is not changed, if the trust was not subject to an ETIP at the time GST exemption was allocated to the trust. In any event, the denominator".

14. On page 66918, column 2, § 26.2642-4, paragraph (b), paragraph (i) of *Example 5*, the last line, the language "is .50 (1 - (\$100,000/\$200,000 = .50))" is corrected to read "is .50 (1 - (\$100,000/\$200,000))".

**§ 26.2652-1 [Corrected]**

15. On page 66918, column 3, § 26.2652-1, paragraph (a)(2), line 2, the language "or gift tax. For purposes of this section," is corrected to read "or gift tax. For purposes of this chapter,".

16. On page 66919, column 1, § 26.2652-1, paragraph (a)(2), line 3 from the top of the column, the language "2501(a). A transfer is subject to Federal" is corrected to read "2501(a) (without regard to exemptions, exclusions, deductions, and credits). A transfer is subject to Federal".

17. On page 66919, columns 1 and 2, § 26.2652-1, paragraph (a)(6) *Example 1*, last two lines in column 1 and first line in column 2, the language "benefit of T's grandchild. The transfer is a completed gift under § 25.2511-2 of this chapter. Thus, for purposes of chapter 13, T" is corrected to read "benefit of T's grandchild. The transfer is subject to Federal gift tax because a gift tax is imposed under section 2501(a) (without regard to exemptions, exclusions,

deductions, and credits). Thus, for purposes of chapter 13, T".

18. On page 66919, column 2, § 26.2652-1, paragraph (a)(6), *Example 5*, lines 13 and 14, the language "transfer by T is a completed transfer within the meaning of § 25.2511-2 of this chapter" is corrected to read "transfer by T is subject to Federal gift tax because a gift tax is imposed under section 2501(a) (without regard to exemptions, exclusions, deductions, and credits)".

**§ 26.2654-1 [Corrected]**

19. On page 66921, column 2, § 26.2654-1, paragraph (a)(1)(ii)(A), last line, the language "person; or" is corrected to read "person; and".

20. On page 66922, column 2, § 26.2654-1, paragraph (a)(5), *Example 6*, line 10 from the top of the column, the language "contribution is  $\frac{3}{4}$  (( $\frac{2}{3}$  × \$180,000) +)" is corrected to read "contribution is  $\frac{3}{4}$  (( $\frac{2}{3}$  × \$180,000) +)".

21. On page 66922, column 2, § 26.2654-1, paragraph (a)(5), *Example 8*, line 4 from the bottom of the paragraph, the language "same if, the trust instrument provided that" is corrected to read "same if the trust instrument provided that".

22. On page 66922, column 2, § 26.2654-1, paragraph (b)(1)(ii)(A), lines 1 and 2, the language "(A) The terms of each of the new trusts provide for the same succession of" is corrected to read "(A) The terms of the new trusts provide in the aggregate for the same succession of".

23. On page 66922, column 3, § 26.2654-1, paragraph (b)(1)(ii)(C)(I), line 2 from the bottom of the paragraph, the language "measured from the date of death to the" is corrected to read "measured from the valuation date to the".

**§ 26.2662-1 [Corrected]**

24. On page 66923, column 3, § 26.2662-1, paragraph (c)(2)(vi), *Example 1*, line 6, the language "T's grandchild GC, was named the sole" is corrected to read "T's grandchild, GC, was named the sole".

**§ 26.2663-2 [Corrected]**

25. On page 66925, column 1, § 26.2663-2, paragraph (c)(2), the last line, the language "the trust)." is corrected to read "(the trust))."

26. On page 66925, column 2, § 26.2663-2, paragraph (d), *Example 3*, line 8 from the bottom of the paragraph, the language "Generation-Skipping Transfer) Tax return" is corrected to read "Generation-Skipping Transfer) Tax Return".

27. On page 66925, column 3, § 26.2663-2, paragraph (e), line 11, the

language "prescribed in section 2632(c). Thus, an" is corrected to read "prescribed in section 2632(c). Thus, a".  
Cynthia E. Grigsby,  
Chief, Regulations Unit, Assistant Chief Counsel (Corporate).

[FR Doc. 96-14863 Filed 6-11-96; 8:45 am]

BILLING CODE 4830-01-U

**DEPARTMENT OF TRANSPORTATION****Coast Guard****33 CFR Part 117**

[CGD07-95-057]

RIN 2115-AE47

**Drawbridge Operation Regulations; Atlantic Intracoastal Waterway, FL**

AGENCY: Coast Guard, DOT.

ACTION: Final rule.

**SUMMARY:** The Coast Guard is changing the regulations governing the operation of the NASA Railroad bridge, mile 876.6, at Kennedy Space Center, by removing the authorization for automatic operation and returning the draw to manual operation. This action will accommodate the needs of railroad traffic and still provide for the reasonable needs of navigation.

**EFFECTIVE DATE:** July 29, 1996.

**ADDRESSES:** Documents are available for inspection or copying at U.S. Coast Guard Seventh District, Office of Aids to Navigation, 909 S.E. 1st Avenue, Miami, Florida 33131 between 8 a.m. and 4 p.m. EDT, Monday through Friday, except Federal holidays.

**FOR FURTHER INFORMATION CONTACT:** Mr. Walt Paskowsky, Project Manager, Bridge Section, (305) 536-4103.

**SUPPLEMENTARY INFORMATION:****Regulatory History**

On February 22, 1996, the Coast Guard published a notice of proposed rulemaking entitled Drawbridge Operation Regulations, Atlantic Intracoastal Waterway, FL in the Federal Register (61 FR 6803). The comment period ended on April 22, 1996. The Coast Guard received no comments on the proposal. A public hearing was not requested and one was not held.

**Background and Purpose**

The draw of the NASA railroad bridge, mile 876.6 at Kennedy Space Center was placed in automatic remote controlled operation by the Florida East Coast Railroad when it was put into service in February 1964. Under remote

operation the span is normally in the open position displaying flashing green signals to allow the movement of water traffic. When a train approaches the bridge the lights go to flashing red, a horn sounds 4 blasts, pauses, then repeats 4 blasts. After an 8 minute delay, the draw lowers and locks, providing scanning equipment reveals nothing under the span. The draw remains down for a period of 8 minutes or while the approach track circuit is occupied. After the train clears, the draw opens and the lights return to flashing green.

The automatic remote control method was discontinued in 1984 when ownership of the bridge was transferred from the Florida East Coast Railroad to the Kennedy Space Center (NASA). The purpose of this change is to describe in the regulation how the bridge is actually being operated.

#### Discussion of Comments and Changes

No comments were received on the proposed rule. The final rule is therefore unchanged from the proposed rule published on February 22, 1996.

#### Regulatory Evaluation

This rule is not a significant regulatory action under section 3(f) of executive order 12866 and does not require an assessment of potential costs and benefits under section 6(a)(3) of that order. It has not been reviewed by the Office of Management and Budget under that order. It is not significant under the regulatory policies and procedures of the Department of Transportation. (DOT) (44 FR 11040; February 26, 1979). The Coast Guard expects the economic impact of this action to be so minimal that a full Regulatory Evaluation under paragraph 10e of the regulatory policies and procedures of DOT is unnecessary.

#### Small Entities

Under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), the Coast Guard must consider whether this rule will have a significant economic impact on a substantial number of small entities. "Small entities" may include small businesses and not for profit organizations that are independently owned and operated and are not dominant in their field and governmental jurisdictions with populations of less than 50,000. Because it expects the impact of the action to be minimal, the Coast Guard certifies under 5 U.S.C. 605(b) that this final rule will not have a significant economic impact on a substantial number of small entities.

#### Collection of Information

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

#### Federalism

The Coast Guard has analyzed the rule under the principles and criteria contained in Executive Order 12612, and has determined that this rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

#### Environment

The Coast Guard considered the environmental impact of this rule and concluded that under section 2.B.2.e.(32) of Commandant Instruction M16475.1B, promulgation of operating requirements or procedures for drawbridges is categorically excluded from further environmental documentation. A "Categorical Exclusion Determination" is available in the docket where listed under **ADDRESSES**.

#### List of Subjects in 33 CFR Part 117

Bridges.

#### Final Regulation

For the reasons set out in the preamble, the Coast Guard amends 33 CFR Part 117 as follows:

#### **PART 117— [AMENDED]**

1. The authority citation for Part 117 continues to read as follows:

Authority: 33 U.S.C. 499; 49 CFR 1.46; 33 CFR 1.05-1(g); section 117.255 also issued under the authority of Pub. L. 102-587, 106 Stat. 5039.

2. Section 117.261 is amended by revising paragraph (j) to read as follows:

#### **§ 117.261 Atlantic Intracoastal Waterway from St. Mary's River to Key Largo**

\* \* \* \* \*

(j) NASA Railroad bridge, mile 876.6 at Kennedy Space Center.

(1) The draw is not constantly tended.

(2) The draw is normally in the fully open position displaying flashing green lights to indicate that vessels may pass.

(3) When a train approaches the bridge, it stops and the operator initiates a command to lower the bridge. The lights go to flashing red and the draw lowers and locks, providing scanning equipment reveals nothing under the draw. The draw remains down until a manual raise command is initiated, or will raise automatically 5 minutes after the intermediate track circuit is no longer occupied by a rail car.

(4) After the train has cleared, the draw opens and the lights return to flashing green.

\* \* \* \* \*

Dated: May 21, 1996.

Roger T. Rufe, Jr.,

Rear Admiral, U.S. Coast Guard, Commander, Seventh Coast Guard District.

[FR Doc. 96-14864 Filed 6-11-96; 8:45 am]

BILLING CODE 4910-14-M

#### **33 CFR Part 165**

[CGD 05-96-038]

RIN 2115-AA97

#### **Safety Zone; Chesapeake Bay, Hampton Roads, Elizabeth River, Norfolk, VA**

**AGENCY:** Coast Guard, DOT.

**ACTION:** Temporary rule.

**SUMMARY:** The Coast Guard is establishing a temporary safety zone around the Nauticus National Maritime Center Norfolk, VA. The zone is needed to protect U.S. Coast Guard Change of Command participant vessels and mariners operating in the vicinity from 8 a.m. to 2 p.m. on June 14, 1996. Entry into this zone is prohibited unless authorized by the Captain of the Port or his designated representative.

**EFFECTIVE DATES:** This regulation is effective from 8 a.m. to 2 p.m. on June 14, 1996, unless sooner terminated by the Captain of the Port, Hampton Roads, Virginia.

**FOR FURTHER INFORMATION CONTACT:** Chief Petty Officer John Pekich, Project Officer, USCG Marine Safety Office Hampton Roads, telephone number (804) 484-8192.

**SUPPLEMENTARY INFORMATION:** In accordance with 5 U.S.C. 553, a Notice of Proposed Rule Making (NPRM) was not published for this rule and good cause exists for making it effective less than 30 days after Federal Register publication. Publishing an NPRM and delaying its effective date would be contrary to the public interest since immediate action is needed to protect the vessels involved in the Change of Command Ceremony and other mariners operating in the vicinity.

#### Discussion of the Regulation

This temporary rule is issued to protect vessels involved in Change of Command ceremonies at the Nauticus National Maritime Center, Norfolk, VA, or those transiting the area on the Elizabeth River, Norfolk, VA. Therefore, the Coast Guard is establishing a 100 yard radius safety zone around the

maritime center's piers while the ceremony is conducted. The safety zone will be in effect from 8 a.m. to 2 p.m. on June 14, 1996, unless terminated sooner by the Captain of the Port. This safety zone will prohibit access by all unauthorized persons to all waters within a 100 yard radius from a point located at 36°54'.28" N 076°05'.31" W during these operations. A safety zone is necessary to protect both the vessels involved with the operation and those operating in the vicinity.

#### Regulatory Evaluation

This rule is not a significant regulatory action under section 3(f) of Executive Order 12866 and does not require an assessment of potential costs and benefits under section 6(a)(3) of that order. It has been exempted from review 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). The Coast Guard expects the economic impact of this rule to be so minimal that a full Regulatory Evaluation under paragraph 10e of the regulatory policies and procedures of DOT is unnecessary.

#### Collection of Information

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

#### Federalism

The Coast Guard has analyzed this rule under the principles and criteria contained in Executive Order 12612 and has determined that it does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

#### Environment

The Coast Guard considered the environmental impact of this rule and concluded that under section 2.B.2.e(34) of Commandant Instruction M16475.1B (as revised by 59 FR 38654; July 29, 1994), this rule is categorically excluded from further environmental documentation.

#### List of Subjects in 33 CFR Part 165

Harbors, Marine Safety, Navigation (water), Reporting and recordkeeping requirements, Security measures, Vessels, Waterways.

For the reasons set out in the preamble, the Coast Guard amends 33 CFR 165 as follows:

#### PART 165—[AMENDED]

1. The authority citation for Part 165 continues to read as follows:

Authority: 33 U.S.C. 1231; 50 U.S.C. 191; 33 CFR 1.05-1(g), 6.04-1, 6.04-6, and 160.5.; 49 CFR 1.46.

2. A new temporary section 165.T05-038 is added to read as follows:

#### § 165.T05-038 Safety Zone: Chesapeake Bay, Hampton Roads, Elizabeth River, Norfolk, Virginia.

(a) *Location:* The following area is a safety zone: All waters within a 100 yard radius from a point located at 36°54'.28" N, 076°05'.31" W, on the Elizabeth River at the Nauticus National Maritime Center, Norfolk, Virginia, during the Change of Command Ceremony.

(b) *Definitions:* *Captain of the Port* means the Commanding Officer of the Marine Safety Office Hampton Roads, Norfolk, VA or any Coast Guard commissioned, warrant, or petty officer who has been authorized by the Captain of the Port to act on his behalf.

(c) (1) In accordance with the general regulations in section 165.23 and 165.501 of this part, entry into this zone is prohibited unless authorized by the Captain of the Port. The general requirements of section 165.23 and 165.501 also apply to this regulation.

(2) Persons or vessels requiring entry into or passage through the safety zone must first request authorization from the Captain of the Port. The Coast Guard vessels enforcing the safety zone can be contacted on VHF Marine Band Radio, channels 13 and 16. The Captain of the Port can be contacted at telephone number (804) 484-8192.

(d) The Captain of the Port will notify the public of changes in the status of this zone by Marine Safety Radio Broadcast on VHF Marine Band Radio, Channel 22 (157.1 MHz).

Dated: June 6, 1996.

D.A. Sande,

*Captain, U.S. Coast Guard, Captain of the Port, Hampton Roads.*

[FR Doc. 96-14861 Filed 6-11-96; 8:45 am]

BILLING CODE 4910-14-M

#### 33 CFR Part 165

#### [COTP San Francisco Bay 96-003]

#### RIN 2115-AA97

#### Safety Zone; San Francisco Bay, CA

AGENCY: Coast Guard, DOT.

ACTION: Temporary final rule.

SUMMARY: The Coast Guard is establishing a safety zone on the waters

of San Francisco Bay, California around the Coast Guard Cutter *Boutwell* which will be moored at the Coast Guard Island Pier, Alameda. The event requiring a safety zone is a military change of command ceremony. The zone will encompass a water area extending 25 yards forward, aft, and to the outboard side of the ship which will be moored at the following location: Latitude: 37°46'50"N, Longitude: 122°15'01"W. Persons and vessels are prohibited from entering into, transiting through, or anchoring within this safety zone unless authorized by the Captain of the Port.

**EFFECTIVE DATE:** This safety zone will be in effect on June 12, 1996, between 9:30 a.m., PDT, and 1:30 p.m., PDT, unless canceled earlier by the Captain of the Port.

**FOR FURTHER INFORMATION CONTACT:** Lieutenant Rob Lee, Coast Guard Marine Safety Office San Francisco Bay, CA; (510) 437-3073.

**SUPPLEMENTARY INFORMATION:** In accordance with 5 U.S.C. 553, a Notice of Proposed Rulemaking (NPRM) was not published for this regulation, and good cause exists for making it effective in less than 30 days after Federal Register publication. Publishing an NPRM and delaying its effective date would be contrary to the public interest since the cope of activities potentially attracting a number of spectator craft and thus requiring a safety zone was not finalized until a date fewer than 30 days prior to the event date.

#### Discussion of Regulation

The military change of command event requiring this regulation will begin at approximately 10:30 a.m. PDT on June 12, 1996. This safety zone is necessary to prevent spectator recreational and commercial craft from collecting within 25 yards of the cutter *Boutwell*, creating possible safety concerns for these vessels and the Coast Guard cutter. Persons and vessels are prohibited from entering into, transiting through, or anchoring within the safety zone unless authorized by the Captain of the Port.

#### Regulatory Evaluation

This regulation is not a significant regulatory action under section 3(f) of Executive Order 12866 and does not require an assessment of potential costs and benefits under section 6(a)(3) of that order. It has been exempted from review 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). The Coast Guard expects the economic impact of this regulation to be so minimal that a full Regulatory evaluation under paragraph 10(e) of the regulatory policies and procedures of DOT is unnecessary. Because the impact is expected to be minimal, the Coast Guard certifies that it will not have a significant economic impact on a substantial number of small entities.

#### Collection of Information

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

#### Federalism

The Coast Guard has analyzed this regulation under the principles and criteria contained in Executive Order 12612 and has determined that this regulation does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

#### Environmental Assessment

The Coast Guard has considered the environmental impact of this regulation and concluded that under section 2.B.2 of Commandant Instruction M16475.1b it will have no significant environmental impact and it is categorically excluded from further environmental documentation.

#### List of Subjects in 33 CFR Part 165

Harbors, Marine safety, Navigation (water), Reporting and recordkeeping requirements, Security measures, Waterways.

#### Regulation

In consideration of the foregoing, Subpart F of Part 165 of Title 33, Code of Federal Regulations, is amended as follows:

#### **PART 165—[AMENDED]**

1. The authority citation for Part 165 continues to read as follows:

Authority: 33 U.S.C. 1231; 50 U.S.C. 191; 33 CFR 1.05-1(g), 6.04-1, 6.04-6, and 160.5; 49 CFR 1.46.

2. A new section 165.T11-074 is added to read as follows:

#### **§ 165.T11-074 Safety Zone: San Francisco Bay, CA**

(a) *Location.* The following area is a safety zone: the waters of San Francisco Bay, California around the Coast Guard Cutter *Boutwell* which will be moored at the Coast Guard Island Pier, Alameda. The zone will encompass a water area extending 25 yards forward, aft, and to the outboard side of the ship which will be moored at the following location:

Latitude: 37°46'50"N, Longitude: 122°15'01"W. [Datum: NAD 83].

(b) *Effective Date.* This safety zone will be in effect on June 12, 1996, between 9:30 a.m., PDT, and 1:30 p.m., PDT, unless canceled earlier by the Captain of the Port.

(c) *Regulations.* In accordance with the general regulations in Section 164.23 of this part, entry into, transit through, or anchoring within this zone is prohibited unless authorized by the Captain of the Port.

Dated: May 28, 1996.  
D.P. Montoro,  
Captain, U.S. Coast Guard, Captain of the Port.  
[FR Doc. 96-14862 Filed 6-11-96; 8:45 am]  
**BILLING CODE 4910-14-M**

## **DEPARTMENT OF VETERANS AFFAIRS**

### **38 CFR Part 1**

**RIN 2900-AI03**

#### **Inventions by Employees of Department of Veterans Affairs**

**AGENCY:** Department of Veterans Affairs.  
**ACTION:** Final rule.

**SUMMARY:** This document amends the regulations concerning inventions developed by employees of the Department of Veterans Affairs (VA). It adds the Federal Technology Transfer Act (FTTA) of the 1986 as an authority for these regulations. Also, it reflects changes in delegations of authority made by the Department of Commerce (DOC), the lead agency concerning patents and inventions. Further, it removes language in the VA regulations that is also set forth in DOC regulations. The DOC regulations are applicable to the Department without restatement in VA regulations. In addition, it makes changes to VA delegations of authority. Lastly, the amendments clarify procedures to be followed by VA employees in reporting inventions.

**EFFECTIVE DATE:** July 12, 1996.

**FOR FURTHER INFORMATION CONTACT:** Chuck Delobe, Deputy Assistant General Counsel (024B), Department of Veterans Affairs, 810 Vermont Ave., NW., Washington, DC 20420, (202) 273-6383.

**SUPPLEMENTARY INFORMATION:** Executive Order 10096, dated January 23, 1950, as amended by Executive Order 10930, dated March 24, 1961, set forth the criteria Federal agencies are to utilize in making determinations of ownership rights to inventions developed by Federal employees. The E.O. also required that each Federal agency take

all necessary steps, including the promulgation of regulations, to effectuate the order. The VA's regulations implementing the executive order are found at 38 CFR 1.650-666.

DOC was given lead agency authority to implement the provisions of the E.O. DOC's regulations, applicable to all Federal agencies, set forth a uniform patent policy and are found at 37 CFR part 501. The amendments reflect more recent changes in the delegations of authority within DOC. It adds the Federal Technology Transfer Act (FTTA) of the 1986 as an authority for these regulations. Also, it reflects changes in delegations of authority made by the Department of Commerce (DOC), the lead agency concerning patents and inventions. Further, it removes language in the VA regulations that is also set forth in DOC regulations. The DOC regulations are applicable to the Department without restatement in VA regulations. In addition, it makes changes to VA delegations of authority. Lastly, the amendments clarify procedures to be followed by VA employees in reporting inventions.

This final rule consists of agency procedures and nonsubstantive changes and, therefore, is not subject to the notice-and-comment and effective date provisions of 5 U.S.C. 553.

The Secretary hereby certifies that this final rule will not have a significant economic impact on a substantial number of small entities as they are defined in the Regulatory Flexibility Act, 5 U.S.C. 601-612. This final rule would not have any impact on individuals or small entities. Therefore, pursuant to 5 U.S.C. 605(B), this final rule is exempt from the initial and final regulatory flexibility analysis requirements of sections 603 and 604.

There is no Catalog of Federal Domestic Assistance number for the program affected by this final rule.

#### List of Subjects in 38 CFR Part 1

Administrative practice and procedure, Archives and records, Cemeteries, Claims, Courts, Flags, Freedom of information, Government contracts, Government employees, Government property, Infants and children, Inventions and patents, Investigation, Parking, Penalties, Postal service, Privacy reporting and record keeping requirements, Seals and insignia security measures, Wages.

Approved: May 5, 1996.

Jesse Brown,  
Secretary of Veterans Affairs.

For the reasons set out in the preamble, 38 CFR part 1 is amended as set forth below:

**PART 1—GENERAL PROVISIONS**

1. The authority citation for part 1 sections 1.650–1.666 is revised to read as follows:

Authority: sections 1.650 to 1.666 issued under sect. 1, 66 Stat. 811, 72 Stat. 1114; 35 U.S.C. 266; 15 U.S.C. 3710a; 38 U.S.C. 501; E.O. 10096, E.O. 10930, 15 FR 389; 3 CFR 1949–1953 Comp.

2. Section 1.650 is amended by removing “the regulations” and adding, in its place, “these regulations”, and by removing “concerning inventions by employees of the Department of Veterans Affairs.”

(Authority: 38 U.S.C. (501(a), unless otherwise noted.)

3. In § 1.651, paragraphs (b) and (c) are revised to read as follows:

**§ 1.651 Definitions.**

\* \* \* \* \*

(b) The term *employee or Government employee* means any officer or employee, civilian or military, of the Department of Veterans Affairs. Part-time, without compensation (WOC) employees and part-time consultants are included.

(c) The term Secretary of Commerce means the Under Secretary of Commerce for Technology.

4. Section 1.652 is revised to read as follows:

**§ 1.652 Criteria for determining rights to employee inventions.**

(a) The criteria to be applied in determining the respective rights of the Government and of the employee-inventor in and to any invention subject to these provisions shall be in accordance with the Uniform Patent Policy regulations found at 37 CFR 501.6 and 501.7.

(b) Ownership in and to inventions arising under Cooperative Research and Development Agreements (CRADAs) pursuant to 15 USC 3710a shall be governed by the provisions of the pertinent CRADA, as authorized by the Federal Technology Transfer Act.

(Authority: 15 U.S.C. 3710a; 37 CFR part 501)

5. Section 1.653 is revised to read as follows:

**§ 1.653 Delegation of authority.**

(a) The General Counsel or Deputy General Counsel is authorized to act for the Secretary of Veterans Affairs in matters concerning patents and inventions, unless otherwise required by law. The determination of rights to an invention as between the Government and the employee where there is no cooperative research and development agreement shall be made

by the General Counsel or Deputy General Counsel, in accordance with 37 CFR part 500.

(b) The Directors of VA Medical Centers are delegated the authority to enter into cooperative research and development and license agreements under the Federal Technology Transfer Act of 1986, Pub. L. 99–502.

(Authority: E.O. 12591; 15 U.S.C. 3710a)

6. Section 1.654 is amended by removing “given in paragraph 1(a) of Executive Order 10096 (15 FR 389, 3 CFR, 1949–1953 comp., p. 292) shall” and adding, in its place, “as set forth in 37 CFR 501.6 should”; by removing “inventor (employee)” and adding, in its place, “employee inventor”; by removing “Commissioner” and adding, in its place, “Secretary of Commerce”; and the section heading is revised to read as follows:

**§ 1.654 Patenting of Inventions.**

\* \* \* \* \*

7. Section 1.655 is revised to read as follows:

**§ 1.655 Government license in invention of employee.**

If an invention is made by an employee and it is determined that the employee inventor is entitled to full ownership under 37 CFR 501.6, subject to a nonexclusive, irrevocable, royalty-free license in the Government with power to grant sublicenses for all Governmental purposes, it shall be the duty of the employee inventor to notify the Office of General Counsel of the status of the patent application, including the patent application number, so that the Department may protect the interests reserved to the Government under 37 CFR 501.6.

8. Section 1.656 is revised to read as follows:

**§ 1.656 Information to be submitted by inventor.**

(a) In the case of an invention or believed invention, the inventor will prepare a statement for submission to his or her immediate superior. It will be submitted regardless of where the ownership is believed to exist. The statement will consist of two parts:

(1) One part of the statement will be a disclosure of the invention sufficient to permit the preparation of a patent applicant. It shall consist of a description, including where applicable, of the parts or components of the invention as shown on the drawings or blueprints, accompanied further by a description of the construction and operation of the invention. Photographs of the invention may be included. The inventor should state pertinent prior art

known to him or her, and set forth in detail as clearly as possible the respects which his or her invention differs.

(2) The other part of the statement will set forth the circumstances attending the making of the invention. It will include the full name and address of the inventor; the grade and title of his or her position; whether full time or part time; his or her duties at the time the invention was made; the facts pertinent to a determination whether the invention bore a direct relation to or was made in consequence of such official duties; whether there was, and if so, the terms of any special agreement or understanding with respect to use or manufacture of his or her invention; date of the invention; when and where it was conceived, constructed and tested; whether it was made entirely during working hours; whether, and to what extent there was a contribution by the Government of any of the following: Facilities; equipment; materials or supplies; funds; information; time or services of other Government employees on duty. When the invention is disclosed through publication, or in consultation with a manufacturer or attorney, simultaneous notification of the publication shall be given to the Office of General Counsel. A copy of the article will accompany the notification.

(b) The inventor’s immediate superior shall promptly review the statement of the employee inventor for completeness and accuracy, and shall certify that the employee’s statement of circumstances attending the invention is or is not correct, giving reasons if pertinent. The file should then be submitted through the facility head (or administration heads or top staff officials in the case of Central Office employees) to the General Counsel together with any comments or recommendations.

**§ 1.657 [Removed]**

9. Section 1.657 is removed.

**§ 1.658 [Redesignated as § 1.657]**

10. Section 1.658 is redesignated as 11. Newly redesignated § 1.657 is revised to read as follows:

**§ 1.657 Determination of rights.**

The General Counsel will make a determination of rights subject to review where required by the Secretary of Commerce. The determination will be in accordance with 37 CFR 501.7.

12. A new § 1.658 is added to read as follows:

**§ 1.658 Right of appeal.**

In accordance with 37 CFR 501.8, the employee has a right of appeal to the

Secretary of Commerce within 30 days of receipt of the Department's determination of ownership rights. The decision reached by the Secretary of Commerce will be communicated to the employee.

13. Section 1.659 is amended by removing "patentability" and adding, in its place, "a determination of ownership rights"; by removing "may" and adding, in its place, "will"; by removing "patent consideration." and adding, in its place, "an ownership determination where the employee idea or suggestion involves an invention. The employee shall be directed to submit a disclosure of invention in accordance with these regulations if such has not been previously submitted."

**§ 1.660 [Removed]**

14. Section 1.660 is removed.

**§ 1.661 [Redesignated as § 1.660]**

15. Section 1.661 is redesignated as § 1.660.

16. Newly redesignated § 1.660 is revised to read as follows:

**§ 1.660 Expedient handling.**

No patent may be granted where the invention has been in public use or publicly disclosed for more than one year before filing of a patent application. Hence, submissions involving inventions should be made as promptly as possible in order to avoid delay which might jeopardize title to the invention or impair the rights of the inventor or the Government.

**§ 1.662 [Redesignated as § 1.661]**

17. Section 1.662 is redesignated as § 1.661.

**§ 1.663 [Redesignated as § 1.662]**

18. Section 1.663 is redesignated as § 1.662.

**§ 1.666 [Redesignated as § 1.663]**

19. Section 1.666 is redesignated as § 1.663.

20. Newly redesignated § 1.663 is revised to read as follows:

**§ 1.663 Licensing of Government-owned inventions.**

(a) The licensing of Government-owned inventions under VA control and custody will be conducted pursuant to the regulations on the licensing of Government-owned inventions contained in 37 CFR part 404, and 15 U.S.C. 3710a, as appropriate.

(b) Any person whose application for a license in an invention under VA control and custody has been denied; whose license in such an invention has been modified or terminated, in whole or in part; or who timely filed a written

objection in response to a proposal to grant an exclusive or partially exclusive license in an invention under VA control or custody, may, if damaged, appeal any decision or determination concerning the grant, denial, interpretation, modification, or termination of a license to the Secretary of Veterans Affairs. Such appeal shall be in writing; shall set forth with specificity the basis of the appeal; and shall be postmarked not later than 60 days after the action being appealed. Upon request of the appellant, such appeal may be considered by one to three persons appointed on a case-by-case basis by the Secretary of Veterans Affairs. Such a request will be granted only if it accompanies the written appeal. Appellant may appear and be represented by counsel before such a panel, which will sit in Washington, DC. If the appeal challenges a decision to grant an exclusive or partially exclusive license in an invention under VA control or custody, the licensee shall be furnished a copy of the appeal, shall be given the opportunity to respond in writing, may appear and be represented by counsel at any hearing requested by appellant, and may request a hearing if appellant has not, under the same terms and conditions, at which the appellant may also appear and be represented by counsel.

[FR Doc. 96-14844 Filed 6-11-96; 8:45 am]  
BILLING CODE 8320-01-P

**ENVIRONMENTAL PROTECTION AGENCY**

**40 CFR Part 52**

[CA 014-0003a FRL-5464-4]

**Approval and Promulgation of Implementation Plans; California State Implementation Plan Revision, Five Local Air Pollution Control Districts**

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Direct final rule.

**SUMMARY:** EPA is taking direct final action on revisions to the California State Implementation Plan. The revisions concern rules from the following: El Dorado County Air Pollution Control District (EDCAPCD), Kern County Air Pollution Control District (KCAPCD), Placer County Air Pollution Control District (PCAPCD), Santa Barbara County Air Pollution Control District (SBCAPCD), and South Coast Air Quality Management District (SCAQMD). These new and revised rules control VOC emissions from

graphic arts operations. This approval action will incorporate these rules into the federally approved SIP. The intended effect of approving these rules is to regulate emissions of volatile organic compounds (VOCs) in accordance with the requirements of the Clean Air Act, as amended in 1990 (CAA or the Act). In addition, the final action on the SBCAPCD rule serves as a final determination that the finding of nonsubmittal for this rule has been corrected and that on the effective date of this action, the Federal Implementation Plan (FIP) clocks is stopped. Thus, EPA is finalizing the approval of these revisions into the California SIP 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:** This action is effective on August 12, 1996, unless adverse or critical comments are received by July 12, 1996. If the effective date is delayed, a timely notice will be published in the Federal Register.

**ADDRESSES:** Copies of the rules and EPA's evaluation report for each rule are available for public inspection at EPA's Region IX office during normal business hours. Copies of the submitted rules are available for inspection at the following locations:

Rulemaking Section (A-5-3), Air and Toxics Division, U.S. Environmental Protection Agency, Region IX, 75 Hawthorne Street, San Francisco, CA 94105

Environmental Protection Agency, Air Docket (6102), 401 "M" Street, SW., Washington, DC 20460

California Air Resources Board, Stationary Source Division, Rule Evaluation Section, 2020 "L" Street, Sacramento, CA 95814

El Dorado County APCD, 2850 Fairlane Court, Placerville, CA 95667

Kern County APCD, 2700 M. Street, Suite 290, Bakersfield, CA 93301

Placer County APCD, 11464 B. Avenue, Auburn, CA 95603

Santa Barbara County APCD, 26 Castilian Drive, B-23 Goleta, CA 93117

South Coast AQMD, 21865 E. Copley Drive, Diamond Bar, CA 91765-4182.

**FOR FURTHER INFORMATION CONTACT:** Erik H. Beck, Rulemaking Section (A-5-3), Air and Toxics Division, U.S. Environmental Protection Agency, Region IX, 75 Hawthorne Street, San Francisco, CA 94105, Telephone: (415) 744-1190. Internet E-mail: beck.erik@epamail.epa.gov.

**SUPPLEMENTARY INFORMATION:****Applicability**

The rules being approved into the California SIP include: EDCAPCD Rule 231 "Graphic Arts Operations"; KCAPCD Rule 410.7, "Graphic Arts"; PCAPCD Rule 239, "Graphic Arts Operations"; SBCAPCD Rule 354, "Graphic Arts"; and SCAQMD Rule 1130.1, "Screen Printing Operations". These rules were submitted by the California Air Resources Board (CARB) to EPA on the following dates in respective order: November 30, 1994, May 30, 1991, October 13, 1995, July 13, 1994, and November 18, 1993. All of these rules are in effect throughout their respective districts, except PCAPCD Rule 239. This rule is applicable only within that part of Placer County that lies within the Sacramento Valley Air Basin.

**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 Act or pre-amended Act), that included the Southeast Desert Modified Air Quality Management Area, Santa Barbara—Santa Maria—Lompoc Area, Sacramento Metro Area (which includes portions of El Dorado County and Placer County), and the Los Angeles—South Coast Air Basin. 43 FR 8964, 40 CFR 81.305. On May 26, 1988, EPA notified the Governor of California, pursuant to section 110(a)(2)(H) of the 1977 Act, that the EDCAPCD, KCAPCD, PCAPCD, SBCAPCD, and the SCAQMD 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. In amended section 182(a)(2)(A) of the CAA, Congress statutorily adopted the requirement that nonattainment areas fix their deficient reasonably available control technology (RACT) rules for ozone and established a deadline of May 15, 1991 for states to submit corrections of those deficiencies.

Section 182(a)(2)(A) applies to areas designated as nonattainment prior to enactment of the amendments and classified as marginal or above as of the date of enactment. It requires such areas to adopt and correct RACT rules pursuant to pre-amended section 172(b) as interpreted in pre-amendment

guidance.<sup>1</sup> EPA's SIP-Call used that guidance to indicate the necessary corrections for specific nonattainment areas. The Los Angeles—South Coast Air Basin is classified as extreme. The Sacramento Metro Area is classified as severe. The Santa Barbara—Santa Maria—Lompoc Area is classified as moderate;<sup>2</sup> therefore, these areas were subject to the RACT fix-up requirement and the May 15, 1991 deadline.<sup>3</sup>

The State of California submitted many RACT rules for incorporation into its SIP on the rule submittal dates listed in the Applicability section above, including the rules being acted on in this document. This document addresses EPA's direct-final action for EDCAPCD Rule 231 "Graphic Arts Operations"; KCAPCD Rule 410.7, "Graphic Arts"; PCAPCD Rule 239 "Graphic Arts Operations"; SBCAPCD Rule 354, "Graphic Arts"; and SCAQMD Rule 1130.1, "Screen Printing Operations". EDCAPCD adopted Rule 231 on September 27, 1994. KCAPCD adopted Rule 410.7 on May 6, 1991. PCAPCD adopted Rule 239 on June 8, 1995. SBCAPCD adopted Rule 354 on June 28, 1994. SCAQMD adopted Rule 1130.1 on July 9, 1993.

These submitted rules were found to be complete on the following respective dates: January 30, 1995 (Rule 231); July 10, 1991 (Rule 410.7); November 28, 1995 (Rule 239); July 22, 1994 (Rule 354); and December 23, 1993 (Rule 1130.1). The completeness determinations were made pursuant to EPA's completeness criteria that are set forth in 40 CFR part 51 Appendix V.<sup>4</sup>

<sup>1</sup> Among other things, the pre-amendment guidance consists of those portions of the proposed post-1987 ozone and carbon monoxide policy that concern 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).

<sup>2</sup> The Los Angeles—South Coast Air Basin, Sacramento Metro Area, and the Santa Barbara—Santa Maria—Lompoc Area retained their designation of nonattainment and were 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). However, on April 25, 1995, EPA published a final rule granting the State's request to reclassify the Sacramento Metro Area to severe from serious (60 CFR 20237). This reclassification became effective on June 1, 1995.

<sup>3</sup> Note Bene: KCAPCD Rule 410.7 applies to that portion of Kern County which falls outside the San Joaquin Valley Unified Air Pollution Control District. This area is known as the Southeast Desert Non-Air Quality Management Area, and its ozone designation is unclassified.

<sup>4</sup> 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).

These rules control VOC emissions from graphic arts operations such as screen printing, flexography, rotogravure, and others. VOCs contribute to the production of ground level ozone and smog. These rules were originally adopted as part of their air pollution control agencies' efforts to achieve the National Ambient Air Quality Standard (NAAQS) for ozone and in response to EPA's SIP-Call and the section 182(a)(2)(A) CAA requirement. The following is EPA's evaluation and final action for this rule.

**EPA Evaluation and 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 the various EPA policy guidance documents listed in footnote 1. 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 "fix-up" their RACT rules. See section 182(a)(2)(A). The CTG applicable to all of these rules, except SCAQMD Rule 1130.1, "Screen Printing Operations", is entitled, *OAQPS Guideline Series—Control of Volatile Organic Emissions from Existing Stationary Sources—Volume VII: Graphic Arts—Rotogravure and Flexography* (Document Number EPA-450/2-78-033). No CTG applies to SCAQMD Rule 1130.1. Accordingly, Rule 1130.1 was evaluated against interpretations of EPA policy found in the Blue Book, referred to in footnote 1. The CTG and the Blue Book have been set forth to ensure that VOC rules are fully enforceable and strengthen or maintain the SIP.

EDCAPCD Rule 231 "Graphic Arts Operations"; PCAPCD Rule 239 "Graphic Arts Operations"; SBCAPCD Rule 354, "Graphic Arts"; and SCAQMD Rule 1130.1, "Screen Printing

Operations", are new rules being approved into the SIP for the first time. These rules have the following significant features:

- Control emissions of VOC from rotogravure and flexography printing and coating equipment (except SCAQMD Rule 1130.1);
- Option of using emission control equipment or using reduced VOC content inks and coatings;
- Test methods for VOC content of coatings and inks;
- Test methods for determining capture efficiency of an emission control device;
- Rule exemptions for firms emitting small quantities of VOC.

In addition to the features listed above, SCAQMD Rule 1130.1 has the following additional features:

- Control of VOC emissions from screen printing operations;
- Test methods for metal content of inks;

KCAPCD's submitted Rule 410.7 "Graphic Arts," includes the following significant changes from the current SIP:

- Comprehensive revision of rule definitions;
- Extension of the rule's applicability to include letterpress, lithography, and screen printing;
- Addition of recordkeeping requirements;
- Addition of test methods;
- Requirement to reduce VOC emissions from cleanup operations;
- Modified control device efficiency standards to require more stringent controls.

EPA has evaluated the submitted rules and has determined that they are consistent with the CAA, EPA regulations, and EPA policy. Therefore, the following district rules are being approved under section 110(k)(3) of the CAA as meeting the requirements of section 110(a) and Part D: EDCAPCD Rule 231 "Graphic Arts Operations"; KCAPCD Rule 410.7, "Graphic Arts"; PCAPCD Rule 239 "Graphic Arts Operations"; SBCAPCD Rule 354, "Graphic Arts"; and SCAQMD Rule 1130.1, "Screen Printing Operations".

Therefore, if this direct final action is not withdrawn, on August 12, 1996, the FIP clock associated with SBCAPCD Rule 354 is stopped.

Nothing in this action should be construed as permitting or allowing or establishing a precedent for any future 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.

EPA is publishing this document without prior proposal because the Agency views this as a noncontroversial amendment and anticipates no adverse comments. However, in a separate document in this Federal Register publication, the EPA is proposing to approve the SIP revision should adverse or critical comments be filed. This action will be effective August 12, 1996, unless, by July 12, 1996, adverse or critical comments are received.

If the EPA receives such comments, this action will be withdrawn before the effective date by publishing a subsequent document that will withdraw the final action. All public comments received will then be addressed in a subsequent final rule based on this action serving as a proposed rule. The EPA will not institute a second comment period on this action. Any parties interested in commenting on this action should do so at this time. If no such comments are received, the public is advised that this action will be effective August 12, 1996.

#### Regulatory Process

Under the Regulatory Flexibility Act, 5 U.S.C. 600 et. seq., EPA must prepare a regulatory flexibility analysis assessing the impact of any proposed or final rule on small entities. 5 U.S.C. 603 and 604. Alternatively, EPA may certify that the rule will not have a significant impact on a substantial number of small entities. Small entities include small businesses, small not-for-profit enterprises and government entities with jurisdiction over populations of less than 50,000.

SIP approvals under sections 110 and 301(a) 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, I certify that it does not have a significant impact on any small entities affected. Moreover, due to the nature of the Federal-state relationship under the CAA, preparation of a regulatory flexibility analysis would constitute Federal inquiry into the economic reasonableness of state action. The CAA forbids EPA to base its actions concerning SIPs on such grounds. *Union Electric Co. v. U.S. E.P.A.*, 427 U.S. 246, 256-66 (S. Ct. 1976); 42 U.S.C. 7410 (a)(2).

#### Unfunded Mandates

Under Sections 202, 203, and 205 of the Unfunded Mandates Reform Act of 1995 ("Unfunded Mandates Act"), signed into law on March 22, 1995, EPA must undertake various actions in

association with proposed or final rules that include a Federal mandate that may result in estimated costs of \$100 million or more to the private sector or to State, local, or tribal governments in the aggregate.

Through submission of this state implementation plan or plan revision, the State and any affected local or tribal governments have elected to adopt the program provided for under Part D of the Clean Air Act. These rules may bind State, local, and tribal governments to perform certain actions and also require the private sector to perform certain duties. The rules being approved by this action will impose no new requirements because affected sources are already subject to these regulations under State law. Therefore, no additional costs to State, local, or tribal governments or to the private sector result from this action. EPA has also determined that this final action does not include a mandate that may result in estimated costs of \$100 million or more to State, local, or tribal governments in the aggregate or to the private sector.

This action has been classified as a Table 3 action for signature by the Regional Administrator under the procedures published in the Federal Register on January 19, 1989 (54 FR 2214-2225), as revised by a July 10, 1995 memorandum from Mary Nichols, Assistant Administrator for Air and Radiation. The Office of Management and Budget (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, Incorporation by reference, Intergovernmental relations, Ozone, Reporting and recordkeeping requirements, Volatile organic compounds.

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

Dated: April 13, 1996.

Felicia Marcus,  
Regional Administrator.

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

#### PART 52—[AMENDED]

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

Authority: 42 U.S.C. 7401-7671q.

**Subpart F—California**

2. Section 52.220 is amended by adding paragraphs (c)(185)(i)(A)(9), (194)(i)(G), (198)(i)(K), (207)(i)(B)(2), and (225)(i)(B)(3) to read as follows:

**§ 52.220 Identification of plan.**

- \* \* \* \* \*
- (c) \* \* \*
- (185) \* \* \*
- (i) \* \* \*
- (A) \* \* \*
- (9) Rule 410.7, adopted May 6, 1991.
- \* \* \* \* \*
- (194) \* \* \*
- (i) \* \* \*
- (G) South Coast Air Quality Management District.
- (I) Rule 1130.1, adopted July 9, 1993.
- \* \* \* \* \*
- (198) \* \* \*
- (i) \* \* \*
- (K) Santa Barbara County Air Pollution Control District.
- (I) Rule 354, adopted June 28, 1994.
- \* \* \* \* \*
- (207) \* \* \*
- (i) \* \* \*
- (B) \* \* \*
- (2) Rule 231, adopted September 27, 1994.
- \* \* \* \* \*
- (225) \* \* \*
- (i) \* \* \*
- (B) \* \* \*
- (3) Rule 239, adopted June 8, 1995.
- \* \* \* \* \*

[FR Doc. 96-14784 Filed 6-11-96; 8:45 am]  
 BILLING CODE 6560-50-W

**40 CFR Part 52**

[OH91-2; FRL-5506-5]

**Approval and Promulgation of Implementation Plans; Ohio**

**AGENCY:** Environmental Protection Agency (EPA).  
**ACTION:** Final rule.

**SUMMARY:** On November 3, 1995, Ohio submitted revisions to its particulate matter plans for the Cleveland and Steubenville nonattainment areas. These revisions were submitted to address plan deficiencies that were identified by EPA in a final limited disapproval of the particulate matter plans published in the Federal Register on May 27, 1994. For the Cleveland area, these revisions provide earlier attainment of the air quality standard and correct the deficient test method disapproved in that rulemaking. For the Steubenville area, these revisions include an administrative order for tightening

controls at Wheeling-Pittsburgh Steel's basic oxygen furnace, and provide a fully updated modeling analysis demonstrating that the plan assures attainment. EPA is approving these revisions and terminating the potential for sanctions based on the deficiencies identified in the rulemaking of May 27, 1994.

**EFFECTIVE DATE:** This action is effective July 12, 1996.

**ADDRESSES:** Copies of the SIP revision and USEPA's analysis are available for public inspection during normal business hours at the following addresses:

United States Environmental Protection Agency, Region 5, Air and Radiation Division, 77 West Jackson Boulevard (AR-18J), Chicago, Illinois 60604; and Office of Air and Radiation (OAR), Docket and Information Center (Air Docket 6102) Room M1500, United States Environmental Protection Agency, 401 M Street, SW., Washington, DC 20460.

**FOR FURTHER INFORMATION CONTACT:** John Summerhays, Regulation Development Section, Air Programs Branch (AR-18J), United States Environmental Protection, Region 5, Chicago, Illinois 60604, (312) 886-6067.

**SUPPLEMENTARY INFORMATION:**

**I. Background**

Ohio submitted major revisions to its particulate matter regulations on November 14, 1991, with supplemental submittals on December 4, 1991, and January 8, 1992. EPA proposed rulemaking on these submittals on August 3, 1993, at 58 FR 41218, and published a notice of final rulemaking on May 27, 1994, at 59 FR 27464, granting limited approval/limited disapproval of these submittals. Although EPA approved most of Ohio's regulations, EPA concluded that Ohio had not satisfied selected requirements of the Clean Air Act applicable to its two particulate matter nonattainment areas, i.e., Cuyahoga County (including Cleveland) and the Steubenville area. This represented a disapproval finding under Section 179(a)(2), thus initiating an 18-month period after which sanctions were to be imposed in these areas under Section 179(b) unless or until the deficiencies are remedied.

On November 3, 1995, Ohio submitted further revisions to its particulate matter plans, seeking to remedy the deficiencies identified in EPA's May 1994 rulemaking. On January 23, 1996 (at 61 FR 1727), EPA proposed to approve the State's submittal and proposed to conclude that all particulate matter SIP requirements

were satisfied (except for new source review requirements, which were not addressed in either the January 1996 or the May 1994 rulemaking and are being addressed separately). Simultaneously, EPA issued an interim final determination that the deficiencies had been remedied (at 61 FR 1720), thereby staying application of sanctions.

In brief, for Cuyahoga County, the deficiencies were (1) failure to satisfy requirements for Reasonably Available Control Measures (RACM) by December 1992; and (2) failure to assure attainment due to deficiencies in the test method applicable to coke quenching. EPA proposed to find that these deficiencies were addressed when Ohio revised its rules to require a control strategy adequate to satisfy RACM requirements by December 1993 and improved the test method for coke quenching. For the Steubenville area, the deficiency was an inadequate attainment demonstration due to, among other factors, inadequate accounting for emissions from Wheeling-Pittsburgh Steel's basic oxygen furnace. EPA proposed to find this deficiency remedied by submittal of Findings and Orders issued by Ohio to Wheeling-Pittsburgh Steel requiring tightened control of basic oxygen furnace emissions and a revised attainment demonstration. A more detailed discussion of the prior deficiencies is provided in the Federal Register of May 27, 1994 (59 FR 27464), and a summary of that discussion and a more extensive discussion of Ohio's submittal which remedied those deficiencies is provided in the notice of proposed rulemaking of January 23, 1996 (61 FR 1727). Today's rule is final action on Ohio's November 1995 submittal and final action with respect to the previously identified deficiencies.

At the time of the proposed rulemaking, Ohio had conducted a public hearing in connection with its Cuyahoga County rule revisions but had not yet held and submitted documentation of a public hearing with respect to revisions to the Steubenville area attainment demonstration. The State held a public hearing on the Steubenville area revisions on January 22, 1996, and provided materials to EPA documenting this hearing and demonstrating satisfaction of related public comment requirements in its December 21, 1995, and March 13, 1996, submittals. EPA has evaluated these materials and has concluded that the relevant procedural requirements have been satisfied.

## II. Comments on Proposed Rulemaking

One set of comments on the proposed rulemaking was received by EPA. These comments were submitted by Porter, Wright, Morris & Arthur on behalf of Ford Motor Company (Ford). These comments urged EPA not to rulemake on the State's November 1995 submittal alone, and instead urged EPA to request that the State address Ford's concerns with the existing particulate matter regulations and to conduct rulemaking on a combined set of revised regulations. No comments were made concerning EPA's proposed analysis of the State's November 1995 submittal.

EPA responds that it would be inappropriate to defer rulemaking on the State's November 1995 submittal pending receipt of a prospective future submittal, particularly in the absence of any expectation that the prospective future submittal would alter EPA's views of the existing submittal. EPA has an obligation to complete rulemaking in timely fashion on any SIP revision requested by the State. Both EPA and the State of Ohio have a particular interest in prompt completion of this rulemaking because sanctions, while stayed by the interim final determination, are nevertheless outstanding until final action approving the corrections to the deficiencies is published. The commenter does not claim that its requested rule revisions are mandated by the Clean Air Act, and the commenter identifies no other basis for EPA to require the State to conduct the desired rulemaking. In any case, assuming that Ohio adopts and submits rule revisions addressing Ford's concerns, EPA will undertake timely rulemaking on those rule revisions as well, in accordance with EPA's obligations under the Clean Air Act.

## III. Today's Action

With respect to Cuyahoga County, EPA concludes that (1) the revised rules now provide for RACM by December 1993; (2) the coke quench water test method issue and the associated attainment demonstration issue have been resolved; and (3) additional revisions to the limitations for Ford's Cleveland Casting Plant do not jeopardize attainment. With respect to the Steubenville area, EPA concludes that the State has now submitted a fully approvable attainment demonstration for the area. In particular, EPA is approving the rule revisions for Cuyahoga County and the Findings and Order requiring control system enhancements at Wheeling-Pittsburgh Steel's basic oxygen furnace.

Based on these findings, EPA concludes that Ohio's particulate matter plans for the Cuyahoga County and Steubenville nonattainment areas now satisfy all applicable requirements under Part D of the Clean Air Act (except for new source review requirements, which are not addressed here or in the May 1994 rulemaking and are being addressed separately). Consequently, EPA finds that Ohio has remedied the deficiencies identified in the rulemaking of May 27, 1994. This finding fully terminates the potential for sanctions pursuant to that prior rulemaking.

Under the Regulatory Flexibility Act, 5 U.S.C. 600 *et seq.*, EPA must prepare a regulatory flexibility analysis assessing the impact of any proposed or final rule on small entities. (5 U.S.C. 603 and 604.) Alternatively, EPA may certify that the rule will not have a significant impact on a substantial number of small entities. Small entities include small businesses, small not-for-profit enterprises, and government entities with jurisdiction over populations of less than 50,000.

SIP approvals under section 110 and subchapter I, part D of the Act 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, I certify that it does not have a significant impact on any small entities affected. Moreover, due to the nature of the Federal-State relationship under the Act, preparation of a regulatory flexibility analysis would constitute federal inquiry into the economic reasonableness of state action. The Act forbids EPA to base its actions concerning SIPs on such grounds. *Union Electric Co. v. EPA*, 427 U.S. 246, 256-66 (1976); 42 U.S.C. 7410(a)(2).

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

This action has been classified as a Table 3 action for signature by the Regional Administrator under the procedures published in the Federal Register on January 19, 1989 (54 FR 2214-2225), as revised by a July 10, 1995, memorandum from Mary D. Nichols, Assistant Administrator for Air and Radiation. The Office of Management and Budget (OMB) has exempted this regulatory action from Executive Order 12866 review.

Under Sections 202, 203 and 205 of the Unfunded Mandates Reform Act of 1995 ("Unfunded Mandates Act"), signed into law on March 22, 1995, EPA must undertake various actions in association with rules that include a Federal mandate that may result in estimated costs of \$100 million or more to the private sector, or to State, local, or tribal governments in the aggregate.

EPA has determined that the approval action taken today does not include a Federal mandate that may result in estimated costs of \$100 million or more to either State, local, or tribal governments in the aggregate, or to the private sector. This Federal action approves pre-existing requirements under State or local law, and imposes no new Federal requirements. Accordingly, no additional costs to State, local, or tribal governments, or to the private sector, result from this action.

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by August 12, 1996. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this rule for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (See Section 307(b)(2).)

### List of Subjects in 40 CFR Part 52

Environmental protection, Air Pollution control, Intergovernmental relations, Particulate matter, Reporting and recordkeeping requirements.

Dated: May 2, 1996.

Valdas V. Adamkus,

*Regional Administrator.*

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

### **PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS**

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

Authority: 42 U.S.C. 7401-7671q.

2. Section 52.1870 is amended by adding paragraph (c)(110) to read as follows:

#### **§§ 52.1870 Identification of plan.**

\* \* \* \* \*

(c) \* \* \*

(110) On November 3, 1995, December 21, 1995, and March 21, 1996,

OEPA submitted revisions to its particulate matter plan, addressing prior deficiencies in its plans for Cuyahoga and Jefferson Counties.

(i) Incorporation by reference.

(A) Rule 3745-17-03—Rule 3745-17-03—Measurement methods and procedures, effective November 15, 1995.

(B) Rule 3745-17-04—Compliance time schedules, effective November 15, 1995.

(C) Rule 3745-17-12—Additional restrictions on particulate emissions from specific air contaminant sources in Cuyahoga County, effective November 15, 1995.

(D) Findings and Orders issued to the Wheeling-Pittsburgh Steel Corporation, signed by Donald Schregardus and effective on October 31, 1995.

(ii) Additional material—Dispersion modeling analyses for the Steubenville area and for Cuyahoga County near Ford's Cleveland Casting Plant.

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BILLING CODE 6560-50-M

#### 40 CFR Part 52

[SIPTRAX No. PA 20-1-4026; PA 31-1-4027; PA 39-1-4028; AD-FRL-5463-3]

#### Approval and Promulgation of Air Quality Implementation Plans; Pennsylvania: Partial Approval of PM-10 Implementation Plan for the Liberty Borough Area of Allegheny County

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Final rule.

**SUMMARY:** EPA is approving, in part, revisions to the Allegheny County portion of the Pennsylvania State Implementation Plan (SIP) prepared by the Allegheny County Health Department (ACHD) and formally submitted by the Pennsylvania Department of Environmental Protection (PADEP). PADEP submitted the SIP revisions, in general, to satisfy the Clean Air Act's (the Act's) requirements for control of particulate matter with an aerodynamic diameter less than or equal to a nominal 10 micrometers (PM-10), and specifically, to satisfy the Act's requirements applicable to the Liberty Borough area of Allegheny County, which is classified as a moderate nonattainment area for the national ambient air quality standards (NAAQS) for PM-10. EPA is approving the regulatory portions the Commonwealth's submittals. EPA is deferring action, at this time, on the attainment demonstration and associated air quality analyses portion

of one of the Commonwealth's submittals. This action is being taken under section 110 of the Act.

**EFFECTIVE DATE:** This final rule will become effective on July 12, 1996.

**ADDRESSES:** Copies of the documents relevant to this action are available for public inspection during normal business hours at the Air, Radiation, and Toxics Divisions, U.S. Environmental Protection Agency, Region III, 841 Chestnut Building, Philadelphia, Pennsylvania 19107; the Air and Radiation Docket and Information Center, U.S. Environmental Protection Agency, 401 M Street, SW., Washington, DC 20460; and the Allegheny County Health Department, Bureau of Environmental Quality, Division of Air Quality, 301 39th Street, Pittsburgh, Pennsylvania 15201.

**FOR FURTHER INFORMATION CONTACT:** Thomas A. Casey, (215) 566-2194.

**SUPPLEMENTARY INFORMATION:** On April 11, 1995, EPA published a notice of proposed rulemaking (NPR) for the Commonwealth of Pennsylvania (60 FR 18385). The NPR proposed full approval of three revisions to the Allegheny County portion of the Pennsylvania SIP: a November 8, 1988 submittal which included the adoption of the PM-10 NAAQS and other provisions to satisfy pre-1990 Clean Air Act Amendment requirements pertaining to Group III PM-10 areas; a December 31, 1992 submittal which consisted of regulations to reduce PM-10 emissions and to limit visible emissions from several categories of fugitive dust sources; and a January 6, 1995 submittal which included revised regulatory provisions to reduce PM-10 emissions and an attainment demonstration of the NAAQS for PM-10 with its associated technical air quality analyses.

#### Description of Today's Action

EPA is approving the Commonwealth's November 8, 1988 submittal, December 31, 1992 submittal, and the regulatory portion of the January 6, 1994 submittal.

The underlying rationale for EPA's approval of these submittals is provided in the April 11, 1995, NPR, referenced above, as well as in the Technical Support Document (TSD), and will not be restated here. Today's action is considered a partial approval because EPA is deferring action at this time on the attainment demonstration portion of the January 6, 1994 submittal and its associated air quality analyses.

EPA is deferring action, at this time, on the attainment demonstration portion of the January 6, 1994 submittal for two reasons. First, EPA received

adverse comments on those aspects on EPA's April 11, 1995 proposal related to the attainment demonstration and air quality analyses, and is still considering those comments. Secondly, since the time EPA's April 11, 1995 proposal on the SIP revisions listed above, EPA has commenced rulemaking to determine whether or not the Liberty Borough PM-10 nonattainment area attained the NAAQS by the December 31, 1994 deadline required for moderate areas.<sup>1</sup>

#### Summary of Public Comments

This section summarizes the public comments that were submitted regarding EPA's proposed approval of the regulatory portions of the SIP submittals, and provides EPA's responses to those comments. The public comments received regarding EPA's proposed approval of the attainment demonstration portion of the January 6, 1994 submittal will be not be discussed in this notice but rather as part of any future rulemaking actions by EPA on that attainment demonstration and its associated air quality analyses. Nine letters of public comment were submitted on EPA's April 11, 1995 proposal (60 FR 18385) which relate to the regulatory portions of the Commonwealth's submittals upon which EPA is taking final action. These comments can be divided in to two major areas: enforcement and general support.

**Enforcement Comment:** Three commenters raised concerns that the ACHD and the PADEP do not dedicate sufficient resources to enforcement, do not inspect coke oven batteries often enough, and that EPA should, therefore, disapprove the SIP because the Commonwealth has not fulfilled its requirement under section 110(a)(2)(E) of the Act to provide adequate personnel to implement the SIP.

**Response:** EPA has determined that the Commonwealth of Pennsylvania satisfies section 110(a)(2)(E) of the Act.

**General Support:** Four commenters expressed general support for EPA's April 11, 1995 proposed actions.

**Final Action:** EPA is approving, in part, revisions submitted by the Commonwealth of Pennsylvania for the Allegheny County portion of the Pennsylvania SIP. Specifically EPA is approving a November 8, 1988 submittal which included the adoption of the PM-10 NAAQS and other provisions to satisfy the pre-1990 Clean Air Act

<sup>1</sup> On September 19, 1995, EPA published a notice of proposed rulemaking (60 FR 48439) that proposes to find, pursuant to section 188(b)(2) of the Act, that Liberty Borough nonattainment area has not attained the PM-10 NAAQS by the statutory attainment date of December 31, 1994.

Amendment requirements pertaining to Group III PM-10 areas; a December 31, 1992 submittal which consisted of regulations to reduce PM-10 emissions and to limit visible emissions from several categories of fugitive dust sources; and the regulatory portion of a January 6, 1994 submittal which included revised and additional regulatory provisions to reduce PM-10 emissions. EPA is deferring action at this time on the attainment demonstration portion of the January 6, 1994 submittal and on its associated air quality analyses.

EPA has reviewed these requests for revision of the federally-approved state implementation plan for conformance with the provisions of the 1990 amendments enacted on November 15, 1990.

The Agency has determined that this action conforms with those requirements irrespective of the fact that one of the submittals preceded the date of enactment.

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.

Under Section 202 of the Unfunded Mandates Reform Act of 1995 ("Unfunded Mandates Act"), signed into law on March 22, 1995, EPA must prepare a budgetary impact statement to accompany any proposed or final that includes a Federal mandate that may result in estimated costs to State, local, or tribal governments in the aggregate; or to the private sector, of \$100 million or more. Under section 205, EPA must select the most cost-effective and least burdensome alternative that achieves the objectives of the rule and is consistent with statutory requirements. Section 203 requires EPA to establish a plan for informing and advising any small governments that may be significantly or uniquely impacted by the rule.

EPA has determined that the approval action promulgated does not include a Federal mandate that may result in estimated costs of \$100 million or more to either State, local, or tribal governments in the aggregate, or to the private sector. This Federal action approves pre-existing requirements under State or local law, and imposes no new Federal requirements. Accordingly, no additional costs to State, local, or tribal governments, or to

the private sector, result from this action.

This action has been classified as a Table 3 action for signature by the Regional Administrator under the procedures published in the Federal Register on January 19, 1989 (54 FR 2214-2225), as revised by a July 10, 1995 memorandum from Mary Nichols, Assistant Administrator for Air and Radiation. The Office of Management and Budget (OMB) has exempted this regulatory action from E.O. 12866 review.

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by August 12, 1996. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this rule for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This partial approval of SIP revisions for the Liberty Borough, Pennsylvania PM-10 nonattainment area may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

#### List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Particulate matter.

Dated: April 10, 1996.

William T. Wisniewski,

*Acting Regional Administrator.*

Chapter I, title 40, of the Code of Federal Regulations is amended as follows:

#### **PART 52—[AMENDED]**

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

Authority: 42 U.S.C. 7401-7671q.

#### **Subpart NN—Pennsylvania**

2. Section 52.2020 is amended by adding paragraphs (c)(90), (c)(91), and (c)(92) to read as follows:

#### **§ 52.2020 Identification of plan.**

\* \* \* \* \*

(c) \* \* \*

(90) Revisions to the Allegheny County portion of the Pennsylvania SIP to adopt the PM-10 NAAQS and fulfill other Group III requirements, submitted on November 8, 1988 by the Pennsylvania Department of Environmental Resources:

(i) Incorporation by reference.

(A) Letter of November 8, 1988 from the Pennsylvania Department of Environmental Resources transmitting revisions to Article XX of Allegheny County Health Department Rules and Regulations.

(B) Revisions to the following sections of Article XX of Allegheny County Health Department Rules and Regulations, effective August 22, 1988:

(1) Section 101, Definitions (definition of "PM10").

(2) Section 109, Ambient Air Quality Standards.

(3) Section 527, Areas Subject to Sections 521 through 526 (various fugitive dust measures).

(4) Section 613, Ambient Measurements.

(5) Section 704, Episode Criteria.

(6) Section 801, Definitions.

(Definitions of "Attainment area," "Nonattainment area," "Significant air quality impact," and "Unclassified area")

(7) Appendix 1, Attainment, Unclassifiable and Nonattainment Areas of Allegheny County: deleted.

(ii) Additional material.

(A) Remainder of the November 8, 1988 submittal pertaining to the Allegheny County portion of the Pennsylvania SIP to adopt the PM-10 NAAQS and fulfill other Group III requirements.

(91) Revisions to the Allegheny County portion of the Pennsylvania SIP to reduce PM-10 emissions and visible emissions from several categories of fugitive dust sources, submitted on December 31, 1992 by the Pennsylvania Department of Environmental Resources:

(i) Incorporation by reference.

(A) Letter of December 31 1992 from the Pennsylvania Department of Environmental Resources transmitting revisions to Article XX of Allegheny county Health Department Rules and Regulations.

(B) Revisions to the following sections of Article XX of Allegheny County Health Department Rules and Regulations, effective November 1, 1992.

(1) Section 402, Particulate Mass Emissions (Paragraph A—Fuel Burning or Combustion Equipment)

(2) Section 520, Coke Ovens (Paragraph J—Compliance Schedule)

(3) Section 521, Permit Source Premises.

(4) Section 521.1, Non-Permit Source Premises.

(5) Section 523, Permit Source Transport.

(6) Section 523.1, Non-Permit Source Transport.

(7) Section 524, Construction and Land Clearing.

(8) Section 527, Areas Subject to Sections 521 through 526.

(9) Section 602, Particulate Matter (test methods).

(10) Section 606, Visible Emissions (measurement).

(11) Section 607, Coke Oven Emissions (measurement).

(12) Section 608, Coke Oven Gas (measurement of hydrogen sulfide content).

(ii) Additional material.

(A) Remainder of the December 31, 1992 submittal pertaining to the Allegheny County portion of the Pennsylvania SIP to reduce PM-10 emissions and visible emissions from several categories of fugitive dust sources.

(92) Revisions to the Allegheny County portion of the Pennsylvania SIP to reduce PM-10 emissions including the newly created Allegheny County Article XXI which both revised and added emission reduction requirements for certain industrial boilers, various emission points at US Steel's Clairton Coke Works and the Glassport Transportation Center, new definitions related to coke oven gas emissions, and new test methods for particulate matter; submitted by the Pennsylvania Department of Environmental Resources on January 6, 1994 and effective February 1, 1994.

(i) Incorporation by reference.

(A) Letter of January 6, 1994 from the Pennsylvania Department of Environmental Resources transmitting Article XXI of Allegheny County Health Department Rules and Regulations.

(B) The newly created Article XXI of Allegheny County Health Department Rules and Regulations in its entirety, effective February 1, 1994.

(1) Part A (sections 2101 *et seq.*), General, reserved in part:

(i) Section 2101, Short Titles.

(ii) Section 2101.3, Effective Date and Repealer.

(iii) Section 2101.20, Definitions.

(2) Part B (sections 2102 *et seq.*), Installation Permits, reserved.

(3) Part C (sections 2103 *et seq.*), Operating Permits and Licenses, reserved.

(4) Part D (sections 2104 *et seq.*), Pollutant Emission Standards, reserved in part.

(i) Section 2104.6, Particulate Mass Emissions, replaces section 402 of Article XX.

(5) Part E (sections 2105 *et seq.*), Sources Emission and Operating Standards, reserved in part.

(j) Section 2105.21, Coke Ovens and Coke Oven Gas, replaces section 520.B. through 520.J. and section 530 of Article XX.

(ii) Section 2105.49, Fugitive Emissions, replaces section 528 of Article XX.

(6) Part F (sections 2106 *et seq.*), Air Pollution Episodes, reserved.

(7) Part G (sections 2107 *et seq.*), Methods, reserved in part:

(i) Section 2107.1, General.

(ii) Section 2107.2, Particulate Matter.

(8) Part H (sections 2108 *et seq.*), Compliance, reserved.

(9) Part I (sections 2109 *et seq.*), Enforcement, reserved.

(ii) Additional material.

(A) Remainder of the January 6, 1994 State submittal.

[FR Doc. 96-14786 Filed 6-11-96; 8:45 am]

BILLING CODE 6560-50-M

#### 40 CFR Part 62

[TN-115-01-9616a; FRL-5519-6]

#### Approval and Promulgation of Air Quality Implementation Plans; Tennessee; Approval of Revisions to Process Gaseous Emission Standards for Total Reduced Sulfur Emissions From Kraft Mills

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Direct final rule.

**SUMMARY:** The Environmental Protection Agency (EPA) is approving revisions to the Tennessee State Implementation Plan (SIP), submitted by the State of Tennessee through the Tennessee Department of Environment and Conservation on June 25, 1993. The submittal included revisions to the State's regulations for Process Gaseous Emission Standards for Total Reduced Sulfur (TRS) from Kraft Mills. These revisions were made to bring these regulations into compliance with the 1990 amendments to the Clean Air Act (the Act) and the Federal regulations. EPA finds that the revised rules meet the Federal requirements for process emission standards for sulfur emissions.

**DATES:** This final rule is effective August 12, 1996, unless adverse or critical comments are received by July 12, 1996. If the effective date is delayed, timely notice will be published in the Federal Register.

**ADDRESSES:** Written comments should be addressed to: Ms. Karen Borel, at the Regional Office Address listed below.

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

Air and Radiation Docket and Information Center (Air Docket 6102), U.S. Environmental Protection

Agency, 401 M Street, SW, Washington, DC 20460.

Environmental Protection Agency, Region 4, Air Programs Branch, 345 Courtland Street, NE, Atlanta, Georgia 30365.

Tennessee Division of Air Pollution Control, 9th Floor L&C Annex, 401 Church Street, Nashville, Tennessee 37243-1531.

#### FOR FURTHER INFORMATION CONTACT:

Interested persons wanting to examine documents relative to this action should make an appointment with the Region 4 Air Programs Branch at least 24 hours before the visiting day. To schedule the appointment or to request additional information, contact Karen C. Borel, Regulatory Planning and Development Section, Air Programs Branch, Air, Pesticides & Toxics Management Division, Region 4 EPA, 345 Courtland Street, NE, Atlanta, Georgia 30365. The telephone number is 404/347-3555 extension 4197. Reference file TN115-01-9616.

**SUPPLEMENTARY INFORMATION:** On June 25, 1993, the State of Tennessee submitted revisions to the Tennessee SIP, through the State of Tennessee Department of Environment and Conservation. These revisions were made to bring this regulation into accordance with the guidance provided in the official EPA guidance document (EPA-450/2-78-0003b) and to improve the ambient air quality surrounding affected facilities. The SIP revision was reviewed by EPA to determine completeness, and a letter of completeness dated July 26, 1993, was sent to the State of Tennessee. EPA finds that the revisions provide for consistency with the Act and corresponding Federal regulations. EPA is approving the following revisions to the Tennessee SIP.

Rule 1200-3-7-.07(4) Total Reduced Sulfur Emissions From Kraft Mills

(a) This subparagraph is amended by striking the number "24" and inserting the number "12."

(b) This subparagraph is amended by striking the number "24" and inserting the number "12."

This new rule meets the requirements set forth in the EPA guidance document EPA 450/2-78-0003b, March, 1979. This recommends the 12-hour averaging interval. Statistically the reduction in the averaging time interval will result in reduced TRS emissions which will improve ambient air quality surrounding the affected facilities.

Final Action

EPA is approving revisions to subparagraphs 1200-3-7-.07(4)(a) and

(b) for Total Reduced Sulfur Emissions for Kraft Mills. Specifically, EPA is approving Tennessee's submittal as meeting the gaseous emissions requirements for TRS emissions for Kraft Mills.

The EPA is publishing this action without prior proposal because the Agency views this as a noncontroversial action and anticipates no adverse comments. However, in a separate document in this Federal Register publication, the EPA is proposing to approve the SIP revision should adverse or critical comments be filed. This action will be effective on August 12, 1996, unless, by July 12, 1996, adverse or critical comments are received.

If the EPA receives such comments, this action will be withdrawn before the effective date by publishing a subsequent document that will withdraw the final action. All public comments received will then be addressed in a subsequent final rule based on the proposed rule. The EPA will not institute a second comment period on this action. Any parties interested in commenting on this action should do so at this time. If no such comments are received, the public is advised that this action will be effective on August 12, 1996.

Under section 307(b)(1) of the Act, 42 U.S.C. 7607 (b)(1), petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by August 12, 1996. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this rule for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. [See section 307(b)(2) of the Act, 42 U.S.C. 7607 (b)(2).]

This action has been classified as a Table 3 action for signature by the Regional Administrator under the procedures published in the Federal Register on January 19, 1989 (54 FR 2214-2225), as revised by a July 10, 1995, memorandum from Mary Nichols, Assistant Administrator for Air and Radiation. The Office of Management and Budget (OMB) has exempted this regulatory action from E.O. 12866 review.

Nothing in this action should be construed as permitting or allowing or establishing a precedent for any future request for revision to any SIP. Each request for revision to any SIP shall be considered separately in light of specific technical, economic, and environmental

factors and in relation to relevant statutory and regulatory requirements.

Under the Regulatory Flexibility Act, 5 U.S.C. 600 *et seq.*, EPA must prepare a regulatory flexibility analysis assessing the impact of any proposed or final rule on small entities. 5 U.S.C. 603 and 604. Alternatively, EPA may certify that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small business, small not-for-profit enterprises, and government entities with jurisdiction over populations of less than 50,000.

SIP approvals under sections 110 and 11 and subchapter I, part D of the Act 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, I certify that it does not have a significant impact on any small entities affected. Moreover, due to the nature of the Federal-state relationship under the Act, preparation of a regulatory flexibility analysis would constitute Federal inquiry into the economic reasonableness of state action. The Act 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 (1976); 42 U.S.C. 7410(a)(2) and 7410(k)(3).

Under Sections 202, 203, and 205 of the Unfunded Mandates Reform Act of 1995 ("Unfunded Mandates Act"), signed into law on March 22, 1995, EPA must undertake various actions in association with proposed or final rules that include a Federal mandate that may result in estimated costs of \$100 million or more to the private sector, or to State, local, or tribal governments in the aggregate.

Through submission of this state implementation plan or plan revision, the State and any affected local or tribal governments have elected to adopt the program provided for under Section 165 of the CAA. These rules may bind State, local and tribal governments to perform certain actions and also require the private sector to perform certain duties. EPA has examined whether the rules being approved by this action will impose no new requirements, since such sources are already subject to these regulations under State law. Accordingly, no additional costs to State, local, or tribal governments, or to the private sector, result from this action, and therefore there will be no significant impact on a substantial number of small entities.

List of Subjects in 40 CFR Part 62

Environmental protection, Air pollution control, Paper and paper products industry, Phosphate, Reporting and recordkeeping requirements, Sulfuric oxides.

Dated: May 28, 1996.

A. Stanley Meiburg,

Acting Regional Administrator.

Part 62, of chapter I, title 40, *Code of Federal Regulations*, is amended as follows:

#### **PART 62—[AMENDED]**

1. The authority citation for part 62 continues to read as follows:

Authority: 42 U.S.C. 7413 and 7601.

#### **Subpart RR—Tennessee**

2. Subpart RR is amended by adding an undesignated heading and a new § 62.10625 to read as follows:

Total Reduced Sulfur Emissions From Existing Kraft Pulp Mills

#### **§ 62.10625 Identification of plan.**

On June 25, 1993, the State submitted revisions to the Tennessee State Implementation Plan (SIP). These were revisions to the process gaseous emission standards. These revisions incorporate changes to Rule 1200-3-7-.07, subparagraphs (4)(a) and (4)(b) of the Tennessee SIP which bring this into conformance with the requirements of 40 CFR part 62, subpart I.

[FR Doc. 96-14908 Filed 6-11-96; 8:45 am]

BILLING CODE 6560-50-P

#### **40 CFR Part 81**

[ID14-6994a; FRL-5515-1]

#### **Description of Areas for Air Quality Planning Purposes; State of Idaho; Correction to Boundary of the Power-Bannock Counties Particulate Matter Nonattainment Area to Exclude the Inkom Area**

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Direct final rule, correction.

**SUMMARY:** This action corrects EPA's announcement of the boundary of the Power-Bannock Counties PM-10 nonattainment area (particulate matter with an aerodynamic diameter less than or equal to a nominal 10 micrometers) in the State of Idaho. The boundary of the Power-Bannock Counties PM-10 nonattainment area is being corrected to exclude that portion east of the Inkom Gap, a geographic feature separating the Inkom area from the rest of the

nonattainment area. New analysis of air quality data existing at the time of the original area designation indicates that the Inkom area, at the time of and prior to designation, had never violated the National Ambient Air Quality Standard (NAAQS) for PM-10. Additional current information also indicates that the Inkom area has not and is not predicted to violate the PM-10 standard into the foreseeable future. This action will remove the City of Inkom and the surrounding area from the nonattainment area. With this correction, the Part D new source review requirements of the Clean Air Act will no longer apply to sources in the Inkom area. Instead, new or modified major sources of particulate matter would be subject to the Prevention of Significant Deterioration (PSD) requirements.

**DATES:** This action will be effective on August 12, 1996 unless adverse or critical comments are received by July 12, 1996. If the effective date is delayed, timely notice will be published in the Federal Register.

**ADDRESSES:** Written comments on this action should be addressed to Steven K. Body, Office of Air Quality, U.S. Environmental Protection Agency, Region 10, 1200 Sixth Avenue, Seattle, WA 98101. Copies of the documents relevant to this action are available for public inspection during normal business hours at the same address.

**FOR FURTHER INFORMATION CONTACT:** Steven K. Body, (206) 553-0782, or by mail at the Region 10 address above.

**SUPPLEMENTARY INFORMATION:**

I. Background

A. In General

Section 107(d)(4)(B) of the Clean Air Act sets out the general process by which areas were to be designated nonattainment for PM-10 upon enactment of the 1990 Clean Air Act Amendments (the "Act" or "CAA"). The procedure that is relevant for the Power-Bannock Counties PM-10 nonattainment area is stated in section 107(d)(4)(B)(i) of the Act, which provides that each area that had been identified by EPA as a PM-10 Group I area prior to the 1990 Clean Air Act Amendments (these were areas that, at the time the particulate matter indicator was changed from TSP to PM-10, were estimated to have a high probability of exceeding the PM-10 NAAQS) be designated nonattainment for PM-10 by operation of law upon enactment of the 1990 Amendments. While EPA believes that, in general, the language of this section would appear to preclude any exercise of EPA discretion to modify

these initial nonattainment area designations, EPA also believes that section 107(d)(4)(B)(i)'s explicit reliance on the Agency's prior Group I determinations provides the basis for an exception to the general rule. By requiring that all Group I areas be among the initial areas designated nonattainment upon enactment of the 1990 CAAA, Congress relied on EPA's expertise and judgment in determining, based on an analysis of relevant air quality information, those areas for which a PM-10 nonattainment status was merited. EPA does not believe that Congress intended initial PM-10 areas to be designated nonattainment based on a clearly erroneous Group I determination. Thus, one exception to the non-initial designation modification principle is where, prior to enactment of the 1990 Amendments, EPA mistakenly construed then-existing air quality data and, as a consequence, incorrectly identified an area as being among the Group I areas that were subsequently reference in section 107(d)(4)(B)(i) of the Act. See 56 FR 37654, 37656 (August 8, 1991).

As discussed below, EPA believes that such a clear identification error occurred in the case of the Power-Bannock Counties PM-10 nonattainment area. That is, EPA believes that it acted in error in including the Inkom area as part of the Power-Bannock Counties PM-10 nonattainment area. Accordingly, under the authority of section 110(k)(6) of the Act, and based on the State's request, EPA is revising the boundary of the Power-Bannock Counties PM-10 nonattainment area to exclude the Inkom area. Although this boundary correction action is not subject to the legal requirements for public notice and comment, EPA is providing the public with an opportunity to comment on this action in order to foster public participation and avoid further error.

B. Designation of the Area as Nonattainment

Prior to promulgation of the PM-10 NAAQS on July, 1, 1987 (52 FR 24672), total suspended particulate (TSP) was the indicator for particulate matter. In the Pocatello vicinity, the TSP nonattainment area consisted of the 12 square mile industrial area approximately 10 miles west of downtown Pocatello. See 49 FR 11177 (March 26, 1984). Two major stationary sources of particulate matter, FMC Corporation's elemental phosphorus facility and J.R. Simplot Company's phosphate fertilizer facility, are located in the industrial complex. This TSP

nonattainment area did not include the City of Pocatello.

After promulgation of the PM-10 standard, EPA published a list of "PM-10 Group I areas," areas with a strong likelihood of violating the PM-10 NAAQS and requiring substantial revisions to their existing state implementation plans. See 52 FR 29383 (August 7, 1987). The August 7, 1987, document listed "Pocatello" as a Group I "area of concern" and identified that area as including both Power and Bannock Counties. 52 FR 29385. In October 1990, EPA issued a document clarifying the description of certain Group I areas of concern. 55 FR 45799 (October 31, 1990). This document described the area of concern as the "City of Pocatello" in Power and Bannock Counties and further explained that: "When cities or towns are shown, the area of concern is defined by the municipal boundary limits as of the date of this notice." 55 FR 45801 n. 2. The City of Pocatello, however, lies only in Bannock County. In addition, the City of Pocatello does not include either the FMC facility or the J.R. Simplot facility in the industrial complex. Considering the original TSP nonattainment area boundary, it would seem apparent that any potential PM-10 nonattainment site for this area would have included the industrial complex, including the two major stationary sources located there. However, the erroneous boundary description for this area on the PM-10 Group I areas list remained, as explained above, and became the boundary description for the PM-10 area that was designated nonattainment by operation of law upon enactment of the 1990 Amendments. Given the above inconsistencies, it seems evident that the current boundaries of the Pocatello PM-10 nonattainment area were and are incorrect.

The 1990 Clean Air Act Amendments became effective November 15, 1990. As discussed above, section 107(d)(4)(B)(i) required that all Group I areas be designated nonattainment for PM-10 by operation of law upon enactment of the 1990 Amendments. In March 1991, EPA published a Federal Register document announcing all the areas, including all the Group I areas, designated under the amended Act as PM-10 nonattainment areas. 56 FR 11101 (March 15, 1991). The document identified the "City of Pocatello" in Power and Bannock Counties as such an area, and provided the public an opportunity to comment. As the document indicated, EPA's solicitation of public comment on the nonattainment area boundaries did not stem from any legal obligation, because neither the initial designations nor the

initial classifications for PM-10 were subject to the requirements for notice-and-comment rulemaking under either the Administrative Procedures Act (5 U.S.C. 553-657) or section 307(d) of the Clean Air Act. See generally 56 FR 11103; see also 56 FR 36755 & n. 2. Rather, as a matter of policy, EPA requested public comment on the document in order to facilitate public participation and avoid errors.

In response to EPA's March 1991 Federal Register document, the Idaho Department of Environmental Quality (IDEQ) submitted comments to EPA indicating what portion of the Pocatello area in Power and Bannock Counties IDEQ believed should be designated nonattainment for PM-10. The area described by IDEQ was approximately 260 square miles of lands in Power and Bannock counties that included lands under State jurisdiction and both trust and fee lands within the Fort Hall Indian Reservation. The area also included the two major stationary sources in the industrial complex, the Cities of Chubbuck and Pocatello and certain areas east of Inkom Gap. The area east of Inkom Gap includes the City of Inkom, a small community approximately 15 miles southeast of downtown Pocatello, and a cement plant operated by Ash Grove Cement Company, which is a major stationary source of PM-10 (see discussion later in this document regarding the emissions impact of this facility).

In August 1991, EPA used its authority under section 110(k)(6) of the Act to make corrections in nonattainment area designations and descriptions for several Group I areas based on information submitted by commenters on the March 1991 document. 56 FR 37656 (August 8, 1991). EPA included in that document corrections and clarifications to the boundary description of the Pocatello nonattainment area consistent with IDEQ's request. In correcting the Power-Bannock Counties listing, EPA noted that the prior boundary description for this nonattainment area as "the City of Pocatello" was clearly erroneous since Pocatello lies only in Bannock County, and that EPA and the State had originally intended that certain areas surrounding the City of Pocatello in both Power and Bannock Counties be included in the nonattainment area. 56 FR 37658, 37664. In formally codifying the final designations, classifications, and boundaries of areas in the country with respect to PM-10 (and other NAAQS) in November 1991, EPA further refined the description of the Power-Bannock Counties PM-10 nonattainment area by clearly specifying

those lands in the nonattainment area which are within the exterior boundary of the Fort Hall Indian Reservation and those lands in the nonattainment area that are State lands. 56 FR 56694, 56749 (November 6, 1991). However, neither the August nor the November 1991 documents addressed the question of whether the portion of the nonattainment area east of the Inkom Gap was properly included in the boundary description.

## II. This Action

### A. Correction of the Boundary of the Nonattainment Area

On May 23, 1995, IDEQ submitted to EPA additional analysis of data that were available at the time of enactment of the 1990 Clean Air Act Amendments in support of a request to once again correct the Power-Bannock Counties PM-10 nonattainment area boundary. The State's submittal asked EPA to exclude that portion east of the Inkom Gap and to simultaneously redesignate the Inkom area to attainment. Based on the data information, EPA believes that the State has demonstrated that inclusion of the Inkom area in the Power-Bannock Counties PM-10 nonattainment area prior to the 1990 Amendments to the Clean Air Act was in error.

IDEQ's additional analysis is based upon monitored TSP data from two locations in Inkom during the 1970s and 1980s. IDEQ operated a sampler at the U.S. Post Office during 1972 and again from 1974 through 1986. In 1986, IDEQ moved the sampler to a well pump station owned by the City of Inkom located on Highway 30, approximately one mile north of the Post Office. Monitoring continued at this location until it was discontinued on December 1, 1988. The State's additional analysis of the TSP data collected by IDEQ during the 1970s and 1980s converting TSP data to PM-10 data using a general ratio of PM-10 to TSP demonstrates that the Inkom area has not experienced a violation of the PM-10 NAAQS since 1981, well before promulgation of the PM-10 NAAQS on July 1, 1987. The data submitted by IDEQ also shows a substantial improvement in air quality in the Inkom area after 1982. In addition, IDEQ submitted emission reduction information (which included both historical actual emission estimates and allowable emission rates for the Ash Grove Cement facility) for the Inkom area that demonstrates that the PM-10 NAAQS has been protected since 1988, when monitoring in the area ceased, because of reduced emissions. For a further discussion of the air quality data

and the emission reductions that have been achieved in the area, please refer to the IDEQ submittal in the docket.

Section 110(k)(6) of the Act authorizes EPA, upon a determination that EPA's action in approving, disapproving or promulgating any State Implementation Plan or plan revision (or any part thereof) was in error, to revise the action as appropriate in the same manner as the approval, disapproval, or promulgation. In making such a correction, EPA must provide such determination and the basis for it to the State and the public. By this document, EPA is notifying the State of Idaho, the Shoshone-Bannock Tribes, and the public that EPA is correcting the boundary of the Power-Bannock Counties PM-10 nonattainment area to exclude the area east of Inkom Gap, thus excluding the City of Inkom and Ash Grove Cement's facility. The basis for this boundary correction is that the State of Idaho, which requested in 1991 that the Inkom area be included in the Power-Bannock County PM-10 nonattainment area, has now submitted valid data information to EPA showing that its 1991 request was in error and asking EPA to correct the boundary description. Had the State of Idaho presented this information either before the clarification of the Group I listing of October 31, 1990, or before the August 8, 1991, clarification of the PM-10 nonattainment area boundary, EPA would have excluded the Inkom area from the Power-Bannock Counties PM-10 nonattainment area.

Accordingly, as of the effective date of this action, the North-South boundary along the eastern edge of the Power-Bannock Counties PM-10 nonattainment area will be defined as the line between the West 1/2 and East 1/2 of:

Sections 10, 15, 22, 27, 34 of T6S, R35E, Sections 3, 10, 15, 22, 27, 34 of T7S, R35E, and Section 3 of T8S, R35E

Although neither the Administrative Procedures Act nor the Clean Air Act legally obligate EPA to provide the public an opportunity to comment on this correction, EPA is inviting the State, the Shoshone-Bannock Tribes, and the public to comment on this action to foster public participation and avoid error. EPA will consider any written comments on this action that are received by July 12, 1996. This correction will become effective on August 12, 1996. This will provide sufficient time for EPA to make any adjustments to this correction that are appropriate in light of the comments.

In making this boundary correction, EPA notes that IDEQ has also provided information showing that significant emission reductions have been achieved at the Ash Grove Cement facility since 1990 and that Ash Grove Cement is now operating under a 1995 IDEQ-issued and federally enforceable operating permit that establishes emission limits that will protect the NAAQS into the future. IDEQ has also provided information showing that emissions from sources in the Inkom area are not expected to contribute to violations of the PM-10 NAAQS in other portions of the Power-Bannock Counties PM-10 nonattainment area because the Inkom Gap, a constriction in the Portneuf River Valley formed by a mountain ridge rising 1500 feet above the valley floor on either side of the river, effectively provides a natural barrier between the airsheds of Inkom and Pocatello and prevents transport of emissions between them. Finally, IDEQ has committed to monitor air quality at two locations in the Inkom area and to monitor meteorology at one location in the Inkom area. Air quality monitoring has already begun in a residential area near the elementary school in Inkom and a second air quality monitor, located at the site of the expected maximum impact of Ash Grove Cement's facility, began operation on October 12, 1995.

In correcting the boundary of the Power-Bannock PM-10 nonattainment area to exclude the Inkom area, EPA has relied on the data available prior to August 1991, when EPA announced the boundary description, along with subsequent analysis of those data. The information submitted by IDEQ regarding emission reductions and emission limitations since that time and IDEQ's commitments to monitor air quality in the Inkom area in the future were not regarded by EPA as a basis for the correction. However, this information and the State's commitments do provide additional assurance that the NAAQS will be protected in the Inkom area into the future. EPA would be reluctant to revise through correction the description of a nonattainment area based on information available before EPA's initial erroneous boundary description if data collected since the initial erroneous boundary description indicated that the area was not in attainment of, or would be expected to soon violate, the NAAQS.

#### *B. State's Request to Redesignate the Inkom Area to Attainment*

The State has also requested that the Inkom area be redesignated to attainment. EPA declines to grant this

portion of the State's request at this time, because to do so would undermine the planning requirements of section 107(d)(3)(E) of the Act for redesignation of a nonattainment area (or portion thereof) to attainment. EPA may redesignate an area to attainment if:

(i) The Administrator determines that the area has attained the NAAQS;

(ii) The Administrator has fully approved the applicable implementation plan for the area under section 110(k) of the Act;

(iii) The Administrator determines that the improvement in air quality is due to permanent and enforceable reductions in emissions resulting from implementation of the applicable implementation plan and applicable federal air pollutant control regulations and other permanent and enforceable reductions;

(iv) The Administrator has fully approved a maintenance plan for the area as meeting the requirements of section 175A of the Act; and,

(v) The State containing such area has met all the requirements applicable to the area under section 110 and part D of the Act.

The State of Idaho has not provided sufficient information to allow EPA to make these findings for the Inkom area. Therefore, EPA is not granting the State's request to redesignate the Inkom area to attainment. Thus, this correction to the nonattainment area boundary will result in the Inkom area being designated "unclassifiable" for PM-10. This designation is the same designation as most rural areas within the State of Idaho, and is the designation the Inkom area would have had in August 1991 had it not been erroneously included in the Power-Bannock Counties PM-10 nonattainment area.

#### III. Implications of this Action

Upon the effective date of this rule, the Inkom area, which is currently designated nonattainment for PM-10, will revert to a designation of "unclassifiable" for PM-10. A revised description of the boundary for the Power-Bannock Counties PM-10 nonattainment area is set forth in the table below, which shows the corrections that will be made to the Table in Part 81.

As a result of today's action, new or modified major stationary sources of particulate matter in the Inkom area will be subject to Prevention of Significant Deterioration (PSD) requirements of Part C of the Act rather than the New Source Review requirements of Part D of the Act. In addition, the State no longer needs to include the Inkom area in the planning requirements for the Power-

Bannock Counties PM-10 nonattainment area. However, removing the Inkom area from the Power-Bannock Counties PM-10 nonattainment area does not protect any source in the area from requirements for additional control technology if the source's emissions are determined in the future to contribute to violations of a NAAQS in the Power-Bannock Counties PM-10 nonattainment area or elsewhere and if such control technology is necessary to attain the NAAQS.

As discussed above, based on the information submitted by the State, EPA believes that the NAAQS in the Inkom area has been protected through the present and will also be protected into the foreseeable future. Should one of the State's monitors record a violation of the PM-10 or other particulate matter NAAQS in the future, however, EPA will proceed immediately to redesignate the Inkom area to nonattainment.

#### IV. Administrative Review

Under the Regulatory Flexibility Act, 5 U.S.C. 600 *et seq.*, EPA must prepare a regulatory flexibility analysis assessing the impact of any proposed or final rule on small entities. 5 U.S.C. 603 and 604. Alternatively, EPA may certify that the rule will not have a significant impact on a substantial number of small entities. Small entities include small businesses, small not-for-profit enterprises, and government entities with jurisdiction over populations of less than 50,000.

SIP approvals under section 110 and subchapter I, Part D of the CAA do not create any new requirements, but simply approve requirements that the state is already imposing. Therefore, because the federal SIP-approval does not impose any new requirements, I certify that it does not have a significant impact on any small entities affected. Moreover, due to the nature of the federal-state relationship under the CAA, preparation of a regulatory flexibility analysis would constitute federal inquiry into the economic reasonableness of state action. The CAA forbids EPA to base its actions concerning SIPs on such grounds. *Union Electric Co. v. E.P.A.*, 427 U.S. 246, 256-66 (S.Ct. 1976); 42 U.S.C. 7410(a)(2).

Under Section 202 of the Unfunded Mandates Reform Act of 1995 ("Unfunded Mandates Act"), signed into law on March 22, 1995, EPA must prepare a budgetary impact statement to accompany any proposed or final rule that includes a Federal mandate that may result in estimated costs to State, local, or tribal governments in the aggregate; or to the private sector, of

\$100 million or more. Under Section 205, EPA must select the most cost-effective and least burdensome alternative that achieves the objectives of the rule and is consistent with statutory requirements. Section 203 requires EPA to establish a plan for informing and advising any small governments that may be significantly or uniquely impacted by the rule.

EPA has determined that the approval action promulgated does not include a Federal mandate that may result in estimated costs of \$100 million or more to either State, local, or tribal governments in the aggregate, or to the private sector. This Federal action approves pre-existing requirements under State or local law, and imposes no new Federal requirements. Accordingly, no additional costs to State, local, or tribal governments, or to the private sector, result from this action.

The EPA has reviewed this request for revision of the federally-approved SIP for conformance with the provisions of the 1990 Clean Air Act Amendments enacted on November 15, 1990. The EPA has determined that this action conforms with those requirements.

Nothing in this action should be construed as permitting or allowing or establishing a precedent for any future request for revision to any SIP. Each request for revision to the SIP shall be considered separately in light of specific

technical, economic and environmental factors and in relation to relevant statutory and regulatory requirements.

The Office of Management and Budget (OMB) has exempted this regulatory action from E.O. 12866 review.

The EPA is publishing this action without prior proposal because the Agency views this as a noncontroversial amendment and anticipates no adverse comments. However, in a separate document in this Federal Register publication, the EPA is proposing to approve the SIP revision should adverse or critical comments be filed. This action will be effective August 12, 1996 unless, by July 12, 1996, adverse or critical comments are received.

If the EPA receives such comments, this action will be withdrawn before the effective date by publishing a subsequent document that will withdraw the final action. All public comments received will be addressed in a subsequent final rule based on this action serving as a proposed rule. The EPA will not institute a second comment period on this action. Any parties interested in commenting on this action should do so at this time. If no such comments are received, the public is advised that this action will be effective August 12, 1996.

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the

appropriate circuit by August 12, 1996. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this rule for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2), 42 U.S.C. 7607(b)(2)).

List of Subjects in 40 CFR Part 81

Environmental protection, Designation of areas for air quality planning purposes.

Dated: May 29, 1996.

Carol M. Browner,  
U.S. EPA Administrator.

**PART 81—[AMENDED]**

Chapter I, Title 40 of the code of Federal Regulations is amended as follows:

1. The authority citation for part 81 continues to read as follows:

Authority 42 U.S.C. 7401-7671q.

2. Section 81.313 is amended by revising the entry for "Bannock and Power Counties" in the "Idaho PM-10 Nonattainment Areas" table to read as follows:

**§ 81.313 Idaho**  
\* \* \* \* \*

IDAHO—PM-10 NONATTAINMENT AREAS

Designated area	Designation		Classification	
	Date	Type	Date	Type
* * * * *				
Power-Bannock Counties, part of: (Pocatello) State Lands	11/15/90	Nonattainment	11/15/90	Moderate
T.5S, R.34E Sections 25-36; T.5S, R.35E Section 31; T.6S, R.34E Sections 1-36; T.6S, R.35E Sections 5-9, 16-21, 28-33 Plus the West 1/2 of Sections 10, 15, 22, 27, 34 T.7S, R.34E Sections 1-4, 10-14, and 24 T.7S, R.35E Sections 4-9, 16-21, 28-33 Plus the West 1/2 of Sections 3, 10, 15, 22, 27, 34 T.8S, R.35E, Section 4 Plus the West 1/2 of Section 3				
Fort Hall Indian Reservation: T.5S, R.34E Sections 15-23; T.5S, R.33E Sections 13-36 T.6S, R.33E Sections 1-36 T.7S, R.33E Sections 4, 5, 6 T.7S, R.34E Section 8				
* * * * *				

\* \* \* \* \*

[FR Doc. 96-14455 Filed 6-11-96; 8:45 am]

BILLING CODE 6560-50-P

**40 CFR Part 180**

[PP 2F4086/R2238; FRL-5368-4]

RIN 2070-AB78

**Pesticide Tolerance for 1-[[2-(2,4-Dichlorophenyl)-4-Propyl-1,3-Dioxolan-2-yl]Methyl]-1H-1,2,4-Triazole****AGENCY:** Environmental Protection Agency (EPA).**ACTION:** Final rule.

**SUMMARY:** This rule establishes a tolerance for combined residues of the fungicide 1-[[2-(2,4-dichlorophenyl)-4-propyl-1,3-dioxolan-2-yl]methyl]-1H-1,2,4-triazole and its metabolites determined as 2,4-dichlorobenzoic acid and expressed as parent compound in or on the raw agricultural commodities oat grain at 0.1 parts per million (ppm), oat straw at 1.0 ppm, oat forage at 10.0 ppm, and oat hay at 30.0 ppm. The regulation to establish a maximum permissible level for residues of the fungicide was requested in a petition submitted by Ciba-Geigy Corp.

**EFFECTIVE DATE:** This regulation becomes effective June 12, 1996.

**ADDRESSES:** Written objections and hearing requests, identified by the document control number, [PP 2F4086/R2238], may be submitted to: Hearing Clerk (1900), Environmental Protection Agency, Rm. M3708, 401 M St., SW., Washington, DC 20460. A copy of any objections and hearing requests filed with the Hearing Clerk should be identified by the document control number and submitted to: Public Response and Program Resources Branch, Field Operations Division (7506C), Office of Pesticide Programs, Environmental Protection Agency, 401 M St., SW., Washington, DC 20460. In person, bring copy of objections and hearing requests to Rm. 1132, CM #2, 1921 Jefferson Davis Hwy., Arlington, VA 22202. Fees accompanying objections shall be labeled "Tolerance Petition Fees" and forwarded to: EPA Headquarters Accounting Operations Branch, OPP (Tolerance Fees), P.O. Box 360277M, Pittsburgh, PA 15251.

An electronic copy of objections and hearing requests filed with the Hearing Clerk may be submitted to OPP by sending electronic mail (e-mail) to: opp-docket@epamail.epa.gov.

Copies of electronic objections and hearing requests must be submitted as an ASCII file avoiding the use of special characters and any form of encryption.

Copies of electronic objections and hearing requests will also be accepted on disks in WordPerfect 5.1 file format or ASCII file format. All copies of electronic objections and hearing requests must be identified by the docket number [PP 2F4086/R2238]. No Confidential Business Information (CBI) should be submitted through e-mail. Copies of electronic objections and hearing requests on this rule may be filed online at many Federal Depository Libraries. Additional information on electronic submissions can be found below in this document.

**FOR FURTHER INFORMATION CONTACT:** By mail: Connie B. Welch, Product Manager (PM) 21, Registration Division (7505C), Office of Pesticide Programs, Environmental Protection Agency, 401 M St., SW., Washington, DC 20460. Office location and telephone number: Rm. 227, CM #2, 1921 Jefferson Davis Highway, Arlington, VA 22202 (703) 305-6226; e-mail: welch.connie@epamail.epa.gov.

**SUPPLEMENTARY INFORMATION:** EPA issued a notice (FRL-4971-5), published in the Federal Register of November 15, 1995 (60 FR 57420), which announced that Ciba-Geigy Corp., P.O. Box 18300, Greensboro, NC 27419 had submitted pesticide petition (PP) 2F4086 to EPA requesting that the Administrator, pursuant to section 408(d) of the Federal Food, Drug, and Cosmetic Act (FFDCA), 21 U.S.C. 346a(d), establish tolerances for combined residues of the fungicide 1-[[2-(2,4-dichlorophenyl)-4-propyl-1,3-dioxolan-2-yl]methyl]-1H-1,2,4-triazole in or on the raw agricultural commodities oat grain at 0.1 ppm, oat straw at 1.0 ppm, oat forage at 10.0 ppm, and oat hay at 30.0 ppm.

There were no comments received in response to the notice of filing.

The scientific data submitted in the petition and other relevant material have been evaluated. The data considered in support of the tolerance include:

1. Plant and animal metabolism studies.
2. Residue data for crop and livestock commodities.
3. Two enforcement methods and multiresidue method testing data.
4. A 90-day rat feeding study with a no-observable-effect level (NOEL) of 12 mg/kg/day.
5. A 90-day dog feeding study with a NOEL of 1.25 mg/kg/day.
6. A rabbit developmental toxicity study with a maternal NOEL of 100 mg/kg/day and a developmental toxicity NOEL of Greater than 400 mg/kg/day (highest dose tested) (HDT)).

7. A rat teratology study with a maternal NOEL of 30 mg/kg/day and a developmental toxicity NOEL of 30 mg/kg/day.

8. A 2-generation rat reproduction study with a reproductive NOEL of 125 mg/kg/day (HDT) and a developmental toxicity NOEL of 25 mg/kg/day.

9. A 1-year dog feeding study with a NOEL of 1.25 mg/kg/day.

10. A 2-year rat chronic feeding/carcinogenicity study with a NOEL of 5 mg/kg/day with no carcinogenic potential under the conditions of the study up to and including approximately 125 mg/kg/day, the highest dose tested.

11. A 2-year mouse chronic feeding/carcinogenicity study with a NOEL of 15 mg/kg/day and with a statistically significant increase in combined adenomas and carcinomas of the liver in male mice at approximately 375 mg/kg/day, the highest dose tested.

12. Ames test with and without activation, negative.

13. A mouse dominant-lethal assay, negative.

14. Chinese hamster nucleus anomaly, negative.

15. Cell transformation assay, negative.

Ciba-Geigy submitted information which resolved the previously outstanding concerns about the nature of the residue in ruminants, an explanation of recovery calculations, and an explanation of the crop field trial protocol. Data gaps exist concerning dosing in the mouse carcinogenicity study. These data requirements were required under reregistration, pursuant to the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. 136 et seq.

As part of EPA's evaluation of potential human health risks, 1-[[2-(2,4-dichlorophenyl)-4-propyl-1,3-dioxolan-2-yl]methyl]-1H-1,2,4-triazole has been the subject of five Peer Reviews and one Scientific Advisory Panel (SAP) meeting.

The fungicide 1-[[2-(2,4-dichlorophenyl)-4-propyl-1,3-dioxolan-2-yl]methyl]-1H-1,2,4-triazole was originally evaluated by the Peer Review Committee on January 15, 1987, and classified as a Group C (possible human) carcinogen with a recommendation made for the quantification of estimated potential human risk using a linearized low-dose extrapolation. The method resulted in the establishment of a Q\* of  $7.9 \times 10^{-2}$  (mg/kg/day)<sup>-1</sup>.

The Peer Review Committee's decision was presented to the FIFRA Scientific Advisory Panel on March 2, 1988. The Panel did not concur with the committee's overall assessment of the

weight-of-evidence on the carcinogenicity of 1-[[2-(2,4-dichlorophenyl)-4-propyl-1,3-dioxolan-2-yl]methyl]-1H-1,2,4-triazole. The Panel recommended placing the chemical in Group D, indicating that the Group C classification was based on minimal evidence. The Panel's determination that EPA's Group C classification was based on minimal evidence was due to the fact that the incidence of liver tumors in male mice only occurred when the mice were given an excessive chemical dose.

As part of a fifth Peer Review, EPA considered additional information provided by the registrant in support of the registrant's argument that the high dose was excessively toxic in the mouse carcinogenicity study. It further argued that the data from the high dose (2,500 ppm) should not be included in the evaluation of carcinogenic potential of -[[2-(2,4-dichlorophenyl)-4-propyl-1,3-dioxolan-2-yl]methyl]-1H-1,2,4-triazole. In support of these arguments, the registrant provided two subchronic oral toxicity studies in mice. Ciba-Geigy also provided a reread of the pathology slides from a mouse oncogenicity study which it felt indicated sufficient concurrent liver toxicity at 2,500 ppm to document that this dose was excessive. These findings were not present in the original pathology report. Owing to the inconsistency in Ciba-Geigy's report and the original report, the Agency requested that an independent (third) evaluation of the pathology slides be made to determine if the pathology reported could be confirmed. The results of this (third) pathology evaluation were used in the fifth Peer Review in place of data resulting from the earlier evaluations provided by Ciba-Geigy.

The Peer Review Committee considered the following facts regarding the toxicology data on 1-[[2-(2,4-dichlorophenyl)-4-propyl-1,3-dioxolan-2-yl]methyl]-1H-1,2,4-triazole in a weight-of-evidence determination of carcinogenic potential:

1. Increased numbers of adenomas (increased trend and pairwise comparison) were found in the livers of male CD1 mice given 2,500 ppm of 1-[[2-(2,4-dichlorophenyl)-4-propyl-1,3-dioxolan-2-yl]methyl]-1H-1,2,4-triazole in their diet.

2. The treated animals had earlier fatalities than the controls.

3. The numbers of carcinomas were increased (trend only) in male mice only at the 2,500 ppm dose level. Tumors were not significantly increased at the 500 ppm dose level. Adenomas observed in the treated animals were larger and more numerous than those in

controls; however, the tumor type (adenoma) was the same.

4. No excessive number of tumors was found in female mice.

5. In a rat study conducted with acceptable doses of 1-[[2-(2,4-dichlorophenyl)-4-propyl-1,3-dioxolan-2-yl]methyl]-1H-1,2,4-triazole, no excessive numbers of tumors were found.

The Peer Review Committee determined, based on the additional information submitted by Ciba-Geigy from two 90-day subchronic studies in mice that the 2,500 ppm dose used in the 2-year chronic study exceeded the maximum tolerated dose (MTD) based on the endpoint of hepatic necrosis, and the 500 ppm dose used in the chronic study was inadequate to assess the carcinogenicity of 1-[[2-(2,4-dichlorophenyl)-4-propyl-1,3-dioxolan-2-yl]methyl]-1H-1,2,4-triazole. Based on the third pathology evaluation of the chronic study, the Peer Review Committee disagreed with Ciba-Geigy's argument that the study showed excessive toxicity at the 2,500 ppm dose. However, the Peer Review Committee concluded that the 90-day subchronic studies are a better measure of what would be an MTD.

Based upon these findings, the Peer Review Committee agreed that the classification for 1-[[2-(2,4-dichlorophenyl)-4-propyl-1,3-dioxolan-2-yl]methyl]-1H-1,2,4-triazole should remain a Group C (possible human) carcinogen and recommended against the previously used Q\* (viz. 0.079) for risk assessment purposes. For the purpose of risk characterization the Peer Review Committee recommended that the reference dose (RfD) approach should be used for quantification of human risk. This decision was based on the disqualification of the high dose (2,500 ppm), making the data inappropriate for the calculation of Q\*. Because the middle dose (500 ppm) was not considered sufficiently high enough for assessing the carcinogenic potential of 1-[[2-(2,4-dichlorophenyl)-4-propyl-1,3-dioxolan-2-yl]methyl]-1H-1,2,4-triazole, EPA has requested an additional mouse study at intermediate dose levels in male mice only. EPA does not expect that these data will significantly change the above cancer assessment that 1-[[2-(2,4-dichlorophenyl)-4-propyl-1,3-dioxolan-2-yl]methyl]-1H-1,2,4-triazole poses a negligible risk to humans.

The reference dose for 1-[[2-(2,4-dichlorophenyl)-4-propyl-1,3-dioxolan-2-yl]methyl]-1H-1,2,4-triazole is 0.013 mg/kg/day, and based on a NOEL of 1.25 mg/kg/day and an uncertainty factor of 100. The NOEL is taken from

a 1-year dog feeding study that demonstrated irritation of the stomach in males as an endpoint effect. The Anticipated Residue Contribution (ARC) from the current action is estimated at 0.000872 mg/kg/day and utilizes 7% of the RfD of the general population of the 48 states. The ARC for the most highly exposed subgroup, non-nursing infants less than 1 year old is 0.00405 or mg/kg/day (31% of the RfD).

The nature of the residue in plants and animals is adequately understood and an adequate analytical method, gas chromatography, is available for enforcement purposes. Adequate animal tissue, milk, and egg tolerances exist to cover secondary residues incurred in those commodities from the proposed uses.

The enforcement methodology has been submitted to the Food and Drug Administration for publication in the *Pesticide Analytical Manual*, Volume II (PAM II). Because of the long lead time for publication of the method in PAM II, the analytical methodology is being made available in the interim to anyone interested in pesticide enforcement when requested from: Calvin Furlow, Public Response and Program Resources Branch, Field Operations Division (7506C), Office of Pesticide Programs, Environmental Protection Agency, 401 M St., SW., Washington, DC 20460. Office location and telephone number: Rm. 1132, CM #2, 1921 Jefferson Davis Highway, Arlington, VA 22202 (703) 305-5232.

There are presently no actions pending against the continued registration of this chemical. The pesticide is considered useful for the purpose for which the tolerance is sought.

Based on the information and data considered, the Agency has determined that the tolerance established by amending 40 CFR part 180 will protect the public health. Therefore, the tolerance is established as set forth below.

Any person adversely affected by this regulation may, within 30 days after publication of this document in the Federal Register, file written objections to the regulation and may also request a hearing on those objections. Objections and hearing requests must be filed with the Hearing Clerk, at the address given above (40 CFR 178.20). A copy of the objections and/or hearing requests filed with the Hearing Clerk should be submitted to the OPP docket for this rulemaking. The objections submitted must specify the provisions of the regulation deemed objectionable and the grounds for the objections (40 CFR 178.25). Each objection must be

accompanied by the fee prescribed by 40 CFR 180.33(i). If a hearing is requested, the objections must include a statement of the factual issue(s) on which a hearing is requested, the requestor's contentions on such issues, and a summary of any evidence relied upon by the objector (40 CFR 178.27). A request for a hearing will be granted if the Administrator determines that the material submitted shows the following: There is genuine and substantial issue of fact; there is a reasonable possibility that available evidence identified by the requestor would, if established, resolve one or more of such issues in favor of the requestor, taking into account uncontested claims or facts to the contrary; and resolution of the factual issue(s) in the manner sought by the requestor would be adequate to justify the action requested (40 CFR 178.32).

A record has been established for this rulemaking under the docket number [PP 2F4086/R2238] (including any comments and data submitted electronically). A public version of this record, including printed, paper versions of electronic comments, which does not include any information claimed as CBI, is available for inspection from 8 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The public record is located in Room 1132 of the Public Response and Program Resources Branch, Field Operations Division (7506C), Office of Pesticide Programs, Environmental Protection Agency, Crystal Mall #2, 1921 Jefferson Davis Highway, Arlington, VA.

The official record for this rulemaking, as well as the public version, as described above will be kept in paper form. Accordingly, EPA will transfer any copies of objections and hearing requests received electronically into printed, paper form as they are received and will place the paper copies in the official rule-making record which will also include all comments submitted directly in writing. The official rulemaking record is the paper record maintained at the address in "ADDRESSES" at the beginning of this document.

Under Executive Order 12866 (58 FR 51735, October 4, 1993), the Agency must determine whether the regulatory action is "significant" and therefore subject to all the requirements of the Executive Order (i.e., Regulatory Impact Analysis, review by the Office of Management and Budget (OMB)). Under section 3(f), the order defines "significant" as those actions likely to lead to a rule (1) having an annual effect on the economy of \$100 million or more, or adversely and materially

affecting a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local or tribal governments or communities (also known as "economically significant"); (2) creating serious inconsistency or otherwise interfering with an action taken or planned by another agency; (3) materially altering the budgetary impacts of entitlement, grants, user fees, or loan programs; or (4) raising novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in this Executive Order.

Pursuant to the terms of this Executive Order, EPA has determined that this rule is not "significant" and is therefore not subject to OMB review.

This action does not impose any enforceable duty, or contain any "unfunded mandates" as described in Title II of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104-4), or require prior consultation as specified by Executive Order 12875 (58 FR 58093, October 28, 1993), entitled Enhancing the Intergovernmental Partnership, or special consideration as required by Executive Order 12898 (59 FR 7629, February 16, 1994).

Pursuant to the requirements of the Regulatory Flexibility Act (Pub. L. 9-354, 94 Stat. 1164, 5 U.S.C. 601-612), the Administrator has determined that regulations establishing new tolerances or raising tolerance levels or establishing exemptions from tolerance requirements do not have a significant economic impact on a substantial number of small entities. A certification statement to this effect was published in the Federal Register of May 4, 1981 (46 FR 24950).

List of Subjects in 40 CFR Part 180

Environmental protection, Administrative practice and procedure, Agricultural commodities, Pesticides and pests, Reporting and recordkeeping requirements.

Dated: May 23, 1996.  
 Stephen L. Johnson,  
 Director, Registration Division, Office of Pesticide Programs.

Therefore, 40 CFR part 180 is amended as follows:

**PART 180—[AMENDED]**

1. The authority citation for part 180 continues to read as follows:

Authority: 21 U.S.C. 346a and 371.

2. In § 180.434, by revising the introductory text to paragraph (a) and by adding alphabetically the entries for

"oats, grain," "oats, straw," "oats, forage," and "oats, hay" to the table in paragraph (a), to read as follows:

**§ 180.434 1-[[2-(2,4-dichlorophenyl)-4-propyl-1,3-dioxolan-2-yl]methyl]-1H-1,2,4-triazole; tolerances for residues.**

(a) Tolerances are established for the combined residues of the fungicide 1-[[2-(2,4-dichlorophenyl)-4-propyl-1,3-dioxolan-2-yl]methyl]-1H-1,2,4-triazole and its metabolites determined as 2,4-dichlorobenzoic acid and expressed as parent compound in or on the following raw agricultural commodities:

Commodity	Parts per million
* * * * *	* * * * *
Oats, grain .....	0.1
Oats, straw .....	1.0
Oats, forage .....	10.0
Oats, hay .....	30.0
* * * * *	* * * * *

[FR Doc. 96-14452 Filed 6-11-96; 8:45 am]  
 BILLING CODE 6560-50-F

**40 CFR Part 180**

[PP 5F4522/R2237; FRL-5367-8]

RIN 2070-AB78

**Imidacloprid; Pesticide Tolerance**

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Final rule.

**SUMMARY:** This rule establishes a tolerance for residues of the insecticide (1-[(6-chloro-3-pyridinyl)methyl]-N-nitro-2-imidazolidinimine) and its metabolites in or on leafy green vegetables. Bayer Corporation (formerly Miles, Inc.) requested this regulation to establish these maximum permissible levels for residues of the insecticide.

**EFFECTIVE DATE:** This regulation became effective May 28, 1996.

**ADDRESSES:** Written objections and hearing requests, identified by the docket control number, [PP 5F4522/R2237], may be submitted to: Hearing Clerk (A-110), Environmental Protection Agency, Rm. M3708, 401 M St., SW., Washington, DC 20460. A copy of any objections and hearing requests filed with the Hearing Clerk should be identified by the docket control number and submitted to: Public Response and Program Resources Branch, Field Operations Division (7506C), Office of Pesticide Programs, Environmental

Protection Agency, 401 M St., SW., Washington, DC 20460. In person, bring copy of objections and hearing requests to Rm. 1132, CM #2, 1921 Jefferson Davis Hwy., Arlington, VA 22202. Fees accompanying objections shall be labeled "Tolerance Petition Fees" and forwarded to: EPA Headquarters Accounting Operations Branch, OPP (Tolerance Fees), P.O. Box 360277M, Pittsburgh, PA 15251.

**FOR FURTHER INFORMATION CONTACT:** By mail: Dennis H. Edwards, Jr., Product Manager (PM) 19, Registration Division (7505C), Office of Pesticide Programs, Environmental Protection Agency, 401 M St., SW., Washington, DC 20460. Office location, telephone number, and e-mail address: Rm. 207, CM #2, 1921 Jefferson Davis Highway, Arlington, VA, (703) 305-6386, e-mail: edwards.dennis@epamail.epa.gov.

**SUPPLEMENTARY INFORMATION:** EPA issued a notice in the Federal Register of July 26, 1995 (60 FR 38333) (FRL-4958-2), which announced that Bayer Corporation, 8400 Hawthorn Road, P.O. Box 4913, Kansas City, MO 64120-0013, had submitted pesticide petition 5F4522 to EPA requesting that the Administrator, pursuant to section 408(d) of the Federal Food, Drug, and Cosmetic Act (FFDCA), 21 U.S.C. 346a(d), establish tolerances for residues of the insecticide 1-[(6-chloro-3-pyridinyl)methyl]-N-nitro-2-imidazolidinimine in or on leafy green vegetables (including amaranth; arrugual; chervil; chrysanthemum, edible-leaved; chrysanthemum, garland; corn salad; cress, garden; cress upland; dandelion; dock; endive; orach; parsley; purslane, garden; purslane, winter; radicchio, (red chicory); spinach; spinach, New Zealand; and spinach vine). There were no comments or request for referral to an advisory committee received in response to this notice of filing.

All relevant materials have been evaluated. The toxicology data considered in support of the tolerance include:

1. A three-generation rat reproduction study with a no-observed-effect level (NOEL) of 100 ppm (8 mg/kg/bwt); rat and rabbit developmental toxicity studies were negative at doses up to 30 mg/kg/bwt and 24 mg/kg/bwt, respectively.

2. A 2-year rat feeding/carcinogenicity study that was negative for carcinogenic effects under the conditions of the study and had a NOEL of 100 ppm (5.7 mg/kg/bwt in male and 7.6 mg/kg/bwt female) for noncarcinogenic effects that included decreased body weight gain in females at 300 ppm and increased

thyroid lesions in males at 300 ppm and females at 900 ppm.

3. A 1-year dog feeding study with a NOEL of 1,250 ppm (41 mg/kg/bwt).

4. A 2-year mouse carcinogenicity study that was negative for carcinogenic effects under conditions of the study and that had a NOEL of 1,000 ppm (208 mg/kg/day).

There is no cancer risk associated with exposure to this chemical. Imidacloprid has been classified under "Group E" (no evidence of carcinogenicity) by EPA's OPP/HED's Reference Dose (RfD) Committee.

The reference dose (RfD) based on the 2-year rat feeding/ carcinogenic study with a NOEL of 5.7 mg/kg/bwt and 100-fold uncertainty factor, is calculated to be 0.057 mg/kg/bwt. The theoretical maximum residue contribution (TMRC) from published uses is 0.008187 mg/kg/bwt/day utilizing 14.4% of the RfD. The proposed tolerance will increase the TMRC by 0.000172 mg/kg/day representing an increase in the ADI of 0.3%. Thus, the TMRC will be 0.008358 mg/kg/day utilizing 14.7% of the RfD. For exposure of the most highly exposed subgroups in the population, non-nursing infants (< 1 year old), the TMRC for the published and proposed tolerances is 0.01547 mg/kg/day. This is equal to 27.1% of the RfD. Dietary exposure from the existing uses and proposed use will not exceed the reference dose for any subpopulation (including infants and children) based on the information available from EPA's Dietary Risk Evaluation System.

The nature of the imidacloprid residue in plants and livestock is adequately understood. The residues of concern are combined residues of imidacloprid and its metabolites containing the 6-chloropyridinyl moiety, all calculated as imidacloprid. The analytical method is a common moiety method for imidacloprid and its metabolites containing the 6-chloropyridinyl moiety using a permanganate oxidation, silyl derivatization, and capillary GC-MS selective ion monitoring. There is also a compound specific HPLC-UV method available. Imidacloprid and its metabolites are stable in the commodities when frozen for at least 24 months. There are adequate amounts of geographically representative crop field trial data to show that combined residues of imidacloprid and its metabolites, all calculated as imidacloprid will not exceed the proposed tolerance when use as directed. There are no livestock feed stuffs associated with the commodity in the petition.

There are presently no actions pending against the continued registration of this chemical.

This pesticide is considered useful for the purposes for which the tolerance is sought. Based on the information and data considered, the Agency has determined that the tolerances established by amending 40 CFR part 180 will protect the public health. Therefore, these tolerances are established as set forth below.

Any person adversely affected by this regulation may, within 30 days after publication of this document in the Federal Register, file written objections to the regulation and may also request a hearing on those objections. Objections and hearing requests must be filed with the Hearing Clerk, at the address given above (40 CFR 178.20). A copy of the objections and/or hearing requests filed with the Hearing Clerk should be submitted to the OPP docket for this rulemaking. The objections submitted must specify the provisions of the regulation deemed objectionable and the grounds for the objections (40 CFR 178.25). Each objection must be accompanied by the fee prescribed by 40 CFR 180.33(i). If a hearing is requested, the objections must include a statement of the factual issue(s) on which a hearing is requested, the requestor's contentions on such issues, and a summary of any evidence relied upon by the objector (40 CFR 178.27). A request for a hearing will be granted if the Administrator determines that the material submitted shows the following: There is a genuine and substantial issue of fact; there is a reasonable possibility that available evidence identified by the requestor would, if established, resolve one or more of such issues in favor of the requestor, taking into account uncontested claims or facts to the contrary; and resolution of the factual issue(s) in the manner sought by the requestor would be adequate to justify the action requested (40 CFR 178.32).

Under Executive Order 12866 (58 FR 51735, October 4, 1993), the Agency must determine whether the regulatory action is "significant" and therefore subject to all the requirements of the Executive Order (i.e., Regulatory Impact Analysis, review by the Office of Management and Budget (OMB)). Under section 3(f), the order defines "significant" as those actions likely to lead to a rule (1) having an annual effect on the economy of \$100 million or more, or adversely and materially affecting a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local or tribal governments or communities (also known as

“economically significant”); (2) creating serious inconsistency or otherwise interfering with an action taken or planned by another agency; (3) materially altering the budgetary impacts of entitlement, grants, user fees, or loan programs; or (4) raising novel legal or policy issues arising out of legal mandates, the President’s priorities, or the principles set forth in this Executive Order.

Pursuant to the terms of this Executive Order, EPA has determined that this rule is not “significant” and is therefore not subject to OMB review.

Pursuant to the requirements of the Regulatory Flexibility Act (Pub. L. 96-354, 94 Stat. 1164, 5 U.S.C. 601-612), the Administrator has determined that regulations establishing new tolerances or raising tolerance levels or establishing exemptions from tolerance requirements do not have a significant economic impact on a substantial number of small entities. A certification statement to this effect was published in the Federal Register of May 4, 1981 (46 FR 24950).

List of Subjects in 40 CFR Part 180

Environmental protection, Administrative practice and procedure, Agricultural commodities, Pesticides and pests, Reporting and recordkeeping requirements.

Dated: May 28, 1996.

Stephen L. Johnson,

Director, Registration Division, Office of Pesticide Programs.

Therefore, 40 CFR part 180 is amended as follows:

**PART 180—[AMENDED]**

1. The authority citation for part 180 continues to read as follows:

Authority: 21 U.S.C. 346a and 371.

2. Section 180.472(a) is amended by revising the table therein by adding and alphabetically inserting the following commodities to read as follows:

**§ 180.472 1-[(6-Chloro-3-pyridinyl)methyl]-N-2-imidazolidinimine; tolerances for residues.**

(a) \* \* \*

Commodity	Parts per million
* * *	* * *
Leafy greens subgroup	3.5
Leafy vegetables crop group	3.5
* * *	* * *

\* \* \* \* \*  
[FR Doc. 96-14629 Filed 6-11-96; 8:45 am]  
BILLING CODE 6560-50-F

**40 CFR Part 180**  
**[PP 5F4485/R2232; FRL-5364-3]**  
**RIN 2070-AB78**

**Bifenthrin; Pesticide Tolerance**

**AGENCY:** Environmental Protection Agency (EPA).  
**ACTION:** Final rule.

**SUMMARY:** This rule establishes a tolerance for residues of the pesticide bifenthrin in or on the raw agricultural commodity strawberries. The regulation to establish a maximum permissible level for residues of the pesticide was requested in a petition submitted by FMC Corporation.

**EFFECTIVE DATE:** This regulation becomes effective June 12, 1996.

**ADDRESSES:** Written objections and hearing requests, identified by the document control number [PP 5F4485/R2232], may be submitted to: Hearing Clerk (1900), Environmental Protection Agency, Rm. M3708, 401 M St., SW., Washington, DC 20460. A copy of any objections and hearing requests filed with the Hearing Clerk should be identified by the docket control number and submitted to: Public Response and Program Resources Branch, Field Operations Division (7506C), Office of Pesticide Programs, Environmental Protection Agency, 401 M St., SW., Washington, DC 20460. In person, bring copy of objections and hearing requests to: Rm. 1132 CM #2, 1921 Jefferson Davis Highway, Arlington, VA 22202. Fees accompanying objections shall be labeled “Tolerance Petition Fees” and forwarded to: EPA Headquarters Accounting Operations Branch, OPP (Tolerance Fees), P.O. Box 360277M, Pittsburgh, PA 15251.

An electronic copy of objections and hearing requests filed with the Hearing Clerk may be submitted to OPP by sending electronic mail (e-mail) to:

opp-docket epamail.epa.gov.

Copies of electronic objections and hearing requests must be submitted as an ASCII file avoiding the use of special characters and any form of encryption. Copies of electronic objections and hearing requests will also be accepted on disks in WordPerfect in 5.1 file format or ASCII file format. All copies of objections and hearing requests in electronic form must be identified by the docket number [PP 5F4485/R2232]. No Confidential Business Information

(CBI) should be submitted through e-mail. Copies of electronic objections and hearing requests on this rule may be filed online at many Federal Depository Libraries. Additional information on electronic submissions can be found below in this document.

**FOR FURTHER INFORMATION CONTACT:** By mail: George T. LaRocca, Product Manager (PM) 13, Registration Division (7505C), Office of Pesticide Programs, Environmental Protection Agency, 401 M St., SW., Washington, DC 20460.

Office location, telephone number, and e-mail address: Rm. 204, CM #2, 1921 Jefferson Davis Highway, Arlington, VA, (703) 305-6100; e-mail: larocca.george@epamail.epa.gov.

**SUPPLEMENTARY INFORMATION:** EPA issued a notice, published in the Federal Register of June 15, 1995 (60 FR 31466), which announced that FMC Corporation, 1735 Market Street, Philadelphia, PA 19103, had submitted a pesticide petition (PP 5F4485) to EPA requesting that the Administrator, pursuant to section 408(d) of the Federal Food, Drug, and Cosmetic Act (FFDCA), 21 U.S.C. 346a(d), establish a tolerance for the residues of the pyrethroid bifenthrin (2-methyl(1,1-biphenyl)-3-yl)methyl-3-(2-chloro-3,3,3-trifluoro-1-propenyl)-2,2-dimethylcyclopropanecarboxylate) in or on the raw agricultural commodity strawberries at 3.0 parts per million (ppm).

No comments were received in response to the notice of filing.

The scientific data submitted in support of this petition and other relevant material have been evaluated. The toxicological and metabolism data considered in support of this tolerance are discussed in detail in a related document published in the Federal Register of June 22, 1994 (59 FR 32167).

A chronic dietary exposure/risk assessment has been performed for bifenthrin using a Reference Dose (RfD) of 0.015 mg/kg of bwt/day. The RfD was based on a No Observed Effect Level (NOEL) of 1.5 mg/kg/day from the 1-year study in dogs and a safety factor of 100. The endpoint effect of concern was intermittent tremors in test animals at the lowest effect level. The chronic exposure analysis was performed using tolerance level residues and 100 percent crop treated information. The current estimated dietary exposure for the

overall U.S. population resulting from established tolerances is 0.002641 mg/kg of bwt/day, which represents 17.6 percent of the RfD, and for non-nursing infants (< 1 yr old) the subgroup population exposed to the highest risk the estimated dietary exposure is 0.008183, which represents 54.6 percent of the RfD. The current action will increase the exposure for the overall U.S. population to 0.002745 mg/kg of bwt/day or 18.3 percent of the RfD and for non-nursing infants (< 1 yr old) to 0.008265 mg/kg of bwt/day or 55.1 percent of the RfD. Generally speaking, the Agency has no concern if for all published and proposed tolerances dietary exposure is less than the RfD.

Because there was a sign of developmental effects seen in animal studies, the Agency used the rat developmental toxicity study with a maternal NOEL of 1 mg/kg/day to assess acute dietary exposure and determine a margin of exposure (MOE) for the overall U.S. population and certain subgroups. Since the toxicological end-point pertains to developmental toxicity, the population group of concern for this analysis is women age 13 and above, the subgroup which most closely approximates women of child-bearing age. The MOE is calculated as the ratio of the NOEL to the exposure. For this analysis the Agency calculated the MOE for women age 13 and above to be 200. Generally speaking, MOE's greater than 100 for data derived from animal studies are regarded as showing no appreciable risk.

The metabolism of the chemical in plants and animals for the use is adequately understood. Secondary residues occurring in livestock and their by-products are not expected since there are no known animal feed stock uses for strawberries. Adequate analytical methodology (Gas liquid chromatography with an electron capture detector) is available for enforcement purposes. The enforcement methodology has been submitted to the Food and Drug Administration for publication in the *Pesticide Analytical Manual, Vol. II* (PAM II). Because of the long lead time for publication of the method in PAM II, the analytical methodology is being made available in the interim to anyone interested in pesticide enforcement when requested from Calvin Furlow, Public Response and Program Resource Branch, Field Operations Division (7506C), Office of Pesticide Programs, U.S. Environmental Protection Agency, 401 M St., SW., Washington, DC 20460. Office location and telephone number: Rm. 1132, CM #2, 1921 Jefferson-Davis Hwy., Arlington, VA 22202, (703) 305-5232.

The tolerances established by amending 40 CFR part 180 will be adequate to cover residues in or on strawberries. The pesticide is considered useful for the purposes which it is sought and capable of achieving the intended physical or technical effect. There are presently no actions pending against the continued registration of this chemical. Based on the information and data considered, the Agency has determined that the tolerance established by amending 40 CFR part 180 would protect the public health. Therefore, the tolerance is established as set forth below.

Any person adversely affected by this regulation may, within 30 days after publication of this document in the Federal Register, file written objections and/or request a hearing with the Hearing Clerk, at the address given above (40 CFR 178.20). A copy of the objections and/or hearing requests filed with the Hearing Clerk should be submitted to the OPP docket for this rulemaking. The objections submitted must specify the provisions of the regulation deemed objectionable and the grounds for the objections (40 CFR 178.25). Each objection must be accompanied by the fee prescribed by 40 CFR 180.33(i). If a hearing is requested, the objections must include a statement of the factual issue(s) on which a hearing is requested, the requestor's contentions on such issues, and a summary of any evidence relied upon by the objector (40 CFR 178.27). A request for a hearing will be granted if the Administrator determines that the material submitted shows the following: There is genuine and substantial issue of fact; there is a reasonable possibility that available evidence identified by the requestor would, if established, resolve one or more of such issues in favor of the requestor, taking into account uncontested claims or facts to the contrary; and resolution of the factual issue(s) in the manner sought by the requestor would be adequate to justify the action requested (40 CFR 178.32).

A record has been established for this rulemaking under docket number [PP 5F4485/R2232] (including comments and data submitted electronically). A public version of this record, including printed, paper version of electronic comments, which does not include any information claimed as CBI, is available for inspection from 8 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The public record is located in Room 1132 of the Public Response and Program Resources Branch, Field Operations Division (7506C), Office of Pesticide Programs, Environmental Protection Agency, Crystall Mall #2,

1921 Jefferson Davis Highway, Arlington, VA.

The official record for this rulemaking, as well as the public version, as described above will be kept in paper form. Accordingly, EPA will transfer all comments received electronically into printed, paper form as they are received and will place the paper copies in the official rulemaking record which will also include all comments submitted directly in writing. The official rulemaking record is the paper record maintained at the address in "ADDRESSES" at the beginning of this document.

Under Executive Order 12866 (58 FR 51735, October 4, 1993), the Agency must determine whether the regulatory action is "significant" and therefore subject to all the requirements of the Executive Order (i.e., Regulatory Impact Analysis, review by the Office of Management and Budget (OMB)). Under section 3(f), the order defines "significant" as those actions likely to lead to a rule (1) having an annual effect on the economy of \$100 million or more, or adversely and materially affecting a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local or tribal governments or communities (also known as "economically significant"); (2) creating serious inconsistency or otherwise interfering with an action taken or planned by another agency; (3) materially altering the budgetary impacts of entitlement, grants, user fees, or loan programs; or (4) raising novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in this Executive Order.

Pursuant to the terms of this Executive Order, EPA has determined that this rule is not "significant" and is therefore not subject to OMB review. In addition, this action does not impose any enforceable duty or contain any "unfunded mandates" as described in Title II of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104-4), or require prior consultation as specified by Executive Order 12875 (58 FR 58093, October 1993), entitled Enhancing the Intergovernmental Partnership, or special considerations as required by Executive Order 12898 (59 FR 7629, February 16, 1994).

Pursuant to the requirements of the Regulatory Flexibility Act (Pub. L. 96-354, 94 Stat. 1164, 5 U.S.C. 601-612), the Administrator has determined that regulations establishing new tolerances or raising tolerance levels or establishing exemptions from tolerance requirements do not have a significant

economic impact on a substantial number of small entities. A certification statement to this effect was published in the Federal Register of May 4, 1981 (46 FR 24950).

List of Subjects in 40 CFR Part 180

Environmental protection, Administrative practice and procedure, Agricultural commodities, Pesticides and pests, Reporting and recordkeeping requirements.

Dated: May 28, 1996.

Stephen L. Johnson,  
Director, Registration Division, Office of Pesticide Programs.

Therefore, 40 CFR part 180 is amended to read as follows:

**PART 180—[AMENDED]**

1. The authority citation of part 180 continues to read as follows:

Authority: 21 U.S.C. 346a.

2. Section 180.442 is amended by redesignating and revising the current introductory text and commodity table as paragraph (a) and adding a new paragraph (b) to read as follows:

**§ 180.442 Bifenthrin; tolerances for residues.**

(a) Tolerances, to expire November 15, 1997, are established for residues of the pyrethroid bifenthrin, (2-methyl(1,1-biphenyl)-3-yl)methyl-3-(2-chloro-3,3,3-trifluoro-1-propenyl)-2,2-dimethylcyclopropanecarboxylate, in or on the following commodities:

\* \* \* \* \*

(b) Tolerances, are established for residue of the pyrethroid bifenthrin, (2-methyl(1,1-biphenyl)-3-yl)methyl-3-(2-chloro-3,3,3-trifluoro-1-propenyl)-2,2-dimethylcyclopropanecarboxylate, in or on the following commodity:

Commodity	Parts per million
Strawberries .....	3.00

[FR Doc. 96-14630 Filed 6-11-96; 8:45 am]  
BILLING CODE 6560-50-F

**40 CFR Part 300**

[FRL-5518-6]

**National Oil and Hazardous Substances Pollution Contingency Plan National Priorities List**

AGENCY: Environmental Protection Agency (EPA).

**ACTION:** Notice of Deletion of New Castle Spill Site from the National Priorities List (NPL).

**SUMMARY:** EPA, Region 3, announces the deletion of the New Castle Spill Site, New Castle, Delaware, from the National Priorities List (NPL). The NPL is Appendix B of 40 CFR part 300, the National Oil and Hazardous Substances Pollution Contingency Plan (NCP). EPA promulgated the NCP pursuant to section 105 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), as amended. EPA and the State of Delaware Department of Natural Resources and Environmental Control (DNREC) have determined that all appropriate CERCLA actions have been implemented, that the Site poses no significant threat to public health or the environment, and that no further cleanup by responsible parties is necessary.

**EFFECTIVE DATE:** June 12, 1996.

**ADDRESSES:** Comprehensive information on this Site is available through the public docket which is available for viewing at the Site information repositories at the following locations: Hazardous Waste Technical Information Center, 9th Floor, U.S. EPA, Region 3, 841 Chestnut Building, Philadelphia, PA, (215) 597-6633.

Delaware Department of Natural Resources and Environmental Control, 715 Grantham Lane, New Castle, DE, (302) 323-4540.

**FOR FURTHER INFORMATION CONTACT:** Stephanie Dehnhard (3HW23), U.S. EPA Region 3, 841 Chestnut Building, Philadelphia, PA 19107, (215) 597-3167.

**SUPPLEMENTARY INFORMATION:** EPA announces the deletion of the New Castle Spill Site located in New Castle, Delaware, from the National Priorities List (NPL). The NPL is Appendix B of the National Oil and Hazardous Substances Pollution Contingency Plan (NCP), 40 CFR Part 300. EPA identifies sites that appear to present a significant risk to public health, welfare, or the environment and maintains the NPL as the list of those sites. Sites on the NPL may be the subject of remedial actions financed by the Hazardous Substances Superfund Response Trust Fund (Fund). Pursuant to CERCLA, 42 U.S.C. section 9605 (40 CFR 300.425(e)(3) of the NCP), any site deleted from the NPL remains eligible for Fund-financed remedial actions in the event that conditions at the site warrant such action in the future. Deletion of a site from the NPL does not affect responsible party liability or impede agency efforts to

recover costs associated with response efforts.

A Notice of Intent to Delete the New Castle Spill Site from the NPL was published on March 21, 1996 in the Federal Register (56 FR 11597). The closing date for comments on the Notice of Intent to Delete was April 22, 1996. EPA received comments on the proposed deletion. The responsiveness summary is attached.

List of Subjects in 40 CFR Part 300

Environmental protection, Air pollution control, Chemicals, Hazardous substances, Hazardous waste, Intergovernmental relations, Penalties, Reporting and recordkeeping requirements, Superfund, Water pollution control, Water supply.

For the reasons set out in the preamble, 40 CFR part 300 is amended as follows:

**PART 300—[AMENDED]**

1. The authority citation for part 300 continues to read as follows:

Authority: 33 U.S.C. 1321(c)(2); 42 U.S.C. 9601-9657; E.O. 12777, 56 FR 54757, 3 CFR, 191 Comp., p. 351; E.O. 12580, 52 FR 2923, 3 CFR, 1987 Comp., p. 193.

Appendix B—[Amended]

2. Table 1 of Appendix B to part 300 is amended by removing the site "New Castle Spill, New Castle County, Delaware".

Dated: May 16, 1996.

W. T. Wisniewski,  
Acting Regional Administrator, U.S. EPA Region 3.

[FR Doc. 96-14770 Filed 6-11-96; 8:45 am]

BILLING CODE 6560-50-P

**DEPARTMENT OF THE INTERIOR**

**Bureau of Land Management**

**43 CFR Part 8000**

[WO-340-1220-00-24 1A]

RIN 1004-AC51

**Recreation Programs**

**AGENCY:** Bureau of Land Management, Interior.

**ACTION:** Final Rule; removal.

**SUMMARY:** This final rule removes 43 CFR Part 8000—Recreation Programs regarding recreation programs on public lands, in its entirety. 43 CFR Part 8000—Recreation Programs contains no substantive material that is not repeated in subsequent sections of 43 CFR. The Bureau of Land Management (BLM) will

provide the public with any necessary policy and practices for the administration of recreation program through procedural guidance.

**EFFECTIVE DATE:** July 12, 1996.

**FOR FURTHER INFORMATION CONTACT:**  
Edna Taylor, (202) 452-5068.

**SUPPLEMENTARY INFORMATION:** This final regulation removes 43 CFR Part 8000—Recreation Programs from BLM's regulatory program as part of its effort to eliminate unnecessary and inappropriate material in the Code of Federal Regulations.

BLM published a proposed rule on the removal of 43 CFR Part 8000—Recreation Programs in the Federal Register of April 9, 1996 (61 FR 15753), requesting comments by May 9, 1996. During the 30-day comment period, BLM did not receive any comments.

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

BLM has determined that this final rule is categorically excluded from environmental review under section 102(2)(C) of the National Environmental Policy Act, pursuant to 516 Departmental Manual (DM), Chapter 2, Appendix I, Item 1.10, and that the final rule does not meet any of the 10 criteria for exceptions to categorical exclusion listed in 516 DM, Chapter 2, Appendix 2. Pursuant to Council on Environmental Quality regulations (40 CFR 1508.4) and the environmental policies and procedures of the Department of the Interior, the term "categorical exclusions" means a "category of actions that do not individually or cumulatively have a significant effect on the human environment and that have been found to have no such effect in procedures adopted by the Federal agency and for which neither an environmental assessment nor an environmental impact statement is required."

The final rule will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 et seq.). The rule does not contain information collection requirements that need approval by the Office of Management and Budget under 44 U.S.C. 3501 et seq.

The principal author of this final rule is Edna Taylor, Regulatory Management Team, BLM.

Accordingly, under the authority of 5 U.S.C. 301, 43 CFR Part 8000—Recreation Programs is removed.

Dated: June 5, 1996.  
Sylvia V. Baca,  
*Acting Assistant Secretary of the Interior.*  
[FR Doc. 96-14846 Filed 6-11-96; 8:45 am]  
BILLING CODE 4310-84-P

### 43 CFR Part 8300

[WO-340-1220-00-24 1A]

RIN 1004-AC50

### Recreation Management

**AGENCY:** Bureau of Land Management, Interior.

**ACTION:** Final Rule; removal.

**SUMMARY:** This final rule removes 43 CFR Part 8300—Procedures regarding recreation management on public lands, in its entirety. 43 CFR Part 8300—Procedures contains no substantive material that is not repeated in subsequent sections of 43 CFR. The Bureau of Land Management (BLM) will provide the public with any necessary policy and practices for the administration of recreation program through procedural guidance.

**EFFECTIVE DATE:** July 12, 1996.

**FOR FURTHER INFORMATION CONTACT:**  
Edna Taylor, (202) 452-5068.

**SUPPLEMENTARY INFORMATION:** This final regulation removes 43 CFR Part 8300—Procedures from BLM's regulatory program as part of its effort to eliminate unnecessary and inappropriate material in the Code of Federal Regulations.

BLM published a proposed rule on the removal of 43 CFR Part 8300—Procedures in the Federal Register of April 9, 1996 (61 FR 15753), requesting comments by May 9, 1996. During the 30-day comment period, BLM did not receive any comments.

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

BLM has determined that this final rule is categorically excluded from environmental review under section 102(2)(C) of the National Environmental Policy Act, pursuant to 516 Departmental Manual (DM), Chapter 2, Appendix I, Item 1.10, and that the final rule does not meet any of the 10 criteria for exceptions to categorical exclusion listed in 516 DM, Chapter 2, Appendix 2. Pursuant to Council on Environmental Quality regulations (40 CFR 1508.4) and the environmental policies and procedures of the Department of the Interior, the term "categorical exclusions" means a "category of actions that do not individually or cumulatively have a significant effect on the human

environment and that have been found to have no such effect in procedures adopted by the Federal agency and for which neither an environmental assessment nor an environmental impact statement is required."

The final rule will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 et seq.). The rule does not contain information collection requirements that need approval by the Office of Management and Budget under 44 U.S.C. 3501 et seq.

The principal author of this final rule is Edna Taylor, Regulatory Management Team, BLM.

Accordingly, under the authority of 5 U.S.C. 301, 43 CFR Part 8300—Procedures is removed.

Dated: June 5, 1996.  
Sylvia V. Baca,  
*Acting Assistant Secretary of the Interior.*  
[FR Doc. 96-14845 Filed 6-11-96; 8:45 am]  
BILLING CODE 4310-84-P

### FEDERAL COMMUNICATIONS COMMISSION

#### 47 CFR Parts 15, 22, 24, and 101

[WT Docket No. 95-157; RM-8643; FCC 96-196]

#### Microwave Facilities Operating in 1850-1990 MHz (2GHz) Band; Relocation Costs Sharing

**AGENCY:** Federal Communications Commission.

**ACTION:** Final rule.

**SUMMARY:** By this *First Report and Order*, the Commission changes and clarifies certain aspects of the microwave relocation rules adopted in our Emerging Technologies proceeding, ET Docket No. 92-9. The Commission also adopts a plan for sharing the costs of relocating microwave facilities currently operating in the 1850 to 1990 MHz ("2 GHz") band, which has been allocated for use by broadband Personal Communications Services ("PCS"). The Commission's plan establishes a mechanism whereby PCS licensees that incur costs to relocate microwave links receive reimbursement for a portion of those costs from other PCS licensees that also benefit from the resulting spectrum clearance. The Commission conditions the cost-sharing plan, however, on selection of one or more entities or organizations to administer the plan.

**EFFECTIVE DATES:** Sections 15.307 and 22.602 are effective August 12, 1996.

Sections 24.5, 24.237, 24.238, 24.239, 24.241, 24.243, 24.245, 24.247, 24.249, 24.251 and 24.253 will become effective August 12, 1996, and will become applicable on the date that the Wireless Telecommunications Bureau selects a clearinghouse to administer the cost-sharing plan. The Commission will publish a document announcing the selection of the clearinghouse at a later date. Sections 101.3, 101.69, 101.71, 101.73, 101.75, 101.77, 101.79, 101.81, and 101.147 will become effective August 1, 1996.

**FOR FURTHER INFORMATION CONTACT:**

Michael Hamra (202) 418-0620, Wireless Telecommunications Bureau.

**SUPPLEMENTARY INFORMATION:** This is a synopsis of the *First Report and Order*, adopted April 24, 1996 and released April 30, 1996. For information regarding the proposed plan for sharing the costs of microwave relocation, see Amendment to the Commission's Rules Regarding a Plan for Sharing the Costs of Microwave Relocation, *Notice of Proposed Rule Making*, WT Docket No. 95-157, 60 FR 55529 (November 1, 1995) ("*Cost-Sharing Notice*"). Part 101 will become effective August 1, 1996. See 61 FR 26670 (May 28, 1996). The complete text of this *First Report and Order* is available for inspection and copying during normal business hours in the FCC Reference Center, Room 230, 1919 M Street, N.W., Washington, D.C., and also may be purchased from the Commission's copy contractor, International Transcription Service, at (202) 857-3800, 2100 M Street, N.W., Suite 140, Washington, D.C. 20037.

**I. Background**

1. In the *First Report and Order and Third Notice of Proposed Rule Making* in ET Docket No. 92-9, 57 FR 49020 (October 29, 1992) the Commission reallocated the 1850-1990, 2110-2150, and 2160-2200 MHz bands from private and common carrier fixed microwave services to emerging technology services. The Commission also established procedures for 2 GHz microwave incumbents to be relocated to available frequencies in higher bands or to other media, by encouraging incumbents to negotiate voluntary relocation agreements with emerging technology licensees or manufacturers of unlicensed devices when frequencies used by the incumbent are needed to implement the emerging technology. *The First Report and Order* stated that, should negotiations fail, the emerging technology licensee could request involuntary relocation of the incumbent, provided that the emerging technology service provider pays the cost of

relocating the incumbent to a comparable facility. In the Commission's *Third Report and Order* in ET Docket No. 92-9, 58 FR 46547 (September 2, 1993) as modified on reconsideration by the *Memorandum Opinion and Order*, 59 FR 19642 (April 25, 1994) the Commission established additional details of the transition plan to enable emerging technology providers to relocate incumbent facilities. The relocation process consists of two negotiation periods that must expire before an emerging technology licensee may request involuntary relocation. The first is a fixed two-year period for voluntary negotiations—three years for public safety incumbents, e.g., police, fire, and emergency medical—commencing with the Commission's acceptance of applications for emerging technology services, during which the emerging technology providers and microwave licensees may negotiate any mutually acceptable relocation agreement. Negotiations are strictly voluntary. If no agreement is reached, the emerging technology licensee may initiate a one-year mandatory negotiation period—or two-year mandatory period if the incumbent is a public safety licensee—during which the parties are required to negotiate in good faith.

2. Should the parties fail to reach an agreement during the mandatory negotiation period, the emerging technology provider may request involuntary relocation of the existing facility. Involuntary relocation requires that the emerging technology provider (1) guarantee payment of all costs of relocating the incumbent to a comparable facility; (2) complete all activities necessary for placing the new facilities into operation, including engineering and frequency coordination; and (3) build and test the new microwave (or alternative) system. Once comparable facilities are made available to the incumbent microwave operator, the Commission will amend the 2 GHz license of the incumbent to secondary status. After relocation, the microwave incumbent is entitled to a one-year trial period to determine whether the facilities are indeed comparable, and if they are not, the emerging technology licensee must remedy the defects or pay to relocate the incumbent back to its former or an equivalent 2 GHz frequency.

3. Under these procedures, it is possible for a relocation agreement between a PCS licensee and a microwave incumbent to have spectrum-clearing benefits for other PCS licensees as well. First, some microwave spectrum blocks overlap with one or

more PCS blocks, because the spectrum in the 1850-1990 MHz band was assigned differently in the two services. Second, incumbents' receivers may be susceptible to adjacent or co-channel interference from PCS licensees in more than one PCS spectrum block. For example, a microwave link located partially in Block A, partially in Block D, and adjacent to Block B, may cause interference to or receive interference from PCS licensees that are licensed in each of those blocks. Third, because most 2 GHz microwave licensees operate multi-link systems, PCS licensees may be asked to relocate links that do not directly encumber their own spectrum or service area in order to obtain the microwave incumbent's voluntary consent to relocate. Finally, the *Unlicensed PCS Ad Hoc Committee for 2 GHz Microwave Transition and Management Inc.* ("*UTAM*"), the frequency coordinator for the PCS spectrum designated for unlicensed devices, expects that some licensed PCS providers will have to relocate links in the unlicensed band that are paired with links in licensed PCS spectrum. The Commission has designated *UTAM* to coordinate relocation in the 1910-1930 MHz band, which has been reallocated for unlicensed PCS devices. Once the 1910-1930 MHz band is clear, or there is little risk of interference to the remaining incumbents, and *UTAM* has recovered its relocation costs, *UTAM*'s role will end and it will be dissolved.

4. Because the Commission is licensing PCS providers at different times and multiple PCS licensees may benefit from the relocation of a microwave system or even a single link, the first PCS licensee in the market potentially bears a disproportionate share of relocation costs. Subsequent PCS licensees to enter the market may therefore obtain a windfall. As a result of this potential "free rider" problem, the first PCS licensee in the market might not relocate a link or might delay its deployment of PCS if it believes that another PCS licensee will relocate the link first, thus paying for some or all of the relocation costs. In addition, unless cost-sharing is adopted, PCS licensees might not engage in relocation that is cost-effective if viewed from an industry-wide perspective. For example, a link that encumbers two PCS blocks might not be moved if the cost is greater than the benefit to any single licensee, even though the joint benefit received by two or more licensees exceeds the cost of relocating the link.

5. In 1994, *PCIA* proposed a cost-sharing plan to alleviate the free rider problem, which the Commission found to be attractive in theory but dismissed

as underdeveloped. On May 5, 1995, Pacific Bell ("PacBell") filed a Petition for Rulemaking. In its petition, PacBell proposed a detailed cost-sharing plan in which PCS licensees on all blocks, licensed and unlicensed, would share in the cost of relocating microwave stations. On May 16, 1995, the Commission requested comment on PacBell's proposal. Most parties that commented on PacBell's *Petition for Rulemaking* supported the cost-sharing concept, although the comments reflected some differences regarding the details of the proposal. On October 12, 1995, the Commission adopted a *Notice of Proposed Rule Making*, 60 FR 55529 (November 1, 1995) which sought comment on a modified version of the plan proposed by PacBell.

6. The Commission released and adopted, with this *First Report and Order*, a *Further Notice of Proposed Rule Making*, 61 FR 24470 (May 15, 1996).

## II. First Report and Order

7. In the *Cost-Sharing Notice*, the Commission proposed a number of changes and clarifications to the microwave relocation rules adopted in the *Emerging Technologies* docket. The Commission suggested that additional guidance with respect to certain aspects of its rules would facilitate negotiations, reduce disputes, and expedite deployment of PCS. As explained below, the Commission adopts many of the changes and clarifications the Commission proposed, along with some suggestions made by commenters. By adopting these rule changes and clarifications, as well as the cost-sharing plan discussed in Section B, *infra*, the Commission intends to expedite the clearing of the 2 GHz band and the introduction of PCS to the public, while protecting the rights of incumbents. The Commission seeks to promote an efficient and equitable relocation process, which minimizes transaction costs and maximizes benefits for all parties, including incumbents, PCS licensees, and the public.

### A. Microwave Relocation Rules

#### 1. Voluntary Negotiations

8. The Commission agrees with commenters who argue that the public interest would not be served by changing the rules regarding the voluntary period for the A and B blocks at this time. First, the A and B block licensees who are now negotiating with incumbents were on notice of the voluntary period when they bid for their licenses, and they presumably have factored the length of the period and the

potential cost of relocation into their bids. They have offered no persuasive justification to shorten the period now. Second, the Commission notes that many voluntary agreements have already been reached or are now being negotiated between A and B block licensees and incumbents. The Commission is concerned that altering the voluntary period could inadvertently delay the deployment of PCS, because negotiations are likely to be interrupted while parties reassess their bargaining positions. Nevertheless, the Commission agrees with PCS licensees that changing the negotiation period for blocks other than the A and B blocks may not raise the same concerns, because negotiations in these blocks have not commenced.

9. Whether or not the negotiation periods are changed, the Commission also agrees with PCS licensees that additional information about the value of an incumbent's system, the estimated amount of time it would take to relocate the incumbent, and the anticipated cost of relocation may help facilitate negotiations during the voluntary period, as the Commission suggested in the *Cost-Sharing Notice*. Therefore, the Commission will require that, if the parties have not reached an agreement within one year after the commencement of the voluntary period, the incumbent must allow the PCS licensee, if the PCS licensee so chooses, to gain access to the microwave facilities to be relocated so that an independent third party can examine the incumbent's 2 GHz system and prepare an estimate of the cost and the time needed to relocate the incumbent to comparable facilities. The PCS licensee must pay for any such cost estimate. Because the one-year anniversary of the commencement of the voluntary period for A and B block licensees has already passed, this requirement shall become effective for the A and B block on the effective date of the rules adopted in this proceeding. The Commission disagrees with incumbents that a cost estimate paid for by the PCS licensee changes the nature of the voluntary period, because participation in negotiations remains voluntary.

10. Finally, although the Commission is not altering the basic structure or length of the voluntary period for A and B block PCS licensees, the Commission emphasizes that its rules provide incentives for voluntary agreements. The Commission has stated in the past that PCS licensees may choose to offer incumbents premiums to relocate quickly. "Premiums" could include: replacing the analog facilities with

digital facilities, paying all of the incumbent's transactions costs, or relocating an entire system as opposed to just the interfering links. These incentives are available only to microwave incumbents who consent to relocation by negotiation. By contrast, PCS licensees are not obligated to pay for such premiums during an involuntary relocation, which is discussed in Section IV(A)(3), *infra*.

#### 2. Mandatory Negotiations

11. As the comments on this issue demonstrate, the question of whether parties are negotiating in good faith typically requires consideration of all the facts and circumstances underlying the negotiations, and thus is likely to depend on the specific facts in each case. The Commission is concerned that creating a presumption that a party is acting in good or bad faith, as proposed in the *Cost-Sharing Notice*, may slow down resolution of disputes by prompting parties to bring claims of bad faith to the Commission prematurely rather than focusing on resolving the underlying disputes through the negotiation process. For these reasons, the Commission declines to adopt its proposal creating a presumption that a party who declines an offer of comparable facilities is acting in bad faith. Instead, the Commission concludes that good faith should be evaluated on a case-by-case basis under basic principles of contract law. Nevertheless, the Commission agrees with those commenters who suggest that guidance with respect to the factors the Commission will consider if a dispute arises over good faith would be helpful.

12. First, the Commission believes that good faith requires each party to provide information to the other that is reasonably necessary to facilitate the relocation process. For example, upon request by a PCS licensee, the Commission expects incumbents to allow inspection of their facilities by the PCS licensee and to provide any other information that the PCS licensee needs in order to evaluate the cost of relocating the incumbent to comparable facilities. Second, when evaluating claims that a party has not negotiated in good faith, the Commission will consider, *inter alia*, the following factors: (1) whether the PCS licensee has made a *bona fide* offer to relocate the incumbent to comparable facilities; (2) if the microwave incumbent has demanded a premium, the type of premium requested (*e.g.*, whether the premium is directly related to relocation, such as system-wide relocations and analog-to-digital conversions, versus other types of

premiums) and whether the value of the premium as compared to the cost of providing comparable facilities is disproportionate (*i.e.*, whether there is a lack of proportion or relation between the two); (3) what steps the parties have taken to determine the actual cost of relocation to comparable facilities; and (4) whether either party has withheld information requested by the other party that is necessary to estimate relocation costs or to facilitate the relocation process.

13. To ensure that parties do not bring frivolous bad faith claims, the Commission will also require any party alleging a violation of the Commission's good faith requirement to provide an independent estimate of the relocation costs of the facilities in question. Independent estimates must include a specification for the comparable facility and a statement of the costs associated with providing that facility to the incumbent licensee. These cost estimates are similar to the cost estimates that the Commission requires if a dispute arises over comparable facilities during the involuntary relocation period. The Commission believes that requiring such estimates will assist them in determining whether the parties are negotiating in good faith. Finally, the Commission agrees with those commenters who argue that penalties for failure to negotiate in good faith should be imposed on a case-by-case basis. The Commission emphasizes, however, that they intend to use the full realm of enforcement mechanisms available to them in order to ensure that licensees bargain in good faith.

### 3. Involuntary Relocation

14. If no agreement is reached during either the voluntary or mandatory negotiation period, a PCS licensee may initiate involuntary relocation procedures. Under involuntary relocation, the incumbent is required to relocate, provided that the PCS licensee meets the conditions under the Commission's rules for making the incumbent whole, such as providing the incumbent with comparable facilities.

#### *a. Comparable Facilities*

15. The Commission concludes that the factors they have identified—communications throughput, system reliability, and operating costs—will be the three factors used to determine when a facility is comparable. As the Commission stated in the *Cost-Sharing Notice*, the Commission believes that providing guidance with respect to the term comparable facilities will facilitate negotiations and reduce disputes. The

record in this proceeding also supports adoption of the factors the Commission has identified. Each factor is discussed in more detail below.

16. *Communication Throughput.* The Commission defines communications throughput as the amount of information transferred within the system in a given amount of time. For analog systems the throughput is measured by the number of voice channels, and for digital systems it is measured in bits per second ("bps"). Therefore, if analog facilities are being replaced by analog facilities, the PCS licensee will be required to provide the incumbent with an equivalent number of 4 kHz voice channels. If an existing digital system is being replaced by digital facilities, the PCS licensee will be required to provide the incumbent with equivalent data loading bps in order for the system to be considered comparable. The Commission agrees with commenters that the more difficult issue will be determining equivalent throughput when analog equipment is being replaced with digital equipment, which can be like comparing "apples with oranges." If disputes arise, the Commission will determine on a case-by-case basis whether comparable throughput has been achieved. For guidance, the Commission plans to refer to other parts of its rules where analog-digital comparisons have been made, such as the minimum channel loading requirements for fixed point-to-point microwave systems in Section 21.710(d).

17. The Commission also concludes that, during involuntary relocation, PCS licensees will only be required to provide incumbents with enough throughput to satisfy their needs at the time of relocation, rather than to match the overall capacity of the system, as some microwave incumbents suggest. For example, the Commission will not require that a 2 GHz incumbent with 5 MHz of bandwidth be relocated to a 5 MHz bandwidth, 6 GHz location when its current needs only justify a 1.25 MHz bandwidth system. If a dispute arises, the Commission will determine what an incumbent's needs are by looking at actual system use rather than total capacity at the time of relocation. The Commission expressly adopted channelization plans for the 6 GHz band with bandwidth requirements ranging from 400 kHz to 30 MHz to increase the efficiency of use by point-to-point microwave operations. Although the Commission recognizes that this policy may affect an incumbent's ability to increase its capacity over time, the Commission agrees with PCS licensees that the public interest would not be

served if spectrum is automatically held in reserve for all incumbents with the expectation that some may require additional capacity in the future. The Commission's goal is to foster efficient use of the spectrum, which would be thwarted if all incumbents are relocated to systems with capacity that exceeds their current needs. Also, limiting spectrum to current needs serves the public interest, because the Commission believes that it will promote the development of spectrum-efficient technology capable of increasing capacity without increasing bandwidth.

18. *Reliability.* The Commission defines system reliability as the degree to which information is transferred accurately within the system. As stated in the *Cost-Sharing Notice*, the reliability of a system is a function of equipment failures (*e.g.*, transmitters, feed lines, antennas, receivers, battery back-up power, etc.), the availability of the frequency channel due to propagation characteristic (*e.g.*, frequency, terrain, atmospheric conditions, radio-frequency noise, etc.), and equipment sensitivity. The Commission defines comparable reliability as that equal to the overall reliability of the incumbent system, and the Commission will not require the system designer to build the radio link portion of the system to a higher reliability than that of the other components of the system. For example, if an incumbent system had a radio link reliability of 99.9999 percent, but an overall reliability of only 99.999 percent because of limited battery back-up power, the Commission requires that the new system have a radio link reliability of 99.999 percent to be considered comparable. For digital data systems this would be measured by the percent of time the bit error rate ("BER") exceeds a desired value, and for analog or digital voice transmissions this would be measured by the percent of time that audio signal quality met an established threshold. Under this approach, for a replacement digital system to be comparable, the data rate throughput must be equal to or greater than that of the incumbent system with an equal or greater reliability. If an analog voice system is replaced with a digital voice system the resulting frequency response, harmonic distortion, signal-to-noise ratio, and reliability would be the factors considered. The Commission declines to adopt AUE's request that the Commission include a "system age" component that takes into account how the age of a given system can affect system reliability, because the

Commission does not have enough information to determine how age will affect a given system. Moreover, the Commission believes that older equipment of high quality may be as reliable as newer equipment of low quality.

19. *Operating Costs.* The Commission defines operating costs as the cost to operate and maintain the microwave system. These costs fall into several categories. First, the incumbent must be compensated for any increased recurring costs associated with the replacement facilities (e.g., additional rental payments, increased utility fees). Although the Commission originally proposed that recurring costs should be limited to a ten-year license term, the Commission is persuaded by PCS licensees that a five-year time period—which is the length of a microwave license in the 1850–1990 MHz band—is a more appropriate time frame, because it strikes an appropriate balance between the burden placed on PCS licensees who must relocate many incumbents, and the burden placed on incumbents that are being forced to relocate. Furthermore, the Commission believes that the five-year time period is not unfair to incumbents because, by five years from now, many incumbents would have been forced to bear some of these costs themselves—such as increased rents—if they had not already been relocated by PCS licensees. Moreover, the Commission is also persuaded that a five-year time period provides incumbents with sufficient time for budget planning and resource allocation to meet such expenses once the five-year period expires. Finally, the Commission concludes that a PCS licensee is permitted but not required to satisfy its obligation by making a lump-sum payment based on present value using current interest rates, as suggested by some incumbents.

20. Second, increased maintenance costs must be taken into consideration when determining whether operating costs are comparable. As several commenters point out, maintenance costs associated with analog systems are frequently higher than the costs for equivalent digital systems, because manufacturers are producing mostly digital equipment and analog replacement parts can be difficult to find. The Commission declines to adopt API's suggestion that "serviceability"—which would require that access to those elements essential to restoration of service be equal to or greater than the original system—should be adopted as a fourth element, however, because the Commission believes that the ease of servicing the equipment will affect

repair costs, which will be factored into operating costs. Furthermore, the Commission agrees with incumbents that, in some instances, the operating costs of 6 GHz analog equipment might be so high that analog replacement facilities would not qualify as comparable. On the other hand, if an available analog replacement system would provide equivalent technical capability without increasing the incumbent's operating costs or sacrificing any of the other factors the Commission has identified, the Commission agrees with PCS licensees that such an analog system would be acceptable. In sum, the Commission's goal is to ensure that incumbents are no worse off than they would be if relocation were not required, not to guarantee incumbents superior systems at the expense of PCS licensees.

21. *Trade Offs.* The Commission also concludes that comparable replacement facilities may not be provided by trading off any of the system parameters discussed above. Thus, the Commission agrees with incumbents that PCS licensees should not be permitted to compromise on one aspect of comparability, such as system reliability, by compensating with another factor, such as increased throughput. Based on the record in this proceeding, the Commission believes that the factors the Commission has identified are central to the concept of comparability, and therefore the replacement system provided to an incumbent during an involuntary relocation must be at least equivalent to the incumbent's existing system with respect to system reliability, throughput, and operating costs. However, other aspects of the system (e.g., bandwidth) do not have to be equivalent to the incumbent's original 2 GHz system. As PCS licensees point out, it might be possible to achieve comparability with respect to the three main factors, even though all of the features on the replacement equipment are not identical to those of the original system. Other media, such as land lines, would also be acceptable, provided that comparability is achieved.

22. *Depreciation.* In the *Cost-Sharing Notice*, the Commission also sought comment on whether and how depreciation of equipment and facilities should be taken into account, and whether it would be appropriate for a PCS licensee to compensate an incumbent only for the depreciated value of the old equipment. Some PCS licensees contend that depreciation should be taken into account during the mandatory period as a means of encouraging incumbents to accept offers

during the voluntary period. The Commission is persuaded by incumbents, however, that compensation for the depreciated value of old equipment would not enable them to construct a comparable replacement system without imposing costs on the incumbent, which would be inconsistent with the Commission's relocation rules. The Commission therefore concludes that the depreciated value of old equipment should not be a factor when determining comparability.

#### b. *Relocating Individual Links*

23. The Commission affirms its decision in the 1994 *Memorandum Opinion and Order* that PCS licensees are obligated to pay to relocate incumbents to comparable facilities only with respect to the specific microwave links for which their systems pose an interference problem. Thus, the Commission clarifies that PCS licensees are not under an obligation to move an incumbent's entire system at once, unless all of the links in the incumbent's system would be subject to interference by the PCS licensee. Although system-wide relocations may be preferable and less disruptive to the incumbent, the Commission concludes that it would be inappropriate to increase a PCS licensee's monetary obligation, e.g., by requiring it to pay to relocate links that it never intended to move, after the licenses have already been auctioned. In fact, several commenters—particularly those bidding in the C block auction—have stated in their comments that they are intentionally designing their systems in such a way that existing links will not have to be relocated. Moreover, incumbents are not harmed by this policy because, as PCS licensees point out, many incumbents already operate networks that consist of both 2 GHz and 6 GHz links or a combination of digital and analog technology. Furthermore, the Commission's rules protect microwave operations by requiring PCS licensees to provide incumbents with a seamless transition from their old facilities to the replacement facilities. Thus, if providing a seamless transition requires it, PCS licensees must relocate additional links or pay for additional costs associated with integrating the new links into the old system, such as employing a different modulation technique to preserve the system's overall integrity. If problems arise, the PCS licensee is required under the Commission's rules to remedy the situation.

24. To ease the burden on incumbents, the Commission has adopted a cost-sharing plan to promote

the relocation of all links in a system at the same time. By enabling PCS licensees to collect reimbursement from subsequent licensees that benefit from the relocation, the Commission believes that its cost-sharing plan will promote a larger number of system-wide relocations.

#### c. Transaction Expenses

25. The Commission concludes that incumbents should be reimbursed only for legitimate and prudent transaction expenses that are directly attributable to an involuntary relocation, subject to a cap of two percent of the "hard" costs involved (e.g., equipment, new towers, site acquisition). Although the Commission proposed in the *Cost-Sharing Notice* that PCS licensees should not be required to reimburse incumbents for any "extraneous" expenses, such as fees for attorneys and consultants, the Commission is persuaded by commenters that some reimbursement for outside assistance is necessary, because not all incumbents have expertise in these fields within their organizations. The Commission concludes that PCS licensees are not required to pay incumbents for internal resources devoted to the relocation process, however, because such expenses are difficult to determine and would be too hard for a PCS licensee to verify. Moreover, the benefits incumbents receive as a result of relocation, such as superior equipment, are likely to outweigh any internal costs they incur.

26. To prevent abuses, PCS licensees will not be required to reimburse incumbents for transaction costs that exceed two percent of the hard costs associated with an involuntary relocation. Rather than adopt a cap on the dollar amount that can be spent on transaction expenses, the Commission believes that a percentage of the total hard costs, as suggested by Cox & Smith, is more appropriate. Therefore, if complicated and costly actions, such as land acquisition, are required to accomplish relocation, the permissible amount of reimbursement for transaction costs would be higher. The Commission also believes that a two-percent cap is reasonable and strikes a fair balance between the concerns of PCS licensees and microwave incumbents. The Commission derived two percent from CIPCO's suggested cap of \$5,000 per link, which is two-percent of \$250,000—the amount the Commission has determined to be the average cost of relocating a link. Furthermore, PCS licensees will not be required to pay for transaction costs incurred by incumbents during the

voluntary or mandatory negotiation periods once an involuntary relocation is initiated, nor will they be required to pay for fees that cannot be legitimately tied to the provision of comparable facilities, such as consultant fees for determining how much of a premium payment PCS licensees would be willing to pay. The Commission agrees with PCS licensees that they should not have to reimburse incumbents for such fees, because it would encourage incumbents to view the relocation process as a business opportunity. Furthermore, requiring PCS licensees to pay such fees does not serve the public interest, because added expenses are likely to be passed on to the public in the form of increased PCS subscriber fees.

#### d. Twelve-Month Trial Period

27. As a preliminary matter, the Commission clarifies that the twelve-month trial period is only automatic if an involuntary relocation occurs. Therefore, if the parties decide that a trial period should be established for relocations that occur during the voluntary and mandatory period, they must provide for such a period in the relocation contract.

28. Because our proposed clarifications to the twelve-month trial period received broad record support, the Commission adopts the following clarifications to Section 94.59(e) of our rules:

(1) The trial period will commence on the date that the incumbent begins full operation (as opposed to testing) on the replacement link; and

(2) An incumbent's right to a twelve-month trial period resides with the incumbent as a function of the Commission's relocation rules, regardless of whether the incumbent has previously surrendered its license. If, however, a microwave licensee has retained its 2 GHz authorization during the trial period, it is required to return the license to the Commission at the conclusion of that period.

In Commission's initial rule, 47 CFR §94.59(c), the Commission stated that they would convert the microwave incumbent to secondary status after the replacement system is built and the microwave incumbent has been provided with a reasonable amount of time to determine comparability. The Commission sees no reason, however, for the incumbent to retain its 2 GHz license once it has been relocated. The Commission declines to adopt the suggestion that the Commission's twelve-month trial period should be extended or begin again if a problem arises. The Commission concludes that

incumbents are adequately protected without such an extension because, by the end of the twelve-month period, the Commission's rules require that they be operating on facilities that are comparable. If at the end of the twelve months the PCS licensee has still failed to meet this requirement, it must relocate the incumbent back to its former or equivalent 2 GHz frequencies. Thus, the expiration of the twelve-month period does not leave the incumbent without further recourse.

29. As a related matter, the Commission clarifies that, even after the PCS licensee has initiated the involuntary relocation process, a mutually acceptable agreement will still be permissible. If the parties do sign an agreement specifying their own terms, the Commission will treat the agreement in the same manner as the Commission treats agreements that are consummated during the voluntary and mandatory periods, and the parties will be bound by contract rather than our rules. The Commission agrees with commenters that neither incumbents nor PCS licensees are harmed by such a policy, because neither party is obligated to enter into such an agreement. If the agreement falls through, however, the incumbent will be subject to involuntary relocation.

30. Finally, the Commission declines to reduce the trial period to one month as suggested by PCS licensees. The Commission agrees with incumbents that twelve months is an appropriate time period, because it gives the incumbent the opportunity to ensure that the facilities function properly during changes in climate and vegetation. The Commission also takes this opportunity to clarify that PCS licensees are not required to leave the incumbent's former 2 GHz spectrum vacant during the twelve-month trial period. The Commission agrees with PCIA that requiring PCS licensees to hold this spectrum in reserve would delay the deployment of PCS for at least one year, which does not serve the public interest. The Commission also clarifies that, if the microwave incumbent demonstrates that the new facilities are not comparable to the former facilities, the PCS licensee must remedy the defects or pay to relocate the microwave licensee to one of the following: its former or equivalent 2 GHz channels, another comparable frequency band, a land-line system, or any other facility that qualifies as comparable.

*e. Request for Clarification of Involuntary Relocation Procedures*

31. The Commission believes that AT&T Wireless, *et al.*, have raised legitimate issues regarding the procedures for implementing involuntary relocation at the conclusion of the mandatory negotiation period. The issues raised in their letter, however, were not included in the *Cost-Sharing Notice*, nor were they raised in any of the regularly filed comments or reply comments in this proceeding. Because of the relative lateness of the parties' *ex parte* filing and the lack of opportunity for other parties to comment, the Commission declines to address these issues at this time. Nevertheless, the Commission encourages the parties to the April 15 letter or any other interested parties to file a petition for rulemaking on the issues raised in the letter.

#### 4. Public Safety Certification

32. The Commission agrees with PCS licensees that certification is necessary to ensure that only those public safety incumbents meriting special status are allowed the advantages of extended negotiation periods. The Commission also agrees with incumbents, however, that self-certification is appropriate, because self-certification will not burden public agencies with time-consuming reporting requirements. The Commission declines to adopt the suggestion made by AT&T that all public safety incumbents should be required to apply to the Commission for certification, because such a requirement would be administratively burdensome for the Commission and could delay negotiations. Furthermore, the Commission believes that PacBell's concerns about biased public agencies are overstated, because the Commission does not believe public agencies will be inclined to falsify the certification.

33. The Commission concludes that, in order for a public safety licensee to qualify for extended negotiation periods under the Commission's rules, the department head responsible for system oversight must certify to the PCS licensee requesting relocation that:

(1) The agency is a licensee in the Police Radio, Fire Radio, Emergency Medical, Special Emergency Radio Services, or that it is a licensee of other Part 94 facilities licensed on a primary basis under the eligibility requirements of Part 90, Subparts B and C; and

(2) the majority of communications carried on the facilities at issue involve safety of life and property.

A public safety licensee must provide certification within 30 days of a request

from a PCS licensee or the PCS licensee may presume that special treatment is inapplicable to the incumbent. If an incumbent falsely certifies to a PCS licensee that it qualifies for the extended time periods, the incumbent will be in violation of the Commission's rules and subject to appropriate penalties. Such an incumbent would also immediately become subject to the non-public safety time periods.

#### 5. Dispute Resolution

34. Because relocations that occur pursuant to agreements arrived at during the voluntary and mandatory period are relocations pursuant to private contracts, the Commission anticipates that parties will pursue common law contract remedies if a dispute arises. Thus, if parties do not agree to use alternative dispute resolution techniques, the Commission expects that they will file suit in a court of competent jurisdiction.

35. To the extent that disputes arise over violation of the Commission's rules (e.g., the good faith requirement, involuntary relocation procedures), the Commission has stated that parties are encouraged to use ADR techniques. Commenters agree that resolution of such disputes entirely by the Commission's adjudication processes would be time consuming and costly to all parties. Therefore, the Commission continues to encourage parties to employ ADR techniques when disputes arise.

#### 6. Ten Year Sunset

36. As the Commission stated in the *Cost-Sharing Notice*, the Commission continues to believe that an emerging technology licensee's obligation to relocate 2 GHz microwave incumbents should not continue indefinitely; however, the Commission is also persuaded by incumbents that immediate conversion to secondary status in the year 2005 may not be necessary, especially with respect to rural links that would not interfere with any PCS systems. To strike a fair balance between these competing interests, the Commission concludes that 2 GHz microwave incumbents will retain primary status unless and until an emerging technology licensee requires use of the spectrum, but that the emerging technology licensee will not be obligated to pay relocation costs after the relocation rules sunset, *i.e.*, ten years after the voluntary period begins for the first emerging technology licensees in the service (which is April 4, 2005, for PCS licensees and unlicensed PCS). Once the relocation rules sunset, an emerging technology licensee may

require the incumbent to either cease operations or pay to relocate itself to alternate facilities, provided that the emerging technology licensee intends to turn on a system within interference range of the incumbent, as determined by TIA Bulletin 10-F or any standard successor thereto. Notification must be in writing, and the emerging technology licensee must provide the incumbent with no less than six months to vacate the spectrum. Emerging technology licensees may provide notice prior to the date that the relocation rules sunset, but may not turn on their systems until after that date. After the six-month notice period has expired, the incumbent will be required to turn its 2 GHz license back into the Commission, unless the parties have entered into an agreement which allows the incumbent to continue to operate on a mutually agreed upon basis. The Commission concludes that their decision promotes spectrum efficiency, because it allows microwave incumbents to continue to operate in the 2 GHz band until their spectrum is needed by an emerging technology licensee.

37. The Commission believes that a sunset date for the Commission's microwave relocation rules serves the public interest, because it provides certainty to the process and prevents the emerging technology licensee from being required to pay for relocation expenses indefinitely. Moreover, the Commission agrees with commenters that ten years provides incumbents with sufficient time (1) to negotiate a relocation agreement or (2) to plan for relocation themselves. In fact, well over ten years will have passed since the Commission first announced our intention to reallocate 2 GHz spectrum to foster the introduction of emerging technologies services in 1992. In other services, the Commission has provided incumbents with even less time to complete relocation. For example, private operational fixed microwave stations in the 12 GHz band received only five years to relocate their facilities before they became secondary to the Direct Broadcast Satellite ("DBS") Service.

38. The Commission also believes that adopting a sunset date is important, because it will provide 2 GHz microwave incumbents with an incentive to relocate to other bands when it comes time to change or replace their equipment. At the current time, the Commission's licensing records indicate that most 2 GHz microwave incumbents use analog equipment. APCO contends that operating 2 GHz analog microwave systems is becoming infeasible, because analog systems are

now outdated and replacement parts will soon be difficult, if not impossible, to find. APCO also states that most incumbents have long-term plans to replace their analog systems with digital systems once the useful life of current equipment has expired and/or adequate funding has been found. As BellSouth points out, by the time the sunset date arrives, much of the microwave equipment operating today at 2 GHz is likely to be either fully amortized or in need of replacement. The Commission believes that informing 2 GHz incumbents that they will have to cover their own relocation expenses after ten years will encourage incumbents to relocate to another band when they replace existing equipment. By contrast, if emerging technology licensees are required to pay to relocate incumbents regardless of when the relocation occurs, incumbents will have little incentive to make such a transition to an alternate band voluntarily. For similar reasons, the Commission rejects the argument by incumbents that PCS licensees should be required to make relocation offers prior to the sunset date to all incumbents located within their market area. Again, incumbents would have no incentive to change out their own systems voluntarily if they knew that PCS licensees would be required to cover the expenses for them at a later date. Furthermore, even if the Commission had not reallocated the spectrum, these incumbents would have had to plan ahead for repair costs, replacement equipment, and infrastructure improvement. Given that most incumbents will incur significant expenses in any event when they replace their analog system with digital equipment, the Commission believes that providing an incentive to incumbents to relocate voluntarily at the same time they purchase new equipment serves the public interest. In sum, the Commission believes that the benefits of imposing a sunset date outweigh the burdens, if any, that such a date may impose.

39. Finally, the Commission believes that six months is a reasonable amount of time for most incumbents to relocate their facilities, especially because they will have been on notice for ten years that they might be requested to move. Nevertheless, the Commission acknowledges that special circumstances might warrant an extension of the six-month period in some instances to enable the incumbent to complete relocation activities. If the incumbent is unable to move or cannot complete relocation in time, the Commission encourages the parties to

negotiate a mutually acceptable solution. In the event that the parties cannot agree on a schedule or an alternative arrangement, the Commission will entertain extension requests on a case-by-case basis. However, the Commission intends to grant such extensions only if the incumbent can demonstrate that: (1) it cannot relocate within the six-month period (e.g., because no alternative spectrum or other reasonable option is available), and (2) the public interest would be harmed if the incumbent is forced to terminate operations (e.g., if public safety communications services would be disrupted).

#### *B. Cost-Sharing Plan*

##### 1. Overview

40. The Commission adopts its proposed plan with a few modifications suggested by commenters. The Commission believes that cost-sharing serves the public interest because (1) it will distribute relocation costs more equitably among PCS licensees, and (2) it will promote the relocation of entire microwave systems at once, which will benefit microwave incumbents. The Commission also believes that cost-sharing will accelerate the relocation process for the PCS band as a whole, thus promoting more rapid deployment of service to the public. Furthermore, the Commission concludes that the benefits of cost-sharing outweigh the costs that may be incurred by licensees who become subject to reimbursement obligations. Under the plan, these licensees will be required to pay reimbursement obligations only when they have benefitted from the spectrum-clearing efforts of another party. Moreover, as discussed in greater detail below, the Commission is adopting limits on reimbursement to ensure that licensees subject to the plan do not bear a disproportionate cost. The Commission concludes that these provisions amply protect the interests of such licensees.

41. Under the Commission's cost-sharing plan, a PCS licensee obtains reimbursement rights for a particular link on the date that it signs a relocation agreement with the microwave incumbent operating on the link at issue. Within ten business days of the date the agreement is signed, the PCS licensee submits documentation of the agreement to a non-profit clearinghouse, which will be selected by the Wireless Telecommunications Bureau ("Bureau"). If the clearinghouse has not yet been selected, the PCS relocater will be responsible for submitting documentation of a relocation

agreement within ten business days of the date that the Bureau announces that the clearinghouse has been established and has begun operation.

42. Prior to commencing commercial operation, each PCS licensee is required to send a prior coordination notification ("PCN") to all existing users in the area. At the same time, each PCS licensee shall file a copy of the PCN with the clearinghouse. The clearinghouse will then apply an objective test to determine whether the proposed base station would have posed an interference problem to the relocated link. If the test shows that the proposed base station is close enough to have posed an interference problem, the clearinghouse will notify the subsequent licensee that it is required to reimburse the PCS relocater under the cost-sharing formula for a portion of the expenses the relocater incurred to move the link. UTAM will be required to reimburse PCS relocaters who relocate microwave links that were operating in the unlicensed PCS band.

43. The clearinghouse will determine the amount that the subsequent PCS licensee must pay the relocater through the use of a cost-sharing formula. The formula takes into consideration such factors as the actual amount paid to relocate the link and the number of PCS licensees that would have interfered with the link. All calculations will be done on a per-link basis. The reimbursement amount also decreases over time to reflect the fact that the initial PCS relocater has received the benefit of being first to market, and to ensure that the PCS relocater pays the largest amount, which the Commission believes will provide an incentive to the relocater to limit relocation expenses. As an additional protection for later-entrants, the Commission has imposed a cap of \$250,000 per link, with an additional \$150,000 if a new or modified tower is required, on the amount that a PCS relocater may recoup for the relocation of each individual microwave link. PCS relocaters are entitled to full reimbursement, up to the cap, for relocating non-interfering links fully outside their market area or licensed frequency band. Also, costs that are incurred prior to the selection of a clearinghouse will be reimbursable after a clearinghouse is established.

44. Once a PCS licensee receives written notification from the clearinghouse of its reimbursement obligation, it must pay the entire amount owed within thirty calendar days, with the exception of those small businesses that qualify for installment payments under the Commission's auction rules. UTAM will be required to

reimburse a PCS relocater once a county is cleared of enough microwave links to enable unlicensed PCS devices to operate. Because UTAM receives its funding in small increments over an extended period of time, UTAM will be permitted to satisfy its reimbursement obligation by making quarterly installment payments to the PCS relocater over a period of five years, at an interest rate of prime plus three percent.

45. The cost-sharing plan will sunset for all PCS licensees ten years after the date that voluntary negotiations commenced for A and B block licensees, on April 4, 2005. However, the sunset date will not eliminate the existing obligations of PCS licensees that are paying their portion of relocation costs on an installment basis. Those licensees must continue their payments until the obligation is satisfied. Finally, while the Commission concludes that the cost-sharing plan is in the public interest, the Commission is conditioning its adoption of these rules on approval of an entity or organization to administer the plan. Once an administrator is selected, the cost-sharing rules will take effect.

46. *Participation in Cost-Sharing Plan.* By this *Report and Order*, the Commission mandates that all PCS licensees benefitting from spectrum clearance by other PCS licensees must contribute to such relocation costs. As the Commission emphasized in the *Cost-Sharing Notice*, however, PCS licensees remain free to negotiate alternative cost-sharing terms. The Commission also agrees with commenters that allowing PCS licensees to enter into such private agreements serves the public interest, because it adds flexibility to the cost-sharing process and may enable such parties to save both time and the administrative expense of seeking reimbursement from a clearinghouse. The Commission therefore concludes that licensees are not required to participate in the Commission's cost-sharing plan if they enter into alternative cost-sharing agreements. The Commission also agrees with commenters that all parties to a separate agreement will still be liable under the cost-sharing plan to other PCS licensees that incur relocation expenses. Finally, the Commission concludes that parties to a private cost-sharing agreement may also seek reimbursement through the clearinghouse from PCS licensees that are not parties to the agreement.

## 2. Dispute Resolution Under the Cost-Sharing Plan

47. The Commission agrees with those commenters who argue that disputes arising out of the cost-sharing plan, such as disputes over the amount of reimbursement required, should be brought to the clearinghouse first for resolution. At the time the dispute is brought to the clearinghouse, the parties will be required to submit appropriate documentation, e.g., an independent appraisal of the equipment expenses at issue, to support their position. To the extent that disputes cannot be resolved by the clearinghouse, the Commission encourages parties to use expedited ADR procedures, such as binding arbitration, mediation, or other ADR techniques. At this time, the Commission does not designate a specific penalty for failure to comply with cost-sharing requirements; however, the Commission emphasizes that they intend to use the full realm of enforcement mechanisms available to them in order to ensure that reimbursement obligations are satisfied.

## 3. Administration of the Cost-Sharing Plan

48. The Commission agrees with those commenters who suggest that the clearinghouse administrator should be selected through an open process. The Commission also believes it is essential for the plan to be administered by industry to the fullest extent possible. Therefore, before the Commission implements the plan, the Commission will seek specific proposals from parties who wish to act as administrator and will request public comment on any such proposals.

49. The Commission delegates to the Wireless Bureau the authority to select one or more entities to create and administer a neutral, not-for-profit clearinghouse. Selection shall be based on criteria established by the Bureau. The Bureau shall publicly announce the criteria and solicit proposals from qualified parties. Once such proposals have been received, and an opportunity has elapsed for public comment on them, the Bureau shall make its selection. When the Bureau selects an administrator, it shall announce the effective date of the cost-sharing rules.

### C. Licensing Issues

50. As of the effective date of the new rules, the Commission will grant pending and newly filed applications for all major modifications and all extensions to existing 2 GHz microwave systems on a secondary basis. The Commission will grant primary status

for the following limited number of technical changes: decreases in power, minor changes in antenna height, minor location changes (up to two seconds), any data correction which does not involve a change in the location of an existing facility, reductions in authorized bandwidths, minor changes in structure heights, changes in ground elevation (but preserving centerline height), and changes in equipment. All other modifications will be permitted on a secondary basis, unless (1) the incumbent affirmatively justifies primary status, and (2) the incumbent establishes that the modification would not add to the relocation costs of PCS licensees. The Commission declines to adopt the suggestion made by PCS licensees that no modifications should be allowed even on a secondary basis, because some incumbents might not need to relocate for several years, and they should be permitted to make modifications to their systems during that time period. The Commission also disagrees with incumbents that the Commission's licensing policy should be expanded, because the Commission believes that limiting primary site grants is necessary to protect the interests of PCS licensees. In sum, the Commission believes that granting secondary site authorizations serves the public interest, because it balances existing licensees' need to expand their systems with the goal of minimizing the number of microwave links that PCS licensees must relocate.

51. Furthermore, the Commission clarifies that secondary operations may not cause interference to operations authorized on a primary basis, and they are not protected from interference from primary operations. Thus, an incumbent operating under a secondary authorization must cease operations if it poses an interference problem to a PCS licensee. However, prior to commencing operations, PCS licensees are obligated to provide all incumbents that are operating within interference range, regardless of whether an incumbent is operating under a primary or a secondary site authorization, with thirty days notice that they will be commencing operations in the vicinity. Finally, PCS licensees are under no obligation to pay to relocate secondary links that exist within their market area and frequency block.

### D. Application to Other Emerging Technology Licensees

52. The Commission agrees with AT&T that the cost-sharing plan and rule clarifications adopted in this proceeding should apply to all emerging technology services, including those

services in the 2110–2150 and 2160–2200 GHz band that have not yet been licensed, because the microwave relocation rules already apply to all emerging technology services. For the same reasons that these changes will facilitate the deployment of PCS, the Commission believes these changes will also facilitate the deployment of other emerging technology services. For example, these changes and clarifications will provide additional guidance and help to accelerate negotiations between the parties. However, as new services develop, the Commission may review its relocation rules and make modifications to these rules where appropriate. In addition, while the Commission concludes that cost-sharing should apply to all emerging technology services, the Commission does not adopt specific cost-sharing rules for new services at this time, but will develop such rules in future proceedings.

### III. Conclusion

53. The Commission believes that the rules adopted in this *Report and Order* will promote the public policy goals set forth by Congress. The cost-sharing formula adopted herein will facilitate the rapid relocation of microwave facilities operating in the 2 GHz band, and will allow PCS licensees to offer service to the public in an expeditious manner.

### IV. Procedural Matters

#### A. Regulatory Flexibility Act

As required by Section 603 of the Regulatory Flexibility Act, an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the *Notice of Proposed Rule Making* in WT Docket No. 95–157, RM–8643. The Commission has prepared a Regulatory Flexibility Analysis of the expected impact on small entities of the proposals suggested in this document. Written comments were requested. The Commission's final analysis is as follows:

*Need for and purpose of the action:* This rulemaking proceeding has implemented Congress' goal of encouraging emerging technologies and bringing innovative commercial wireless services to the public in an efficient manner. The cost-sharing plan will promote the efficient relocation of microwave licensees by encouraging PCS licensees to relocate entire microwave systems rather than individual microwave links. A cost-sharing plan is necessary to enhance the speed of relocation and provide an incentive to PCS licensees to negotiate system-wide relocation agreements with

microwave incumbents. This action will result in faster deployment of PCS and delivery of service to the public. The Commission has also clarified some terminology regarding certain aspects of the Commission's rules for microwave relocation contained in the Commission's *Emerging Technologies* proceeding, Docket No. 92–9.

*Issues raised in response to the IRFA:* The American Public Power Association ("APPA") states that conversion of 2 GHz microwave systems to secondary status in the year 2005 would have a particularly severe impact on the limited budgets of small, non-profit public utility systems.

*Significant alternatives considered and rejected:* Although the Commission has decided not to convert microwave incumbents to secondary status automatically as the Commission proposed in the *Cost-Sharing Notice*, microwave incumbents will be required to pay for their own relocation costs after the sunset date. The Commission has considered the impact of the ten year sunset date, and the Commission has determined that the benefits of imposing a sunset date outweigh the burdens such a date may impose on these incumbents. For further discussion, see Section IV(A)(6), *supra*.

#### B. Paperwork Reduction Act

This *First Report and Order* contains either a proposed or modified information collection. The Commission, as part of its continuing effort to reduce paperwork burdens, invites the general public and the Office of Management and Budget (OMB) to comment on the information collections contained in this *First Report and Order*, as required by the Paperwork Reduction Act of 1995, Public Law 104–13. Comments should address: (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimates; (c) ways to enhance the quality, utility and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology.

*Further Information.* For additional information concerning the information collections contained in this Report and Order, contact Dorothy Conway at (202) 418–0217, or via the Internet at [dconway@fcc.gov](mailto:dconway@fcc.gov).

*Supplementary Information:*

*Title:* Amendment of the Commission's Rules Regarding a Plan for Sharing the Costs of Microwave Relocation, First Report and Order.

*Type of Review:* Revision to existing collection.

*Respondents:* Personal Communications Service licensees that relocate existing microwave operators, subsequent Personal Communications Service applicants potentially benefitted by such relocation, and incumbent microwave operators.

*Number of Respondents:* Approximately 2,000.

*Estimated Time Per Response:* One hour to compose, type and mail the information to the requesting party.

*Total Annual Burden:* Approximately 2,000 hours.

*Estimated Costs Per Respondent:* Assuming that respondent uses one attorney at \$200/hour to compose, type and mail the information to the requesting party, respondents' costs are estimated at approximately \$200 per one-time response.

*Needs and Uses.* The Commission recently adopted a *First Report and Order* regarding a plan for sharing the costs of relocating microwave facilities currently operating in the 1850 to 1990 MHz (2 GHz) band, which has been allocated for use by broadband Personal Communications Services (PCS).

*Amendment of the Commission's Rules Regarding a Plan for Sharing the Costs of Microwave Relocation, First Report and Order*, adopted April 25, 1996. The *First Report and Order* establishes a mechanism whereby PCS licensees that incur costs to relocate microwave links would receive reimbursement for a portion of those costs from other PCS licensees that also benefit from the resulting clearance of the spectrum.

The *First Report and Order* concludes, *inter alia*, that in order for a public safety licensee to qualify for extended negotiation periods under the Commission's Rules, the department head responsible for system oversight must certify to the PCS licensee requesting relocation that:

(1) the agency is a licensee in the Police Radio, Fire Radio, Emergency Medical, Special Emergency Radio Services, or that it is a licensee of other Part 94 facilities licensed on a primary basis under the eligibility requirements of Part 90, Subparts B and C; and

(2) the majority of communications carried on the facilities at issue involve safety of life and property.

A public safety licensee must provide certification within 30 days of a request from a PCS licensee, or the PCS licensee may presume that special treatment is inapplicable to the incumbent.

In addition, the *First Report and Order* concludes that good faith negotiation between parties involved in microwave relocation requires each party to provide information to the other that is reasonably necessary to facilitate the relocation process. For example, upon request by a PCS licensee, the Commission expects incumbents to provide any information that the PCS licensee needs in order to evaluate the cost of relocating the incumbent to comparable facilities.

The legal authority for this proposed information collection includes 47 U.S.C. Sections 154(i), 303(c), 303(f), 303(g), 303(r) and 332. The information collection would not affect any FCC Forms. The proposed collection would increase minimally the burden on public safety licensees seeking to qualify for an extended negotiation period by requiring such a licensee to self-certify to the PCS licensee requesting relocation that it is indeed a public safety licensee, and by requiring that licensees share information in good faith.

#### C. *Ex Parte* Rules—Non-Restricted Proceeding

This is a non-restricted notice and comment rulemaking proceeding. *Ex parte* presentations are permitted except during the Sunshine Agenda period, provided they are disclosed as provided in Commission rules.

#### D. Authority

Authority for issuance of this *Report and Order* is contained in the Communications Act, Sections 4(i), 7, 303(c), 303(f), 303(g), 303(r), and 332, 47 U.S.C. §§ 154(i), 157, 303(c), 303(f), 303(g), 303(r), 332, as amended.

#### E. Ordering Clauses

Accordingly, *it is ordered* that Section 15.307 is amended as set forth below and will become effective August 12, 1996.

*It is further ordered* that Section 22.602 is amended as set forth below and will become effective August 12, 1996.

*It is further ordered* that Sections 24.5, 24.237, 24.239, 24.241, 24.243, 24.245, 24.247, 24.249, 24.251, 24.251 and 24.253 are amended as set forth below.

*It is further ordered* that the cost-sharing plan is conditioned on approval by the Wireless Telecommunications Bureau of an entity (or entities) to administer the plan, as described in Section IV(B)(3), *supra*.

*It is further ordered* that Part 24 rule changes will become applicable on the date that the Wireless Telecommunications Bureau selects a

clearinghouse to administer the cost-sharing plan. The Commission will issue a public announcement after the selection has been made.

*It is further ordered* that Sections 101.3, 101.67, 101.69, 101.71, 101.73, 101.75, 101.77, 101.79, 101.81 and 101.147, the new Part 101 (effective August 1, 1996) of the Commission's rules are amended as set forth below and will become effective August 1, 1996.

*It is further ordered* that rules requiring Paperwork Reduction Act approval shall become effective upon approval by the Office of Management and Budget pursuant to the Paperwork Reduction Act of 1995, Public Law No. 104-13;

*It is further ordered that*, as of the effective dates of the rules listed herein, the Commission will only grant primary status to applications for minor modifications that would not add to the relocation costs of PCS licensees, as described in Section IV(C) *supra*.

*It is further ordered that*, as of the effective dates of the rules listed herein, the Commission will grant applications for major modifications and extensions to existing 2 GHz microwave systems only on a secondary basis, as described in Section IV(C) *supra*.

*It is further ordered* that the Regulatory Flexibility Analysis, as required by Section 604 of the Regulatory Flexibility Act, and as set forth in Section VII(A) is *adopted*.

*It is further ordered* that the Secretary shall send a copy of this *First Report and Order* to the Chief Counsel for Advocacy of the Small Business Administration.

#### List of Subjects

##### 47 CFR Part 15

Radio.

##### 47 CFR Part 22

Radio.

##### 47 CFR Part 24

Personal communications services.

##### 47 CFR Part 101

Fixed microwave services.

Federal Communications Commission.

William F. Caton,  
*Acting Secretary.*

#### Rule Changes

Parts 15, 22, 24 and 101 of Chapter I of Title 47 of the Code of Federal Regulations are amended as follows:

## PART 15—RADIO FREQUENCY DEVICES

1. The authority citation for Part 15 is revised to read as follows:

Authority: 47 U.S.C. 154, 302, 303, 304, 307 and 544A.

2. Section 15.307 is amended by revising paragraphs (a), (f) and (g) to read as follows:

#### § 15.307 Coordination with fixed microwave service.

(a) UTAM, Inc. is designated to coordinate and manage the transition of the 1910–1930 MHz band from the Private Operational-Fixed Microwave Service (OFS) operating under Part 101 of this chapter to unlicensed PCS operations,

\* \* \* \* \*

(f) At such time as the Commission deems that the need for coordination between unlicensed PCS operations and existing Part 101 Private Operational-Fixed Microwave Services ceases to exist, the disabling mechanism required by paragraph (e) of this section will no longer be required.

(g) Operations under the provisions of this subpart are required to protect systems in the Private Operational-Fixed Microwave Service operating within the 1850–1990 MHz band until the dates and conditions specified in §§ 101.69 through 101.73 of this chapter for termination of primary status. Interference protection is not required for Part 101 stations in this band licensed on a secondary basis.

\* \* \* \* \*

## PART 22—PUBLIC MOBILE SERVICES

3. The authority citation for Part 22 is revised to read as follows:

Authority: 47 U.S.C. 154, 303, unless otherwise noted.

4. Section 22.602 is revised to read as follows:

#### § 22.602 Transition of the 2110–2130 and 2160–2180 MHz channels to emerging technologies.

The microwave channels listed in § 22.591 have been allocated for use by emerging technologies (ET) services. No new systems will be authorized under this part. The rules in this section provide for a transition period during which existing Paging and Radiotelephone Service (PARS) licensees using these channels may relocate operations to other media or to other fixed channels, including those in other microwave bands. For PARS licensees relocating operations to other microwave bands, authorization must be obtained under Part 101 of this chapter.

(a) Licensees proposing to implement ET services may negotiate with PARS licensees authorized to use these channels, for the purpose of agreeing to terms under which the PARS licensees would—

(1) Relocate their operations to other fixed microwave bands or other media, or alternatively,

(2) Accept a sharing arrangement with the ET licensee that may result in an otherwise impermissible level of interference to the PARS operations.

(b) PARS operations on these channels will continue to be co-primary with other users of this spectrum until two years after the FCC commences acceptance of applications for ET services, and until one year after an ET licensee initiates negotiations for relocation of the fixed microwave licensee's operations.

(c) *Voluntary Negotiations.* During the two year voluntary negotiation period, negotiations are strictly voluntary and are not defined by any parameters. However, if the parties have not reached an agreement within one year after the commencement of the voluntary period, the PARS licensee must allow the ET licensee (if it so chooses) to gain access to the existing facilities to be relocated so that an independent third party can examine the PARS licensee's 2 GHz system and prepare an estimate of the cost and the time needed to relocate the PARS licensee to comparable facilities. The ET licensee must pay for any such estimate.

(d) *Mandatory Negotiations.* If a relocation agreement is not reached during the two year voluntary period, the ET licensee may initiate a mandatory negotiation period. This mandatory period is triggered at the option of the ET licensee, but ET licensees may not invoke their right to mandatory negotiation until the voluntary negotiation period has expired. Once mandatory negotiations have begun, a PARS licensee may not refuse to negotiate and all parties are required to negotiate in good faith. Good faith requires each party to provide information to the other that is reasonably necessary to facilitate the relocation process. In evaluating claims that a party has not negotiated in good faith, the FCC will consider, *inter alia*, the following factors:

(1) Whether the ET licensee has made a *bona fide* offer to relocate the PARS licensee to comparable facilities in accordance with Section 101.75(b) of this chapter;

(2) If the PARS licensee has demanded a premium, the type of premium requested (e.g., whether the premium is directly related to

relocation, such as system-wide relocations and analog-to-digital conversions, versus other types of premiums), and whether the value of the premium as compared to the cost of providing comparable facilities is disproportionate (i.e., whether there is a lack of proportion or relation between the two);

(3) What steps the parties have taken to determine the actual cost of relocation to comparable facilities;

(4) Whether either party has withheld information requested by the other party that is necessary to estimate relocation costs or to facilitate the relocation process. Any party alleging a violation of our good faith requirement must attach an independent estimate of the relocation costs in question to any documentation filed with the Commission in support of its claim. An independent cost estimate must include a specification for the comparable facility and a statement of the costs associated with providing that facility to the incumbent licensee.

(e) *Involuntary period.* After the periods specified in paragraph (b) of this section have expired, ET licensees may initiate involuntary relocation procedures under the Commission's rules. ET licensees are obligated to pay to relocate only the specific microwave links to which their systems pose an interference problem. Under involuntary relocation, a PARS licensee is required to relocate, provided that:

(1) The ET applicant, provider, licensee or representative guarantees payment of relocation costs, including all engineering, equipment, site and FCC fees, as well as any legitimate and prudent transaction expenses incurred by the PARS licensee that are directly attributable to an involuntary relocation, subject to a cap of two percent of the hard costs involved. Hard costs are defined as the actual costs associated with providing a replacement system, such as equipment and engineering expenses. ET licensees are not required to pay PARS licensees for internal resources devoted to the relocation process. ET licensees are not required to pay for transaction costs incurred by PARS licensees during the voluntary or mandatory periods once the involuntary period is initiated or for fees that cannot be legitimately tied to the provision of comparable facilities;

(2) The ET applicant, provider, licensee or representative completes all activities necessary for implementing the replacement facilities, including engineering and cost analysis of the relocation procedure and, if radio facilities are involved, identifying and obtaining, on the incumbents behalf,

new channels and frequency coordination; and,

(3) The ET applicant, provider, licensee or representative builds the replacement system and tests it for comparability with the existing 2 GHz system.

(f) *Comparable Facilities.* The replacement system provided to an incumbent during an involuntary relocation must be at least equivalent to the existing PARS system with respect to the following three factors:

(1) *Throughput.* Communications throughput is the amount of information transferred within a system in a given amount of time. If analog facilities are being replaced with analog, the ET licensee is required to provide the PARS licensee with an equivalent number of 4 kHz voice channels. If digital facilities are being replaced with digital, the ET licensee must provide the PARS licensee with equivalent data loading bits per second (bps). ET licensees must provide PARS licensees with enough throughput to satisfy the PARS licensee's system use at the time of relocation, not match the total capacity of the PARS system.

(2) *Reliability.* System reliability is the degree to which information is transferred accurately within a system. ET licensees must provide PARS licensees with reliability equal to the overall reliability of their system. For digital data systems, reliability is measured by the percent of time the bit error rate (BER) exceeds a desired value, and for analog or digital voice transmissions, it is measured by the percent of time that audio signal quality meets an established threshold. If an analog voice system is replaced with a digital voice system, only the resulting frequency response, harmonic distortion, signal-to-noise ratio and its reliability will be considered in determining comparable reliability.

(3) *Operating Costs.* Operating costs are the cost to operate and maintain the PARS system. ET licensees must compensate PARS licensees for any increased recurring costs associated with the replacement facilities (e.g. additional rental payments, increased utility fees) for five years after relocation. ET licensees may satisfy this obligation by making a lump-sum payment based on present value using current interest rates. Additionally, the maintenance costs to the PARS licensee must be equivalent to the 2 GHz system in order for the replacement system to be considered comparable.

(g) The PARS licensee is not required to relocate until the alternative facilities are available to it for a reasonable time to make adjustments, determine

comparability, and ensure a seamless handoff.

(h) *The Commission's Twelve-Month Trial Period.* If, within one year after the relocation to new facilities, the PARS licensee demonstrates that the new facilities are not comparable to the former facilities, the ET applicant, provider, licensee or representative must remedy the defects or pay to relocate the PARS licensee to one of the following: its former or equivalent 2 GHz channels, another comparable frequency band, a land-line system, or any other facility that satisfies the requirements specified in paragraph (f) of this section. This trial period commences on the date that the PARS licensee begins full operation of the replacement link. If the PARS licensee has retained its 2 GHz authorization during the trial period, it must return the license to the Commission at the end of the twelve months.

(i) After April 25, 1996, all major modifications and extensions to existing PARS systems operating on channels in the 2110–2130 and 2160–2180 MHz bands will be authorized on a secondary basis to future ET operations. All other modifications will render the modified PARS license secondary to future ET operations unless the incumbent affirmatively justifies primary status and the incumbent PARS licensee establishes that the modification would not add to the relocation costs of ET licensees. Incumbent PARS licensees will maintain primary status for the following technical changes:

- (1) Decreases in power;
- (2) Minor changes (increases or decreases) in antenna height;
- (3) Minor location changes (up to two seconds);
- (4) Any data correction which does not involve a change in the location of an existing facility;
- (5) Reductions in authorized bandwidth;
- (6) Minor changes (increases or decreases) in structure height;
- (7) Changes (increases or decreases) in ground elevation that do not affect centerline height;
- (8) Minor equipment changes.

(j) *Sunset.* PARS licensees will maintain primary status in the 2110–2130 and 2160–2180 MHz bands unless and until an ET licensee requires use of the spectrum. ET licensees are not required to pay relocation costs after the relocation rules sunset (*i.e.* ten years after the voluntary period begins for the first ET licensees in the service). Once the relocation rules sunset, an ET licensee may require the incumbent to

cease operations, provided that the ET licensee intends to turn on a system within interference range of the incumbent, as determined by TIA Bulletin 10–F or any standard successor. ET licensee notification to the affected PARS licensee must be in writing and must provide the incumbent with no less than six months to vacate the spectrum. After the six-month notice period has expired, the PARS licensee must turn its license back into the Commission, unless the parties have entered into an agreement which allows the PARS licensee to continue to operate on a mutually agreed upon basis. If the parties cannot agree on a schedule or an alternative arrangement, requests for extension will be accepted and reviewed on a case-by-case basis. The Commission will grant such extensions only if the incumbent can demonstrate that:

- (1) It cannot relocate within the six-month period (*e.g.*, because no alternative spectrum or other reasonable option is available), and;
- (2) The public interest would be harmed if the incumbent is forced to terminate operations (*e.g.*, if public safety communications services would be disrupted).

**PART 24—PERSONAL COMMUNICATIONS SERVICES**

5. The authority citation for Part 24 is revised to read as follows:

Authority: 47 U.S.C. 154, 301, 302, 303, 309 and 332.

6. Section 24.5 is amended by adding the definitions for “PCS Relocator” and “UTAM” in alphabetical order to read as follows:

**§ 24.5 Definitions.**

\* \* \* \* \*

*PCS Relocator.* A PCS entity that pays to relocate a fixed microwave link from its existing 2 GHz facility to other media or other fixed channels.

*UTAM.* The Unlicensed PCS Ad Hoc Committee for 2 GHz Microwave Transition and Management, which coordinates relocation in the 1910–1930 MHz band.

\* \* \* \* \*

7. Section 24.237 is amended by revising paragraph (c) to read as follows:

**§ 24.237 Interference protection.**

\* \* \* \* \*

(c) In all other respects, coordination procedures are to follow the requirements of § 101.103(d) of this chapter to the extent that these

requirements are not inconsistent with those specified in this part.

\* \* \* \* \*

8. Subpart E is amended by adding a new heading following Section 24.238 to read as follows:

**Policies Governing Microwave Relocation From the 1850–1990 MHz Band**

9. A new Section 24.239 is added to Subpart E to read as follows:

**§ 24.239 Cost-sharing requirements for Broadband PCS.**

Frequencies in the 1850–1990 MHz band listed in § 101.147(c) of this chapter have been allocated for use by PCS. In accordance with procedures specified in §§ 101.69 through 101.81 of this chapter, PCS entities (both licensed and unlicensed) are required to relocate the existing Fixed Microwave Services (FMS) licensees in these bands if interference to the existing FMS operations would occur. All PCS entities who benefit from spectrum clearance by other PCS entities must contribute to such relocation costs. PCS entities may satisfy this requirement by entering into private cost-sharing agreements or agreeing to terms other than those specified in § 24.243. However, PCS entities are required to reimburse other PCS entities that incur relocation costs and are not parties to the alternative agreement. In addition, parties to a private cost-sharing agreement may seek reimbursement through the clearinghouse (as discussed in § 24.241) from PCS entities that are not parties to the agreement. The cost-sharing plan is in effect during all phases of microwave relocation specified in § 101.69 of this chapter.

10. A new Section 24.241 is added to Subpart E to read as follows:

**§ 24.241 Administration of the Cost-Sharing Plan.**

The Wireless Telecommunications Bureau, under delegated authority, will select an entity to operate as a neutral, not-for-profit clearinghouse. This clearinghouse will administer the cost-sharing plan by, *inter alia*, maintaining all of the cost and payment records related to the relocation of each link and determining the cost-sharing obligation of subsequent PCS entities. The cost-sharing rules will not take effect until an administrator is selected.

11. A new Section 24.243 is added to Subpart E to read as follows:

**§ 24.243 The Cost-Sharing Formula.**

A PCS relocater who relocates an interfering microwave link, i.e., one that is in all or part of its market area and in all or part of its frequency band, is entitled to pro rata reimbursement based on the following formula:

$$R_N = \frac{C}{N} \times \frac{[120 - (T_m)]}{120}$$

(a) *R<sub>N</sub>* equals the amount of reimbursement.

(b) *C* equals the actual cost of relocating the link. Actual relocation costs include, but are not limited to, such items as: radio terminal equipment (TX and/or RX—antenna, necessary feed lines, MUX/Modems); towers and/or modifications; back-up power equipment; monitoring or control equipment; engineering costs (design/path survey); installation; systems testing; FCC filing costs; site acquisition and civil works; zoning costs; training; disposal of old equipment; test equipment (vendor required); spare equipment; project management; prior coordination notification under § 101.103(d) of this chapter; required antenna upgrades for interference control; power plant upgrade (if required); electrical grounding systems; Heating Ventilation and Air Conditioning (HVAC) (if required); alternate transport equipment; and leased facilities. *C* also includes incumbent transaction expenses that are directly attributable to the relocation, subject to a cap of two percent of the “hard” costs involved. *C* may not exceed \$250,000 per link, with an additional \$150,000 permitted if a new or modified tower is required.

(c) *N* equals the number of PCS entities that would have interfered with the link. For the PCS relocater, *N* = 1. For the next PCS entity that would have interfered with the link, *N*=2, and so on.

(d) *T<sub>M</sub>* equals the number of months that have elapsed between the month the PCS relocater obtains reimbursement rights and the month that the clearinghouse notifies a later-entrant of its reimbursement obligation. A PCS relocater obtains reimbursement rights on the date that it signs a relocation agreement with a microwave incumbent.

12. A new Section 24.245 is added to Subpart E to read as follows:

**§ 24.245 Reimbursement under the Cost-Sharing Plan.**

(a) *Registration of Reimbursement Rights.* To obtain reimbursement, a PCS relocater must submit documentation of the relocation agreement to the clearinghouse within ten business days of the date a relocation agreement is signed with an incumbent. If the clearinghouse has not yet been selected, the PCS relocater will be responsible for submitting documentation of the relocation agreement within ten business days of the date that the Wireless Telecommunications Bureau issues a public notice announcing that the clearinghouse has been established and has begun operation.

(b) *Documentation of Expenses.* Once relocation occurs, the PCS relocater must submit documentation itemizing the amount spent for items listed in § 24.243(b). The PCS relocater must identify the particular link associated with appropriate expenses (i.e., costs may not be averaged over numerous links). If a PCS relocater pays a microwave incumbent a monetary sum to relocate its own facilities, the PCS relocater must estimate the costs associated with relocating the incumbent by itemizing the anticipated cost for items listed in § 24.243(b). If the sum paid to the incumbent cannot be accounted for, the remaining amount is not eligible for reimbursement. A PCS relocater may submit receipts or other

documentation to the clearinghouse for all relocation expenses incurred since April 5, 1995.

(c) *Full Reimbursement.* A PCS relocater who relocates a microwave link that is either fully outside its market area or its licensed frequency band may seek full reimbursement through the clearinghouse of compensable costs, up to the reimbursement cap as defined in § 24.243(b). Such reimbursement will not be subject to depreciation under the cost-sharing formula.

13. A new Section 24.247 is added to Subpart E to read as follows:

**§ 24.247 Triggering a Reimbursement Obligation.**

(a) *Licensed PCS.* The clearinghouse will apply the following test to determine if a PCS entity preparing to initiate operations must pay a PCS relocater in accordance with the formula detailed in § 24.243:

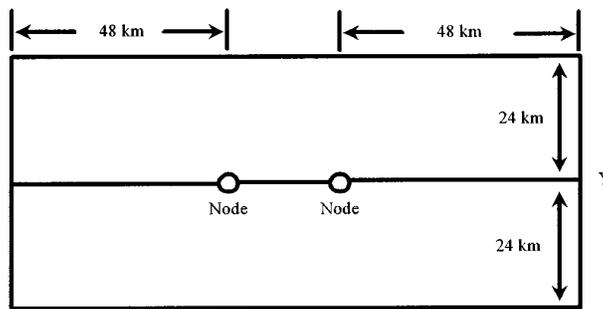
(1) All or part of the relocated microwave link was initially co-channel with the licensed PCS band(s) of the subsequent PCS entity;

(2) A PCS relocater has paid the relocation costs of the microwave incumbent; and

(3) The subsequent PCS entity is preparing to turn on a fixed base station at commercial power and the fixed base station is located within a rectangle (Proximity Threshold) described as follows:

(i) The length of the rectangle shall be *x* where *x* is a line extending through both nodes of the microwave link to a distance of 48 kilometers (30 miles) beyond each node. The width of the rectangle shall be *y* where *y* is a line perpendicular to *x* and extending for a distance of 24 kilometers (15 miles) on both sides of *x*. Thus, the rectangle is represented as follows:

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X

(ii) If the application of the Proximity Threshold test indicates that a reimbursement obligation exists, the clearinghouse will calculate the reimbursement amount in accordance with the cost-sharing formula and notify the subsequent PCS entity of the total amount of its reimbursement obligation.

(b) *Unlicensed PCS.* UTAM's reimbursement obligation is triggered either:

(1) When a county is cleared of microwave links in the unlicensed allocation, and UTAM invokes a Zone 1 power cap as a result of third party relocation activities; or

(2) A county is cleared of microwave links in the unlicensed allocation and UTAM reclassifies a Zone 2 county to Zone 1 status.

14. A new Section 24.249 is added to Subpart E to read as follows:

**§ 24.249 Payment Issues.**

(a) *Timing.* On the day that a PCS entity files its prior coordination notice (PCN) in accordance with § 101.103(d) of this chapter, it must file a copy of the PCN with the clearinghouse. The clearinghouse will determine if any reimbursement obligation exists and notify the PCS entity in writing of its repayment obligation, if any. When the PCS entity receives a written copy of such obligation, it must pay directly to the PCS relocater the amount owed within thirty days, with the exception of those businesses that qualify for installment payments. A business that qualifies for an installment payment plan must make its first installment payment within thirty days of notice from the clearinghouse. UTAM's first payment will be due thirty days after its reimbursement obligation is triggered as described in § 24.247(b).

(b) *Eligibility for Installment Payments.* PCS licensees that are allowed to pay for their licenses in installments under our designated entity rules will have identical payment options available to them with respect to payments under the cost-sharing plan. The specific terms of the installment payment mechanism, including the treatment of principal and interest, are the same as those applicable to the licensee's installment auction payments. If, for any reason, the entity eligible for installment payments is no longer eligible for such installment payments on its license, that entity is no longer eligible for installment payments under the cost-sharing plan. UTAM may make quarterly payments over a five-year period with an interest rate of prime plus 2.5 percent. UTAM may also negotiate separate repayment arrangements with other parties.

15. A new Section 24.251 is added to Subpart E to read as follows:

**§ 24.251 Dispute Resolution Under the Cost-Sharing Plan.**

Disputes arising out of the cost-sharing plan, such as disputes over the amount of reimbursement required, must be brought, in the first instance, to the clearinghouse for resolution. To the extent that disputes cannot be resolved by the clearinghouse, parties are encouraged to use expedited ADR procedures, such as binding arbitration, mediation, or other ADR techniques.

16. A new Section 24.253 is added to Subpart E to read as follows:

**§ 24.253 Termination of Cost-Sharing Obligations.**

The cost-sharing plan will sunset for all PCS entities on April 4, 2005, which is ten years after the date that voluntary negotiations commenced for A and B block PCS entities. Those PCS entities that are paying their portion of relocation costs on an installment basis must continue the payments until the obligation is satisfied.

**PART 101—FIXED MICROWAVE SERVICES**

17. The authority citation for Part 101 is revised to read as follows:

Authority: 47 U.S.C. 154, 303.

18. Section 101.3 is amended by adding the definition for "Secondary Operations" in alphabetical order to read as follows:

**§ 101.3 Definitions.**

\* \* \* \* \*

*Secondary Operations.* Radio communications which may not cause interference to operations authorized on a primary basis and which are not protected from interference from these primary operations.

\* \* \* \* \*

19. Subpart B is amended by adding a new heading following Section 101.67 to read as follows:

**Policies Governing Microwave Relocation From the 1850–1990 and 2110–2200 MHz Bands**

20. Section 101.69 is revised to read as follows:

**§ 101.69 Transition of the 1850–1990 and 2110–2200 MHz bands from the Fixed Microwave Services to Personal Communications Services and emerging technologies.**

Fixed Microwave Services (FMS) frequencies in the 1850–1990 and 2110–2200 MHz bands listed in §§ 101.147 (c), (d) and (e) have been allocated for use

by emerging technology (ET) services, including Personal Communications Services (PCS). The rules in this section provide for a transition period during which ET licensees may relocate existing FMS licensees using these frequencies to other media or other fixed channels, including those in other microwave bands.

(a) ET licensees may negotiate with FMS licensees authorized to use frequencies in the 1850–1990 and 2110–2200 MHz bands, for the purpose of agreeing to terms under which the FMS licensees would—

(1) Relocate their operations to other fixed microwave bands or other media; or alternatively

(2) Accept a sharing arrangement with the ET licensee that may result in an otherwise impermissible level of interference to the FMS operations.

(b) FMS operations in the 1850–1990 and 2110–2200 MHz bands, with the exception of public safety facilities defined in § 101.77, will continue to be co-primary with other users of this spectrum until two years after the FCC commences acceptance of applications for ET services (voluntary negotiation period), and until one year after an ET licensee initiates negotiations for relocation of the fixed microwave licensee's operations (mandatory negotiation period). In the 1910–1930 MHz band allocated for unlicensed PCS, FMS operations will continue to be co-primary until one year after UTAM, Inc. initiates negotiations for relocation of the fixed microwave licensee's operations. Public safety facilities defined in § 101.77 will continue to be co-primary in these bands until three years after the Commission commences acceptance of applications for an emerging technology service (voluntary negotiation period), and until two years after an emerging technology service licensee or an emerging technology unlicensed equipment supplier or representative initiates negotiations for relocation of the fixed microwave licensee's operations (mandatory negotiation period). If no agreement is reached during either the voluntary or mandatory negotiation periods, an ET licensee may initiate involuntary relocation procedures. Under involuntary relocation, the incumbent is required to relocate, provided that the ET licensee meets the conditions of § 101.75.

21. A new Section 101.71 is added to Subpart B to read as follows:

**§ 101.71 Voluntary Negotiations.**

During the two or three year voluntary negotiation period, negotiations are strictly voluntary and are not defined by any parameters. However, if the parties have not reached an agreement within one year after the commencement of the voluntary period, the FMS licensee must allow the ET licensee (if it so chooses) to gain access to the existing facilities to be relocated so that an independent third party can examine the FMS licensee's 2 GHz system and prepare an estimate of the cost and the time needed to relocate the FMS licensee to comparable facilities. The ET licensee must pay for any such estimate.

22. A new Section 101.73 is added to Subpart B to read as follows:

**§ 101.73 Mandatory Negotiations.**

(a) If a relocation agreement is not reached during the two or three year voluntary period, the ET licensee may initiate a mandatory negotiation period. This mandatory period is triggered at the option of the ET licensee, but ET licensees may not invoke their right to mandatory negotiation until the voluntary negotiation period has expired.

(b) Once mandatory negotiations have begun, an FMS licensee may not refuse to negotiate and all parties are required to negotiate in good faith. Good faith requires each party to provide information to the other that is reasonably necessary to facilitate the relocation process. In evaluating claims that a party has not negotiated in good faith, the FCC will consider, *inter alia*, the following factors:

(1) Whether the ET licensee has made a *bona fide* offer to relocate the FMS licensee to comparable facilities in accordance with Section 101.75(b);

(2) If the FMS licensee has demanded a premium, the type of premium requested (*e.g.*, whether the premium is directly related to relocation, such as system-wide relocations and analog-to-digital conversions, versus other types of premiums), and whether the value of the premium as compared to the cost of providing comparable facilities is disproportionate (*i.e.*, whether there is a lack of proportion or relation between the two);

(3) What steps the parties have taken to determine the actual cost of relocation to comparable facilities;

(4) Whether either party has withheld information requested by the other party that is necessary to estimate relocation costs or to facilitate the relocation process.

(c) Any party alleging a violation of our good faith requirement must attach an independent estimate of the

relocation costs in question to any documentation filed with the Commission in support of its claim. An independent cost estimate must include a specification for the comparable facility and a statement of the costs associated with providing that facility to the incumbent licensee.

23. A new Section 101.75 is added to Subpart B to read as follows:

**§ 101.75 Involuntary Relocation Procedures.**

(a) If no agreement is reached during either the voluntary or mandatory negotiation period, an ET licensee may initiate involuntary relocation procedures under the Commission's rules. ET licensees are obligated to pay to relocate only the specific microwave links to which their systems pose an interference problem. Under involuntary relocation, the FMS licensee is required to relocate, provided that the ET licensee:

(1) Guarantees payment of relocation costs, including all engineering, equipment, site and FCC fees, as well as any legitimate and prudent transaction expenses incurred by the FMS licensee that are directly attributable to an involuntary relocation, subject to a cap of two percent of the hard costs involved. Hard costs are defined as the actual costs associated with providing a replacement system, such as equipment and engineering expenses. ET licensees are not required to pay FMS licensees for internal resources devoted to the relocation process. ET licensees are not required to pay for transaction costs incurred by FMS licensees during the voluntary or mandatory periods once the involuntary period is initiated, or for fees that cannot be legitimately tied to the provision of comparable facilities;

(2) Completes all activities necessary for implementing the replacement facilities, including engineering and cost analysis of the relocation procedure and, if radio facilities are used, identifying and obtaining, on the incumbents' behalf, new microwave frequencies and frequency coordination; and

(3) Builds the replacement system and tests it for comparability with the existing 2 GHz system.

(b) *Comparable Facilities.* The replacement system provided to an incumbent during an involuntary relocation must be at least equivalent to the existing FMS system with respect to the following three factors:

(1) *Throughput.* Communications throughput is the amount of information transferred within a system in a given amount of time. If analog facilities are being replaced with analog, the ET

licensee is required to provide the FMS licensee with an equivalent number of 4 kHz voice channels. If digital facilities are being replaced with digital, the ET licensee must provide the FMS licensee with equivalent data loading bits per second (bps). ET licensees must provide FMS licensees with enough throughput to satisfy the FMS licensee's system use at the time of relocation, not match the total capacity of the FMS system.

(2) *Reliability.* System reliability is the degree to which information is transferred accurately within a system. ET licensees must provide FMS licensees with reliability equal to the overall reliability of their system. For digital data systems, reliability is measured by the percent of time the bit error rate (BER) exceeds a desired value, and for analog or digital voice transmissions, it is measured by the percent of time that audio signal quality meets an established threshold. If an analog voice system is replaced with a digital voice system, only the resulting frequency response, harmonic distortion, signal-to-noise ratio and its reliability will be considered in determining comparable reliability.

(3) *Operating Costs.* Operating costs are the cost to operate and maintain the FMS system. ET licensees must compensate FMS licensees for any increased recurring costs associated with the replacement facilities (*e.g.*, additional rental payments, increased utility fees) for five years after relocation. ET licensees may satisfy this obligation by making a lump-sum payment based on present value using current interest rates. Additionally, the maintenance costs to the FMS licensee must be equivalent to the 2 GHz system in order for the replacement system to be considered comparable.

(c) The FMS licensee is not required to relocate until the alternative facilities are available to it for a reasonable time to make adjustments, determine comparability, and ensure a seamless handoff.

(d) *Twelve-Month Trial Period.* If, within one year after the relocation to new facilities, the FMS licensee demonstrates that the new facilities are not comparable to the former facilities, the ET licensee must remedy the defects or pay to relocate the microwave licensee to one of the following: its former or equivalent 2 GHz channels, another comparable frequency band, a land-line system, or any other facility that satisfies the requirements specified in paragraph (b) of this section. This trial period commences on the date that the FMS licensee begins full operation of the replacement link. If the FMS licensee has retained its 2 GHz

authorization during the trial period, it must return the license to the Commission at the end of the twelve months.

24. A new Section 101.77 is added to Subpart B to read as follows:

**§ 101.77 Public Safety Licensees in the 1850–1990 and 2110–2200 MHz bands.**

(a) Public safety facilities are subject to the three-year voluntary and two-year mandatory negotiation period. In order for public safety licensees to qualify for extended negotiation periods, the department head responsible for system oversight must certify to the ET licensee requesting relocation that:

(1) The agency is a licensee in the Police Radio, Fire Radio, Emergency Medical, Special Emergency Radio Services, or that it is a licensee of other Part 101 facilities licensed on a primary basis under the eligibility requirements of Part 90, Subparts B and C of this chapter; and

(2) The majority of communications carried on the facilities at issue involve safety of life and property.

(b) A public safety licensee must provide certification within thirty (30) days of a request from a ET licensee, or the ET licensee may presume that special treatment is inapplicable. If a public safety licensee falsely certifies to an ET licensee that it qualifies for the extended time periods, this licensee will be in violation of the Commission's rules and will subject to appropriate penalties, as well as immediately subject to the non-public safety time periods.

25. A new Section 101.79 is added to Subpart B to read as follows:

**§ 101.79 Sunset provisions for licensees in the 1850–1990 and 2110–2200 MHz bands.**

(a) FMS licensees will maintain primary status in the 1850–1990 and 2110–2200 MHz bands unless and until an ET licensee requires use of the spectrum. ET licensees are not required to pay relocation costs after the relocation rules sunset (*i.e.* ten years after the voluntary period begins for the first ET licensees in the service). Once the relocation rules sunset, an ET licensee may require the incumbent to cease operations, provided that the ET licensee intends to turn on a system within interference range of the incumbent, as determined by TIA Bulletin 10-F or any standard successor. ET licensee notification to the affected FMS licensee must be in writing and must provide the incumbent with no less than six months to vacate the spectrum. After the six-month notice period has expired, the FMS licensee must turn its license back into the Commission, unless the parties have

entered into an agreement which allows the FMS licensee to continue to operate on a mutually agreed upon basis.

(b) If the parties cannot agree on a schedule or an alternative arrangement, requests for extension will be accepted and reviewed on a case-by-case basis. The Commission will grant such extensions only if the incumbent can demonstrate that:

(1) It cannot relocate within the six-month period (*e.g.*, because no alternative spectrum or other reasonable option is available), and;

(2) The public interest would be harmed if the incumbent is forced to terminate operations (*e.g.*, if public safety communications services would be disrupted).

26. A new Section 101.81 is added to Subpart B to read as follows:

**§ 101.81 Future licensing in the 1850–1990 and 2110–2200 MHz bands.**

After April 25, 1996, all major modifications and extensions to existing FMS systems in the 1850–1990 and 2110–2200 MHz bands will be authorized on a secondary basis to ET systems. All other modifications will render the modified FMS license secondary to ET operations, unless the incumbent affirmatively justifies primary status and the incumbent FMS licensee establishes that the modification would not add to the relocation costs of ET licensees. Incumbent FMS licensees will maintain primary status for the following technical changes:

- (a) Decreases in power;
- (b) Minor changes (increases or decreases) in antenna height;
- (c) Minor location changes (up to two seconds);
- (d) Any data correction which does not involve a change in the location of an existing facility;
- (e) Reductions in authorized bandwidth;
- (f) Minor changes (increases or decreases) in structure height;
- (g) Changes (increases or decreases) in ground elevation that do not affect centerline height;
- (h) Minor equipment changes.

27. Section 101.147 is amended by adding references to note 20 in the entries for frequency ranges 1,850–1,990, 2,130–2,150, 2,150–2,160 and 2,180–2,200 MHz and revising note 20 to read as follows:

**§ 101.147 Frequency assignments.**

(a) * * *
1,850–1,990 MHz (20)
* * * * *
2,130–2,150 MHz (20) (22)
2,150–2,160 MHz (20) (22)
* * * * *
2,180–2,200 MHz (20), (22)
* * * * *

Notes

\* \* \* \* \*

(20) New facilities in these bands will be licensed only on a secondary basis. Facilities licensed or applied for before January 16, 1992, are permitted to make modifications and minor extensions in accordance with § 101.77 and still retain primary status.

\* \* \* \* \*

(22) Frequencies in these bands are for the exclusive use of Private Operational Fixed Point-to-Point Microwave Service (Part 101).

[FR Doc. 96–14138 Filed 6–11–96; 8:45 am]

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**DEPARTMENT OF COMMERCE**

**National Oceanic and Atmospheric Administration**

**50 CFR Part 301**

[Docket No. 960111003–6068–03; I.D. 060496A]

**Pacific Halibut Fisheries; 1996 Halibut Landing Report No. 2**

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

**ACTION:** In season action.

**SUMMARY:** The Assistant Administrator for Fisheries, NOAA, on behalf of the International Pacific Halibut Commission (IPHC), publishes these inseason actions pursuant to IPHC regulations approved by the U.S. Government to govern the Pacific halibut fishery. This action is intended to enhance the conservation of the Pacific halibut stock.

**EFFECTIVE DATES:** Oregon sport halibut season closure: 11:59 p.m. May 25, 1996 until May 26, 1996; Southwest Washington coast sport halibut fishery closure: 11:59 p.m., May 26, 1996 until May 27, 1996.

**FOR FURTHER INFORMATION CONTACT:** Steven Pennoyer, 907-586-7221; William W. Stelle, Jr., 206-526-6140; or Donald McCaughran, 206-634-1838.

**SUPPLEMENTARY INFORMATION:** The IPHC, under the Convention between the United States of America and Canada for the Preservation of the Halibut Fishery of the Northern Pacific Ocean and Bering Sea (signed at Ottawa, Ontario, on March 2, 1953), as amended by a Protocol Amending the Convention (signed at Washington, DC, on March 29, 1979), has issued this inseason action pursuant to IPHC regulations governing the Pacific halibut fishery.

The regulations have been approved by NMFS (60 FR 14651, March 20, 1995, and amended at 61 FR 11337, March 20, 1996). On behalf of the IPHC, this inseason action is published in the Federal Register to provide additional notice of its effectiveness, and to inform persons subject to the inseason action of the restrictions and requirements established therein.

#### In Season Action

##### *1996 Halibut Landing Report No. 2*

#### First Oregon Sport Halibut Season to Close May 25

The preliminary catch estimate for the 1996 sport halibut fishery between Cape Falcon (45°46'00" N. lat.) and the Florence North Jetty (Siuslaw River, 44°01'08" N. lat.) indicates the 64,392 lb (29.20 metric tons (mt)) catch limit will be reached on May 25. Therefore, the sport halibut fishery in this area will close at 11:59 p.m. on May 25.

Sport fishing for Pacific halibut will reopen on May 26 and remain open through August 1, 7 days a week, only in the area inside the 30-fathom curve nearest to the coastline as plotted on National Ocean Service charts numbered 18520, 18580, and 18600 from Cape Falcon to the Florence North Jetty (Siuslaw River), or until 6,629 lb (3.0 mt) are estimated to have been taken and the season is closed by the IPHC, whichever occurs first. Any poundage remaining unharvested after the earlier season will be added to this season. The daily bag limit remains two halibut per person, one with a minimum overall size limit of 32 inches (81.28 centimeters (cm)) and the second with a minimum overall size limit of 50 inches (127.0 cm).

#### First Southwest Washington Coast Sport Halibut Fishery Season to Close May 26

The sport halibut fishery off the Southwest Washington coast (Queets River south to Leadbetter Point) will reach the sub-quota of 14,222 lb at the conclusion of fishing on Sunday, May 26. Therefore, the fishery will close at 11:59 p.m. on Sunday, May 26.

In accordance with the pre-season catch sharing plan developed by the

Pacific Fishery Management Council, this fishery will immediately reopen on Monday, May 27, only in the near-shore area (south of the Queets River to 47°00'00" N. lat. and east of 124°40'00" W. long.), until the remaining quota of about 1,000 pounds is reached. The fishery will be open 7 days a week, with a one fish bag limit and no minimum size limit, until the remaining quota is harvested and the season is closed by the Commission or until September 30, whichever occurs first.

Dated: June 4, 1996.

Richard W. Surdi,

*Acting Director, Office of Fisheries Conservation and Management, National Marine Fisheries Service.*

[FR Doc. 96-14589 Filed 6-11-96; 8:45 am]

**BILLING CODE 3510-22-F**

#### **50 CFR Part 675**

**[Docket No. 960129019-6019-01, I.D. 060696E]**

#### **Groundfish of the Bering Sea and Aleutian Islands Area; Trawl Rock Sole/Flathead Sole/"Other Flatfish" Fishery Category**

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

**ACTION:** Closure.

**SUMMARY:** NMFS is closing the directed fishery for species in the rock sole/flathead sole/"other flatfish" fishery category by vessels using trawl gear in the Bering Sea and Aleutian Islands management area (BSAI). This action is necessary to prevent exceeding the second seasonal bycatch allowance of Pacific halibut apportioned to the trawl rock sole/flathead sole/"other flatfish" fishery category in the BSAI.

**EFFECTIVE DATE:** 12 noon, Alaska local time (A.l.t.), June 8, 1996, until 12 noon, A.l.t., July 1, 1996.

**FOR FURTHER INFORMATION CONTACT:** Andrew Smoker, 907-586-7228.

**SUPPLEMENTARY INFORMATION:** The groundfish fishery in the BSAI exclusive economic zone is managed by NMFS

according to the Fishery Management Plan for the Groundfish Fishery of the Bering Sea and Aleutian Islands Area (FMP) prepared by the North Pacific Fishery Management Council under authority of the Magnuson Fishery Conservation and Management Act. Fishing by U.S. vessels is governed by regulations implementing the FMP at 50 CFR parts 620 and 675.

The second seasonal bycatch allowance of Pacific halibut for the BSAI trawl rock sole/flathead sole/"other flatfish" fishery category, which is defined at § 675.21(b)(1)(iii)(B)(2), was established by the Final 1996 Harvest Specifications of Groundfish (61 FR 4311, February 5, 1996) as 139 metric tons (mt). This fishery was previously closed with the expectation that the second seasonal allocation had been taken (61 FR 16883, April 18, 1996), it was subsequently opened on June 3, 1996, when NMFS determined that 50 mt of halibut mortality remained in the allocation (61 FR 28071, June 4, 1996).

The Director, Alaska Region, NMFS, has determined, in accordance with § 675.21(c)(1)(iii), that the second seasonal bycatch allowance of Pacific halibut apportioned to the trawl rock sole/flathead sole/"other flatfish" fishery in the BSAI has been caught. Therefore, NMFS is prohibiting directed fishing for species in the rock sole/flathead sole/"other flatfish" fishery category by vessels using trawl gear in the BSAI.

Maximum retainable bycatch amounts for applicable gear types may be found in the regulations at § 675.20(h).

#### Classification

This action is taken under 50 CFR 675.21 and is exempt from review under E.O. 12866.

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

Dated: June 7, 1996.

Richard H. Schaefer,  
*Director, Office of Fisheries Conservation and Management, National Marine Fisheries Service.*

[FR Doc. 96-14925 Filed 6-7-96; 3:52 pm]

**BILLING CODE 3510-22-F**

# Proposed Rules

Federal Register

Vol. 61, No. 114

Wednesday, June 12, 1996

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.

## NATIONAL CREDIT UNION ADMINISTRATION

### 12 CFR Part 703

#### Investment and Deposit Activities

**AGENCY:** National Credit Union Administration (NCUA).

**ACTION:** Proposed rule; Extension of comment period.

**SUMMARY:** On November 29, 1995 (60 FR 61219), the National Credit Union Administration (NCUA) published for public comment a proposed rule regarding investment and deposit activities for credit unions. The comment period for this proposed rule was to have expired on March 28, 1996. The original comment period was extended to June 26, 1996 (61 FR 8499). A national trade association has requested an additional extension in which to respond in order to review the proposed rule concurrently with the proposed rule governing corporate credit unions which was issued by the NCUA Board on May 22, 1996 with a 90-day comment period. To encourage additional comments, the NCUA Board has decided to extend the comment period on the proposed rule. The extended comment period now expires September 30, 1996.

**DATES:** The comment period has been extended and now expires September 30, 1996. Comments must be received on or before September 30, 1996.

**ADDRESSES:** Comments should be directed to Becky Baker, Secretary of the Board. Mail or hand-deliver comments to: National Credit Union Administration Board, 1775 Duke Street, Alexandria, Virginia 22314-3428. Fax comments to (703) 518-6480. Please send comments by one method only.

**FOR FURTHER INFORMATION CONTACT:** David M. Marquis, Director, Office of Examination and Insurance, (703) 518-6360, or Daniel Gordon, Senior Investment Officer, (703) 518-6620, or at the above address.

By the National Credit Union Administration Board on June 3, 1996.

Becky Baker,

*Secretary of the Board.*

[FR Doc. 96-14919 Filed 6-11-96; 8:45 am]

BILLING CODE 7535-01-M

## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

#### 14 CFR Part 39

[Docket No. 96-ANE-09]

RIN 2120-AA64

#### Airworthiness Directives; Rolls-Royce plc RB211-535E4 and -535E4-B Series Turbofan Engines

**AGENCY:** Federal Aviation Administration, DOT.

**ACTION:** Notice of proposed rulemaking (NPRM).

**SUMMARY:** This document proposes the adoption of a new airworthiness directive (AD) that is applicable to Rolls-Royce plc RB211-535E4 and -535E4-B series turbofan engines. This proposal would require installation of an improved fuel flow governor that incorporates revised minimum compressor discharge P4 stop settings. This proposal is prompted by reports of engine rundowns during low idle descent during icing conditions. The actions specified by the proposed AD are intended to prevent compressor stall and subsequent engine rundown on one or both engines.

**DATES:** Comments must be received by August 12, 1996.

**ADDRESSES:** Submit comments in triplicate to the Federal Aviation Administration (FAA), New England Region, Office of the Assistant Chief Counsel, Attention: Rules Docket No. 96-ANE-09, 12 New England Executive Park, Burlington, MA 01803-5299. Comments may also be submitted to the Rules Docket by using the following Internet address: "epd-adcomments@mail.hq.faa.gov". Comments may be inspected at this location between 8:00 a.m. and 4:30 p.m., Monday through Friday, except Federal holidays.

The service information referenced in the proposed rule may be obtained from Rolls-Royce plc, P.O. Box 31, Moor Lane, Derby, DE248BJ, United Kingdom;

telephone 1332-249428, fax 1332-249423. This information may be examined at the FAA, New England Region, Office of the Assistant Chief Counsel, 12 New England Executive Park, Burlington, MA.

**FOR FURTHER INFORMATION CONTACT:** Daniel Kerman, Aerospace Engineer, Engine Certification Office, FAA, Engine and Propeller Directorate, 12 New England Executive Park, Burlington, MA 01803-5299; telephone (617) 238-7130, fax (617) 238-7199.

#### SUPPLEMENTARY INFORMATION:

Comments Invited

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

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

Commenters wishing the FAA to acknowledge receipt of their comments submitted in response to this notice must submit a self-addressed, stamped postcard on which the following statement is made: "Comments to Docket Number 96-ANE-09." The postcard will be date stamped and returned to the commenter.

#### Availability of NPRMs

Any person may obtain a copy of this NPRM by submitting a request to the FAA, New England Region, Office of the Assistant Chief Counsel, Attention: Rules Docket No. 96-ANE-09, 12 New England Executive Park, Burlington, MA 01803-5299.

## Discussion

The Civil Aviation Authority (CAA), which is the airworthiness authority for the United Kingdom, recently notified the Federal Aviation Administration (FAA) that an unsafe condition may exist on Rolls-Royce plc (R-R) RB211-535 series turbofan engines. The CAA advises that they have reports of seven engine rundown events on the R-R RB211-535E4 and -535E4-B engines installed on Boeing 757-200 series aircraft since January 1992. All of the events occurred within a narrow band of altitude between 25,000 and 29,000 feet. In four of the seven events, the second engine installed on the aircraft surged and recovered. In six of the seven events, the engine rundowns occurred approximately 3 to 5 seconds following selection of inlet cowl anti-ice during the descent phase of flight. Selection of cowl inlet anti-ice results in an engine acceleration from low idle to high idle thrust, which can cause liberation of accreted ice within the engine core. In one event, the rundown occurred following an auto-throttle initiated acceleration.

Rolls-Royce plc has performed extensive analysis and testing and has concluded that the engine rundown is due to the following: (1) Ice accretion at the inlet to the Intermediate Pressure Compressor (IPC) induces a rotating compressor stall during descent, which leads to a High Pressure Compressor (HPC) surge on acceleration; and (2) Ice accretion at the inlet to the IPC during descent is released into the core engine, which in turn causes an HPC surge. This condition, if not corrected, could result in compressor stall and subsequent engine rundown on one or both engines.

The manufacturer has determined that the proposed solution for preventing engine rundown is to raise the minimum compressor discharge P4 stop setting in the fuel flow governor (FFG), which will increase the low idle schedule above the engine idle conditions experienced during all of the prior engine rundown events. This schedule increase will result in a substantial increase in IPC stall margin, a moderate increase in HPC stall margin, as well as provide the additional benefit of increased ice accretion tolerance due to increased compressor airflow.

Rolls-Royce plc has issued Mandatory (SB) No. RB.211-73-B869, Revision 1, dated May 24, 1996, that specifies installation of an improved FFG, which incorporates an increased minimum compressor discharge pressure P4 stop setting, which will result in increased engine idle speeds.

The FAA Transport Airplane Directorate issued AD 96-04-11, Amendment 39-9523, (61 FR 6935, February 23, 1996) applicable to Boeing 757-200 series airplanes equipped with R-R Model RB211-535E4 and -535E4-B engines, that requires revision of the limitations section of the FAA-approved Airplane Flight Manual (AFM) to require the flight crew to activate engine inlet cowl thermal anti-ice systems on both engines prior to descent. Installation of the improved FFG on both engines for each aircraft would constitute terminating action to the AFM revision requirements of AD 96-04-11.

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

Since an unsafe condition has been identified that is likely to exist or develop on other engines of the same type design registered in the United States, the proposed AD would require installation of improved FFGs that incorporate revised minimum compressor discharge P4 stop settings. This revised setting will raise the steady state low idle schedule above the idle conditions experienced during any of the prior engine rundown events. This schedule increase will result in a substantial increase in IPC stall margin, a moderate increase in HPC stall margin, as well as provide the additional benefit of increased ice accretion tolerance due to increased compressor airflow. This proposed action must be accomplished at the next shop visit, or within 9 calendar months after the effective date of this AD, whichever occurs first. The FAA has determined the calendar end-date based on the time interval required for fleet modification. The actions would be required to be accomplished in accordance with SB described previously.

There are approximately 770 engines of the affected design in the worldwide fleet. The FAA estimates that 381 engines installed on aircraft of U.S. registry would be affected by this proposed AD, that it would take approximately 3 work hours per engine

to accomplish the proposed actions, and that the average labor rate is \$60 per work hour. The affected FFGs would be modified to incorporate the changes required by this proposed AD on a free-of-charge basis per engine. Based on these figures, the total cost impact of the proposed AD on U.S. operators is estimated to be \$68,580.

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

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

### List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Safety.

### The Proposed Amendment

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

### **PART 39—AIRWORTHINESS DIRECTIVES**

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

Authority: 49 U.S.C. 106(g), 40113, 44701.

#### **§ 39.13 [Amended]**

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

Rolls-Royce plc: Docket No. 96-ANE-09.

*Applicability:* Rolls-Royce plc. (R-R) Models RB211-535E4 and -535E4-B turbofan engines installed on Boeing 757-200 series aircraft.

Note: This airworthiness directive (AD) applies to each engine 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 engines 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 (d) to request approval from the Federal Aviation Administration (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 engine from the applicability of this AD.

**Compliance:** Required as indicated, unless accomplished previously.

To prevent compressor stall and subsequent engine rundown on one or both engines, accomplish the following:

(a) At the next shop visit, but no later than 9 calendar months after the effective date of this AD, install a fuel flow governor (FFG) that incorporates a revised minimum compressor discharge P4 stop setting, in accordance with R-R Mandatory Service Bulletin (SB) No. RB.211-73-B869, Revision 1, dated May 24, 1996.

(b) Installation of improved FFG's on both engines for each Boeing 757 aircraft in accordance with paragraph (a) of this AD constitutes terminating action to the requirements of AD 96-04-11.

(c) For the purpose of this AD, a shop visit is defined as removal of the engine from the aircraft for maintenance.

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

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

Issued in Burlington, Massachusetts, on May 22, 1996.

Robert E. Guyotte,

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

[FR Doc. 96-14866 Filed 6-11-96; 8:45 am]

BILLING CODE 4910-13-U

## 14 CFR Part 71

[Airspace Docket No. 96-ANM-012]

### Proposed Establishment of Class E Airspace; Grants Pass, Oregon.

**AGENCY:** Federal Aviation Administration (FAA), DOT.

**ACTION:** Notice of Proposed Rulemaking (NPRM).

**SUMMARY:** This proposed rule would establish the Grants Pass, Oregon, Class E airspace to accommodate a new Global Positioning System (GPS) standard instrument approach procedure (SIAP) to the Grants Pass Airport. The area would be depicted on aeronautical charts for pilot reference.

**DATES:** Comments must be received on or before July 19, 1996.

**ADDRESSES:** Send comments on the proposal in triplicate to: Manager, Operations Branch ANM-530, Federal Aviation Administration, Docket No. 96-ANM-012, 1601 Lind Avenue S.W., Renton, Washington 98055-4056.

The official docket may be examined at the same address.

An informal docket may also be examined during normal business hours at the address listed above.

**FOR FURTHER INFORMATION CONTACT:** James Frala, ANM-532.4, Federal Aviation Administration, Docket No. 96-ANM-012, 1601 Lind Avenue S.W., Renton, Washington 98055-4056; telephone number: (206) 227-2535.

#### SUPPLEMENTARY INFORMATION:

##### Comments Invited

Interested parties are invited to participate in this proposed rulemaking by submitting such written data, views, or arguments as they may desire. Comments that provide the factual basis supporting the views and suggestions presented are particularly helpful in developing reasoned regulatory decisions on the proposal. Comments are specifically invited on the overall regulatory, aeronautical, economic, environmental, and energy related aspects of the proposal.

Communications should identify the airspace docket number and be submitted in triplicate to the address listed above. Commenters wishing the FAA to acknowledge receipt of their comments on this notice must submit with those comments a self-addressed, stamped postcard on which the following statement is made: "Comments to Airspace Docket No. 96-ANM-012." The postcard will be date/time stamped and returned to the commenter. All communications received on or before the specified closing date for comments will be considered before taking action on the proposed rule. The proposal contained in this notice may be changed in the light of comments received. All comments submitted will be available for examination at the address listed above both before and after the closing

date for comments. A report summarizing each substantive public contact with FAA personnel concerned with this rulemaking will be filed in the docket.

#### Availability of NPRM's

Any person may obtain a copy of this NPRM by submitting a request to the Federal Aviation Administration, Operations Branch, ANM-530, 1601 Lind Avenue S.W., Renton, Washington 98055-4056. Communications must identify the notice number of this NPRM. Persons interested in being placed on a mailing list for future NPRM's should also request a copy of Advisory Circular No. 11-2A, which describes the application procedure.

#### The Proposal

The FAA is considering an amendment to part 71 of the Federal Aviation Regulations (14 CFR part 71) to establish Class E airspace at Grants Pass, Oregon, to accommodate a new GPS SIAP at Grants Pass Airport. The area would be depicted on aeronautical charts for pilot reference. The coordinates for this airspace docket are based on North American Datum 83. Class E airspace areas extending upward from 700 feet or more above the surface of the earth are published in Paragraph 6005 of FAA Order 7400.9C dated August 17, 1995, and effective September 16, 1995, which is incorporated by reference in 14 CFR 71.1. The Class E airspace designation listed in this document would be published subsequently in the Order.

The FAA has determined that this proposed regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. It, therefore, (1) is not a "significant regulatory action" under Executive Order 12866; (2) is not a "significant rule" under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. Since this is a routine matter that will only affect air traffic procedures and air navigation, it is certified that this rule, when promulgated, will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

### The Proposed Amendment

In consideration of the foregoing, the Federal Aviation Administration proposes to amend 14 CFR part 71 as follows:

#### **PART 71—[AMENDED]**

1. The authority citation for 14 CFR part 71 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40103, 40113, 40120; E.O. 10854, 24 FR 9565, 3 CFR, 1959–1963 Comp., p. 389; 14 CFR 11.69.

#### **§ 71.1 [Amended]**

2. The incorporation by reference in 14 CFR 71.1 of the Federal Aviation Administration Order 7400.9C, Airspace Designations and Reporting Points, dated August 17, 1995, and effective September 16, 1995, is amended as follows:

*Paragraph 6005 Class E airspace areas extending upward from 700 feet or more above surface of the earth.*

\* \* \* \* \*

ANM OR E5 Grants, OR

Grants Pass Airport, OR  
(Lat. 42°30' 37"N, long. 123°23'17"W)

That airspace extending upward from 700 feet above the surface within a 7-mile radius of the Grants Pass Airport and within 7 miles each side of a 331° bearing from the Grants Pass Airport extending from the 7-mile radius to 25 miles northwest of the airport.

\* \* \* \* \*

Issued in Seattle, Washington, on May 28, 1996.

Richard E. Prang,

*Acting Assistant Manager, Air Traffic Division, Northwest Mountain Region.*

[FR Doc. 96–14877 Filed 6–11–95; 8:45 am]

BILLING CODE 4910–13–M

### **14 CFR Part 71**

**[Airspace Docket No. 96–ANM–013]**

#### **Proposed Establishment of Class E Airspace; Libby, Montana**

**AGENCY:** Federal Aviation Administration (FAA), DOT.

**ACTION:** Notice of proposed rulemaking (NPRM).

**SUMMARY:** This proposed rule would establish the Libby, Montana, Class E airspace to accommodate a new Global Positioning System (GPS) standard instrument approach procedure (SIAP) to the Libby Airport. The area would be depicted on aeronautical charts for pilot reference.

**DATES:** Comments must be received on or before July 19, 1996.

**ADDRESSES:** Send comments on the proposal in triplicate to: Manager,

Operations Branch ANM–530, Federal Aviation Administration, Docket No. 96–ANM–013, 1601 Lind Avenue S.W., Renton, Washington 98955–4056.

The official docket may be examined at the same address.

An informal docket may also be examined during normal business hours at the address listed above.

#### **FOR FURTHER INFORMATION CONTACT:**

James Frala, ANM–532.4, Federal Aviation Administration, Docket No. 96–ANM–013, 1601 Lind Avenue S.W., Renton, Washington 98055–4056; telephone number: (206) 227–2535.

#### **SUPPLEMENTARY INFORMATION:**

##### **Comments Invited**

Interest parties are invited to participate in this proposed rulemaking by submitting such written data, views, or arguments as they may desire. Comments that provide the factual basis supporting the views and suggestions presented are particularly helpful in developing reasoned regulatory decisions on the proposal. Comments are specifically invited on the overall regulatory, aeronautical, economic, environmental, and energy related aspects of the proposal.

Communications should identify the airspace docket number and be submitted in triplicate to the address listed above. Comments wishing the FAA to acknowledge receipt of their comments on this notice must submit with those comments a self-addressed, stamped postcard on which the following statement is made: "Comments to Airspace Docket No. 96–ANM–013." The postcard will be date/time stamped and returned to the commenter. All communications received on or before the specified closing date for comments will be considered before taking action on the proposed rule. The proposal contained in this notice may be changed in the light of comments received. All comments submitted will be available for examination at the address listed above both before and after the closing date for comments. A report summarizing each substantive public contact with FAA personnel concerned with this rulemaking will be filed in the docket.

##### **Availability of NPRM's**

Any person may obtain a copy of this NPRM by submitting a request to the Federal Aviation Administration, Operations Branch, ANM–530, 1601 Lind Avenue S.W., Renton, Washington 98055–4056. Communications must identify the notice number of this NPRM. Persons interested in being

placed on a mailing list for future NPRM's should also request a copy of Advisory Circular No. 11–2A, which describes the application procedure.

##### **The Proposal**

The FAA is considering an amendment to part 71 of the Federal Aviation Regulations (14 CFR part 71) to establish Class E airspace at Libby, Montana, to accommodate a new GPS SIAP to the Libby Airport. The area would be depicted on aeronautical charts for pilot reference. The coordinates for this airspace docket are based on North American Datum 83. Class E airspace areas extending upward from 700 feet or more above the surface of the earth are published in paragraph 6005 of FAA Order 7400.9C dated August 17, 1995, and effective September 16, 1995, which is incorporated by reference in 14 CFR 71.1. The Class E airspace designation listed in this document would be published subsequently in the Order.

The FAA has determined that this proposed regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. It, therefore, (1) is not a "significant regulatory action" under Executive Order 12866; (2) is not a "significant rule" under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. Since this is a routine matter that will only affect air traffic procedures and air navigation, it is certified that this rule, when promulgated, will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

##### **List of Subjects in 14 CFR Part 71**

Airspace, Incorporation by reference, Navigation (air).

##### **The Proposed Amendment**

In consideration of the foregoing, the Federal Aviation Administration proposes to amend 14 CFR part 71 as follows:

#### **PART 71—[AMENDED]**

1. The authority citation for 14 CFR part 71 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40103, 40113, 40120; E.O. 10854, 24 FR 9565, 3 CFR, 1959–1963 Comp., p. 389; 14 CFR 11.69.

#### **§ 71.1 [Amended]**

2. The incorporation by reference in 14 CFR 71.1 of the Federal Aviation

Administration Order 7400.9C, Airspace Designations and Reporting Points, dated August 17, 1995, and effective September 16, 1995, is amended as follows:

*Paragraph 6005 Class E airspace areas extending upward from 700 feet or more above the surface of the earth.*

\* \* \* \* \*

ANM MT E5 Libby, MT

Libby Airport, MT

(Lat 48°17'02"N, long. 115°29'25"W)

That airspace extending upward from 700 feet above the surface within a 7-mile radius of the Libby Airport and within 4 miles each side of the 345° bearing from the Libby Airport extending from the 7-mile radius to 10 miles northwest of the airport; that airspace extending upward from 1,200 feet above the surface within an area bounded by a line beginning at lat. 48°19'00"N, long. 115°42'00"W; to lat. 48°19'00"N, long. 115°16'00"W; to lat. 48°45'00"N, long. 115°22'00"W; to lat. 48°45'00"N, long. 115°50'00"W, to point of beginning.

\* \* \* \* \*

Issued in Seattle, Washington, on May 28, 1996.

Richard E. Prang,

*Acting Assistant Manager, Air Traffic Division, Northwest Mountain Region.*

[FR Doc. 96-14875 Filed 6-11-96; 8:45 am]

BILLING CODE 4910-13-M

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Food and Drug Administration

**21 CFR Parts 70, 71, 80, 101, 107, 170, 172, 173, 174, 175, 177, 178, 184, and 1250**

[Docket No. 96N-0149]

#### **Food Standards; Reinvention of Regulations Needing Revisions; Request for Comments on Certain Existing Regulations**

**AGENCY:** Food and Drug Administration, HHS.

**ACTION:** Advance notice of proposed rulemaking.

**SUMMARY:** The Food and Drug Administration (FDA) is announcing that it intends to review its human food labeling regulations pertaining to: The exemption for soft drinks from requirements for the type size and placement of certain information on the information panel, requirements for listing "statements of identity," and requirements for flavor labeling; its infant formula regulations to ensure that they fully reflect the Federal Food, Drug, and Cosmetic Act (the act); and its regulations pertaining to the discharge

of waste aboard casino ships, passenger ships, and ferries. The agency is also conducting a review of its food additive regulations to consolidate existing regulations. As part of this review of agency regulations, the agency is soliciting comments from all interested persons on whether the above regulations should be retained, revised, or revoked. FDA solicits comments on the benefits or lack of benefits of such regulations in facilitating domestic, as well as international, commerce and on the value of these regulations to consumers. The agency also solicits comments on alternative means of accomplishing the statutory objectives that led to the adoption of the subject regulations. This review is in response to the Administration's "Reinventing Government" initiative which seeks to ease the burden on regulated industry and consumers.

**DATES:** Written comments by September 10, 1996.

**ADDRESSES:** Submit written comments to the Dockets Management Branch (HFA-305), Food and Drug Administration, 12420 Parklawn Dr., rm. 1-23, Rockville, MD 20857.

**FOR FURTHER INFORMATION CONTACT:** Corinne L. Howley, Center for Food Safety and Applied Nutrition (HFS-24), Food and Drug Administration, 200 C St. SW., Washington, DC 20204, 202-205-4272.

#### **SUPPLEMENTARY INFORMATION:**

##### **I. Background**

On March 4, 1995, President Clinton announced plans for the reform of the Federal regulatory system as part of the Administration's "Reinventing Government" initiative. In his March 4 directive, the President ordered all Federal agencies to conduct a page-by-page review of all of their regulations to "eliminate or revise those that are outdated or otherwise in need of reform."

In response to this directive, FDA issued proposals to revoke a number of regulations (60 FR 53480, October 13, 1995; 60 FR 56513 and 56541, November 9, 1995) and an advance notice of proposed rulemaking (ANPRM) to review standards of identity, quality, and fill of container (60 FR 67492, December 29, 1995). The agency has completed the review of its food regulations in response to the President's initiative and as a result is publishing two documents elsewhere in this issue of the Federal Register. This document is an ANPRM to review regulations that the agency believes may need to be revised. In addition to requesting information on the following

issues, FDA requests any other comments relevant to the regulations discussed herein that would assist the agency in fulfilling its mission to protect the interest of consumers.

##### **II. Soft Drinks**

Elsewhere in this issue of the Federal Register, FDA is proposing a number of changes in § 101.2 (21 CFR 101.2) pertaining to information that must appear on the information panel of the label. FDA explains in that document that it considers a number of exemptions from the type size and placement requirements in § 101.2 to be obsolete, and the agency is proposing to remove them.<sup>1</sup> The exemptions that FDA is proposing to remove appear in § 101.2(c), but that paragraph also contains a number of exemptions that the agency is not proposing to revoke.

Among the latter exemptions is a provision for soft drinks in § 101.2(c)(4). FDA is undecided about whether to retain this provision because the agency does not know enough about nationwide packing practices for these products. For example, this provision exempts soft drink bottles that were manufactured before October 31, 1975, from the type size and placement requirements. The agency does not know, however, whether any bottles manufactured before that date are still in use. If not, this exemption is obsolete and should be removed. Other soft drink exemptions may also be obsolete, or in need of revision, to respond more efficiently to changes in labeling practices that have resulted from the Nutrition Labeling and Education Act (the 1990 amendments). The agency needs to know more about how firms are presenting newly required information to consumers on labels and on labeling materials other than labels (e.g., counter cards, posters), as well as whether they are encountering any difficulties associated with such presentation, before it can determine whether it should pursue further rulemaking activities for soft drinks. For example, where soft drink manufacturers are using posters for some label information, there may be ample free space to present ingredient

<sup>1</sup> The type size and location requirements apply to all information required to appear on the label of any package of food under certain regulations that are referenced in § 101.2. The information must appear either on the principal display panel or the information panel unless otherwise specified in the regulations. Section 101.2(a) defines the term "information panel" as it applies to packaged food, and § 101.2(b) identifies referenced regulations. Section 101.2(c) requires that information required by the referenced regulations be in letters or numbers of at least one-sixteenth inch in height, unless otherwise exempted by regulation.

information in relatively large type size. Would consumers be better informed by such a presentation of this information than they would with smaller type size on the soft drink package itself? If FDA were to permit alternative labeling locations for information required to appear on the information panel, would the current soft drink exemptions still be needed? FDA requests comments on these issues from all interested parties.

### III. Statements of Identity

Section 101.3(a) and (b) (21 CFR 101.3(a) and (b)) requires that the principal display panel of the label of food in package form bear a statement of identity of the food product. Specifically, § 101.3 requires that the statement of identity be in terms of the name of the food as required by Federal law or regulation or, in the absence of such, of the common or usual name for the food. If no such common or usual name has been established, the statement of identity must be an appropriately descriptive term. When the nature of the food is obvious, however, a fanciful name commonly used by the public for the food may be used.

This regulation also requires, among other things, that where the food is marketed in optional forms (whole, slices, diced), the particular form be considered a necessary part of the name (§ 101.3(c)). This provision does not affect the required declarations of identity under definitions and standards of identity for foods that specify other ways of declaring the optional forms of the food.

Section 101.3(d) requires that the statement of identity be presented in bold type on the principal display panel of the label, be in a type size that is reasonably related to the most prominent printed matter on such panel, and be in lines generally parallel to the base on which the package rests as it is designed to be displayed. These provisions were established to meet the prominence and conspicuousness requirements of section 403(f) of the act (21 U.S.C. 343(f)).

The requirement that the type size in which the statement of identity appears be reasonably related to the largest type size used on the principal display panel has been informally interpreted by FDA to mean that the statement of identity must appear in type not less than one-half the size of the largest printed matter on the principal display panel. However, the agency has observed that brand name identifications and flavor declarations often appear many times larger than the statement of identity on the food label. The agency requests

comments on whether the statements of identity are sufficiently conspicuous in light of other representations on the principal display panel. If they are not, how should the regulation be changed to ensure that the type size used for the statement of identity will be adequate? For example, should FDA's informal guidance be established as a requirement in a regulation? Should a different criterion be established, perhaps related to the area of the principal display panel, similar to the requirement for net contents declaration?

FDA is also aware that some identity statements are not placed parallel to the base on which the container rests. Does this create problems for consumers in reading labels? Are there specific needs for variations from this requirement that should be provided for by special exemptions? For example, do advancements in packaging foods and in displaying them justify exemptions for certain types of packaging?

Section 101.3(e) defines the term "imitation" and how it is to be used in the labeling of foods. This provision states that a food shall be deemed to be an imitation, and thus subject to the requirements of section 403(c) of the act, if it is a substitute for and resembles another food but is nutritionally inferior to that food. If the food is an imitation, as so defined, then the label of the food must bear in type of uniform size and prominence, the word "imitation" and, immediately thereafter, the name of the food imitated.

When section 403(c) of the act was adopted in 1938, Congress was seeking to protect the consumer from the uninformed purchase of an inferior substitute product that could be mistaken for a traditional food product (38 FR 2138, January 19, 1973). In 1973, in proposed regulations pertaining to imitation foods, the agency noted that vast strides in food technology had taken place since section 403(c) of the act was enacted, and that since 1938 many new wholesome and nutritious food products had entered the marketplace, some of which resembled and substituted for traditional foods (38 FR 2138). The agency stated that it was no longer the case that such products were necessarily substandard compared to the traditional foods for which they substituted. However, FDA still believed that the consumer must be protected from the unwitting purchase of a product that is different from what he or she may reasonably expect (38 FR 2138). FDA proposed that the term "imitation" only be applied to substitute foods that are nutritionally inferior to the foods for which they substitute (38 FR 2143 at

2148). In its final regulation (38 FR 20703, August 2, 1973), FDA confirmed this view and defined nutritional inferiority as any reduction in the content of an essential nutrient that is present in a measurable amount.

Over the years, FDA has received questions as to when a food is considered to resemble and substitute for a traditional food, so that it is subject to the provisions of this regulation. The agency has advised that where there is no standard of identity for the food in parts 130 through 169 (21 CFR parts 130 through 169), no common or usual name regulation in part 102 (21 CFR part 102), or no provision for the food in the nutritional quality guideline that appears in part 104 (21 CFR part 104), the product must be evaluated in terms of whether it resembles or purports to be (has similar functional, physical, and organoleptic properties), and whether it substitutes for, a food product that has a commonly understood identity or common or usual name. For example, there are products on the market that are textured, colored, flavored, and shaped to resemble crabmeat. These products resemble and substitute for crabmeat, and when they are nutritionally inferior to crabmeat, they must be labeled "imitation crabmeat."

In addition, manufacturers have often sought advice on how a food should be labeled when it resembles and substitutes for a traditional food but is not nutritionally inferior to the traditional food. In some cases, the agency has recommended the use of the term "substitute" as part of the name of such a food. For example, the agency has advised that a beverage made by replacing the milkfat in milk with vegetable oil, and which is not nutritionally inferior to milk, could be labeled as a "milk substitute." The agency stated that the name would be followed by a descriptive phrase, such as "made with skim milk and vegetable oil" or "contains 3 percent soybean oil to replace the milkfat," to inform the consumer as to the difference between the milk substitute and milk.

In view of these questions, the agency is seeking comment on whether it should develop more in-depth guidance to assist manufacturers in naming new food products. If so, how should this be accomplished: through revision of the regulations in §§ 101.3 or 102.5 (common or usual name), a Compliance Policy Guide, or other less formal guidance, such as an addendum to FDA's Food Labeling Guide? In developing comments on this issue, interested parties should keep in mind that FDA has published an ANPRM seeking comment on whether

and how standards of identity and common or usual name regulations should be revised (60 FR 67492). Many, though not all, of the foods subject to § 101.3(e) resemble and substitute for foods subject to those regulations. FDA will evaluate any proposed changes in its policy on labeling of imitation foods in light of any changes it ultimately decides to make in its approach to standards of identity and common or usual name regulations.

In § 101.3(e)(4), FDA has defined nutritional inferiority to include any reduction in the content of an essential nutrient that is present in a measurable amount. A measurable amount of an essential nutrient under this regulation is 2 percent or more of the Daily Reference Value of protein listed under § 101.9(c)(7)(iii) (21 CFR 101.9(c)(7)(iii)) and of potassium listed under § 101.9(c)(9) and of the Reference Daily Intake (RDI) of any vitamin or mineral listed under § 101.9(c)(8)(iv). In the Federal Register of December 28, 1995 (60 FR 67164), FDA established RDI's for several nutrients and revised the definition of nutritional inferiority to accommodate those new RDI's where practicable. The agency stated that as substitute products proliferate, it is important to ensure that these products contain essential nutrients in amounts consistent with the reference food, so that consumers can continue to have confidence that a varied diet will supply adequate nutrition (60 FR 67164 at 67169).

The agency is requesting comment on the appropriateness of the current definition of nutritional inferiority for the purpose of determining whether a food is an imitation. Fat and calories are currently excluded from the nutrients to be considered when determining nutritional inferiority. The agency did not reevaluate this provision when it revised the definition of nutritional inferiority in the December 28, 1995, final rule. Nonetheless, it now seeks comment on whether that definition should be further revised. Should the definition be changed to take into account current dietary guidelines? For example, should sodium, saturated fat, and cholesterol be excluded from the nutrients to be considered? On the other hand, if a substitute food is modified to achieve a nutrition goal, such as a reduction in the sodium content of the diet, and as a consequence the fat or calorie content of the food is increased to achieve a more palatable product, should such a product be considered to be nutritionally inferior? Is there some other way of highlighting such a change on the label?

FDA notes that the concept of nutritional inferiority is widely used in the agency's regulations and interpretations. For example, FDA relies on this concept in the definition of the term "substitute" food in § 101.13 *Nutrient content claims—general principles*. Section 101.13(d) states that a "substitute" food is one that may be used interchangeably with another food that it resembles, i.e., to which it is organoleptically, physically, and functionally (including shelf life) similar, and to which it is not nutritionally inferior, unless it is labeled as an "imitation." In addition, the general standard of identity, § 130.10 *Requirements for foods named by use of a nutrient content claim and a standardized term* (21 CFR 130.10), explains how to derive statements of identity for foods that substitute for and resemble traditional standardized foods. This regulation specifically references § 101.3(e) and provides for the addition of nutrients to the new food so that it will not be nutritionally inferior to the traditional standardized food that is named in the statement of identity. Thus, comments that suggest changes in the definition of nutritional inferiority in § 101.3(e) should also consider the effect of such changes on the labeling of foods covered by other regulations such as those mentioned here.

#### IV. Flavors

FDA's flavor labeling regulation, § 101.22 (21 CFR 101.22), has generated many questions over the years. Some representatives of the food industry have complained that this regulation is so complex that it is subject to a multitude of differing interpretations. In light of such complaints, FDA believes that it should attempt to revise this regulation to make it more user friendly and, at the same time, to make flavor designations on food labels more meaningful to consumers. Comments on the existing regulation will help the agency to achieve this goal.

Section 101.22 lists a variety of characteristics that would make the flavoring used in a food either "artificial" or "natural." The regulation does not, however, contain an adequate definition for either term. Before a firm can decide how to describe the flavoring used in its product, it may have to engage in a rather arduous analysis. For example:

In § 101.22(a), FDA defines an "artificial flavor" or "artificial flavoring" as any substance, the function of which is to impart flavor, which is not derived from a spice, fruit or fruit juice, vegetable or vegetable juice, edible yeast, herb, bark, bud, root,

leaf, or similar plant material, meat, fish, poultry, eggs, dairy products, or fermentation products thereof. The term "artificial flavor" also includes those synthetic flavoring substances and adjuvants listed in §§ 172.515(b) and 182.60 (21 CFR 172.515(b) and 182.60) except where the flavors are derived from natural sources.

This definition would be simpler if FDA could state that the term "artificial flavor" generally connotes a synthetic source. However, the agency has traditionally viewed this term as having wider application than simply to synthetic substances. For example, FDA has advised that when a flavor from a natural source is used in a food product to simulate a flavor of a food other than the one from which the flavor is derived, the food to which the flavor is added must be labeled as "artificially flavored" (38 FR 20718, August 2, 1973). Thus, a "lemon" type pie, made with natural flavor derived predominantly from citrus products, could not be identified simply as "lemon pie" without misleading the consumer. It must be labeled as "citrus pie" or "artificially flavored lemon pie." This position has led to considerable confusion because often manufacturers do not consider the end use of the flavoring, in addition to its source, in determining whether the food should be labeled as being "artificially flavored."

Further, the exception in the definition of "artificial flavor" that permits substances that are listed as synthetic flavoring substances and adjuvants in §§ 172.515(b) and 182.60 to be designated as "natural" when they are derived from "natural sources" has resulted in a very broad category of substances labeled as "natural flavor." There is confusion regarding the interpretation of "natural source" in this context. Should this provision be retained? If so, how should it be phrased so that it can be interpreted consistently?

The agency's definition for "natural flavor" is also very complex. In § 101.22(a)(3), FDA defines "natural flavor" or "natural flavoring" as the essential oil, oleoresin, essence or extractive, protein hydrolysate, distillate, or any product of roasting, heating or enzymolysis, that contains the flavoring constituents derived from a spice, fruit or fruit juice, vegetable or vegetable juice, edible yeast, herb, bark, bud, root, leaf, or similar plant material, meat, seafood, poultry, eggs, dairy products, or fermentation products thereof, whose significant function in food is flavoring rather than nutritional. Natural flavors include natural essence or extractives obtained from plants

listed in 21 CFR 182.10, 182.20, 182.40, and 182.50 and part 184 (21 CFR part 184) and such substances listed in 21 CFR 172.510.

Recognizing that, with advances being made in the technology of flavor development, the distinctions established in its regulations and policy statements may need to be modified, FDA requests comments on whether and, if so, how the definitions of natural and artificial flavor should be revised. For example, if a substance from a natural source is used to produce an intermediate product that is further reacted with another substance from a natural source, e.g., hydrolyzed by use of enzymes or other substances, should the resultant flavor, which obviously differs from its original natural source, be permitted to be labeled as "natural," or should the new flavoring compound be considered to be "an artificial flavor" because the new flavor is not native to the natural sources? Should hydrolysates and their reaction products continue to be considered as natural flavors? What about flavors produced by the Maillard reaction? Would it be better to define "natural flavor" and simply provide that "artificial flavor" constitutes all flavor that does not fall within that definition, or vice versa? Does it make sense to simply abandon the distinction between "artificial" and "natural" flavoring as no longer being relevant to the interests and understanding of consumers and to simply provide for the use of the term "flavor added" on the principal display panel and as part of the ingredient list?

In addition, FDA would like to focus attention on the designation of characterizing flavors on food labels in accordance with § 101.22(i). This matter has provided another source of confusion. Section 101.22(i) provides that if the label or labeling or advertising makes any direct or indirect representations with respect to the primary recognizable flavors of a food, by word, vignette (e.g., by depiction of a fruit) or other means, or if for any reason the manufacturer or distributor of the food wishes to designate the type of flavor in the food other than through the statement of ingredients, such flavor shall be considered to be the characterizing flavor and shall be designated in the following way:

1. If the food contains no artificial flavor that simulates, resembles, or reinforces the characterizing flavor, the name of the food on the principal display panel or panels of the label shall be accompanied by the common or usual name of the characterizing flavor, e.g., "vanilla," in letters not less than

one-half the height of the letters used in the name of the food.

2. If the food is one that is commonly expected to contain a characterizing food ingredient, e.g., strawberries in "strawberry shortcake," and the food contains natural flavor derived from such ingredient, but the amount of the characterizing ingredient is insufficient to independently characterize the food, or the food contains no such ingredient, the name of the characterizing flavor may be immediately preceded by the word "natural" and shall be immediately followed by the word "flavored" in letters not less than one-half the height of the letters in the name of the characterizing flavor, e.g., "natural strawberry flavored shortcake" or "strawberry flavored shortcake."

3. If none of the natural flavor used in the food is derived from the product whose flavor is simulated, the food in which the flavor is used shall be labeled either with the flavor of the product from which the flavor is derived or as "artificially flavored."

4. If the food contains both a characterizing flavor from the product whose flavor is simulated and other natural flavor that simulates, resembles, or reinforces the characterizing flavor, the name of the food shall be immediately followed by the words "with other natural flavor" in letters not less than one-half the height of the letters used in the name of the characterizing flavor.

5. If the food contains any artificial flavor that simulates, resembles, or reinforces the characterizing flavor, the name of the food on the principal display panel or panels of the label shall be accompanied by the common or usual name of the characterizing flavor, in letters not less than one-half the height of the letters used in the name of the food, and the name of the characterizing flavor shall be accompanied by the words "artificial" or "artificially flavored," in letters not less than one-half the height of the letters in the name of the characterizing flavor, e.g., "artificial vanilla," "artificially flavored strawberry," or "grape artificially flavored."

6. Wherever the name of the characterizing flavor appears on the label (other than in the statement of ingredients) so conspicuously as to be easily seen under customary conditions of purchase, the words prescribed by § 101.22(i) shall immediately and conspicuously precede or follow such name, without any intervening written, printed, or graphic matter, with certain exceptions.

These provisions are so complex that it is not surprising that they have

frequently been the cause of confusion and varying interpretations by both manufacturers and regulators. The regulation needs to be clarified. In addition, developments in food processing since the regulation was adopted have resulted in the manufacture of more diverse products using natural and artificial flavors.

The agency requests comment on how the use of flavors should be declared on the food label. Some manufacturers have contended that declaration of natural and artificial flavors in the ingredient list is sufficient to inform consumers of their role in the food. FDA's position has been that consumers can be misled unless the characterizing flavor of the food is described as "flavored" when flavoring substances are needed to characterize the food. The agency's position has been that the term "artificial" should be used to describe the flavor unless it is a natural flavor and is from the same source as the flavor of the food.

What is the best way to inform the consumer of the use and the role of a flavoring substance in a food? How should a combination of natural and artificial flavors be declared? The agency requests suggestions for revisions of § 101.22(i) and substantiating information regarding why the suggested revisions are appropriate, and how they would affect marketing practices.

Further, § 101.22(i) requires that the flavor supplier certify, in writing, that any flavor it supplies that is designated as containing no artificial flavor does not, to the best of the supplier's knowledge and belief, contain any artificial flavor, and that the supplier has not added any artificial flavor to it. Although the agency is not aware of any concerns about labeling of flavors supplied to manufacturers, it requests comments on the suitability of these requirements.

#### V. Infant Formula

Part 107 (21 CFR part 107) provides for labeling of infant formulas, for terms and conditions that a manufacturer must meet with respect to exempt infant formulas, for required levels of nutrients in infant formulas as prescribed by statute, and for recalls of infant formulas in appropriate circumstances. Congress passed the Infant Formula Act of 1980 (the 1980 act) (Pub. L. 96-359), which amended the act to add section 412 (21 U.S.C. 350a). In 1985, FDA partially implemented the 1980 act by establishing subparts B, C, and D in part 107 regarding the labeling of infant formula, exempt infant formulas, and nutrient requirements for infant

formula, respectively (50 FR 1833, January 14, 1985; 50 FR 48183, November 22, 1985; and 50 FR 45106, October 30, 1985). In 1986, Congress, as part of the Drug Enforcement, Education, and Control Act of 1986 (the 1986 amendments) (Pub. L. 99-570), completely revamped section 412 of the act to address concerns that had been expressed by Congress and consumers about the 1980 act and FDA's implementation of those provisions.

In 1990, Congress passed the 1990 amendments which amended the act to add paragraphs (q) and (r) to section 403. While the 1990 amendments exempt infant formulas subject to section 412 of the act from the nutrition labeling provisions of section 403(q) of the act, only infant formulas subject to section 412(h) of the act (exempt infant formulas) are exempt from the nutrient content and health claims provisions of section 403(r).

The agency is considering what changes need to be made to part 107 in light of the 1986 and 1990 amendments to the act. Subpart D of part 107—Nutrient Requirements was not affected by either the 1986 or 1990 amendments and is not being reconsidered under this review. In 1989, the agency responded to the provisions of the 1986 amendments on recalls by establishing subpart E in part 107—Infant Formula Recalls (54 FR 4006, January 27, 1989). To assist in the update of subparts B (Labeling) and C (Exempt Infant Formulas) of part 107, the agency requests comments on what matters need to be addressed.

Section 412(h)(1) of the act states that "any infant formula which is represented and labeled for use by an infant—(A) who has an inborn error of metabolism or a low birth weight, or (B) who otherwise has an unusual medical or dietary problem, is exempt from the requirements of \* \* \*" section 412(a) (adulteration provisions of the act for failure to meet the nutrient requirements of the act, failure to meet the quality factor requirements, and failure to process the infant formula in compliance with the good manufacturing practices and quality control procedures), (b) (quality factors and good manufacturing requirements including quality control procedures), and (c) (registration, submission, and notification requirements). Section 412(h)(2) of the act provides that the Secretary of Health and Human Services (and by delegation FDA) may by regulation establish terms and conditions for the exemption of an infant formula from the requirements of section 412(a), (b), and (c).

In 1980, the House Committee on Interstate and Foreign Commerce stated:

The Committee recognizes the need to make special formulas available without the imposition of cumbersome regulations which may discourage formula manufacturers from committing resources into this vital public service. Conditions on exemptions promulgated under this authority should not make access to special formulas difficult. Instead, they should insure that such formulas are manufactured to the same high standards of quality required of formulas for normal infants. The Committee recognizes the importance of these products and the continued need to make them and new products like them, readily available to the public. (H. Rept. 96-936, 96th Cong., 2d sess., 1980, p.10.)

The agency is soliciting comment on what terms and conditions should be set for the exemption of an infant formula from the requirements of section 412(a), (b), and (c) of the act.

In the past, FDA and infant formula manufacturers have disagreed on how to interpret section 412(h) of the act in light of the current regulations on exempt infant formula in § 107.50. One manufacturer stated that the statute and regulations do not envision a premarket designation or clearance for exempt formulas. Another manufacturer asserted that section 412(h)(1) of the act exempts these formulas from section 412(c) (registration and submissions), and that § 107.50(b)(4) only requires notification to FDA of any change in ingredients or processes that may result in an adverse impact on the levels of nutrients or on the availability of nutrients before the first processing of the infant formula. This manufacturer argued that, consequently, there is no requirement to give notice to the agency 90 days before marketing any exempt infant formula that has been changed in formulation or processing.

The agency has deep reservations about both of these industry assertions. The first would mean that infants who need an exempt formula, and who are by definition among the most vulnerable, would receive the least protection from the law. The second would raise significant questions about the agency's ability to carry out its mandate to "insure that such formulas are manufactured to the same high standards of quality required of formulas for normal infants." The agency would be unable to do so unless it receives notification of "major changes" in exempt infant formula at least 90 days before the marketing of the changed formula. The agency requests comment on what terms and conditions should be set for the exemption of an infant formula from the requirements of

section 412(c) of the act (registration and submissions).

Problems also have occurred in the regulation of infant formulas that meet the statutory definition of an exempt infant formula, i.e., formulas that are intended for infants who have an inborn error of metabolism or a low birth weight, or who otherwise have an unusual medical or dietary problem, but that do not need an exemption from any of the nutrient, quality factor, or good manufacturing requirements (including quality control procedures) of the act. In 1980, the House Committee on Interstate and Foreign Commerce stated that it recognized that infants suffering from special medical disorders, such as phenylketonuria, or severe kidney diseases, require formulas tailored specifically to their medical needs. The Committee recognized also the need to exempt these formulas from the nutritional standards applicable to formulas intended for normal, fullterm infants. (*Id.*)

However, infant formulas are now being developed that meet the nutritional standards applicable to formulas for normal, fullterm infants, i.e. the nutrient requirements of § 107.100, but that are for infants with low birth weight or with unusual medical or dietary problems. Thus, these formulas apparently are exempt infant formulas under section 412(h) of the act. The agency requests comment on what terms and conditions should be set for the exemption of an infant formula from the requirements of section 412(a) of the act. Should infant formulas that are intended for special populations of infants but that meet the nutrient requirements of the act be exempted from being deemed to be adulterated if they do not meet the same quality factor requirements or good manufacturing practices and quality control procedures that are required of infant formulas for normal, fullterm infants? Should infant formulas that meet the definition in the act for an "exempt infant formula" be exempted from meeting the quality factor and good manufacturing practice requirements when they are fully capable of meeting these requirements?

Current § 107.50(b)(3) requires the submission of the label and other labeling in the notification required to retain the exempt status of an infant formula. Current § 107.50(b)(3) further states that FDA will review the submitted information under § 107.50(d), and current § 107.50(d)(4) lists the criteria that FDA will use to determine whether a deviation from the requirements of subpart C of part 107 (Exempt Infant Formulas) is necessary and will adequately protect the public

health. One such criterion is whether a deviation from the labeling requirements of subpart B of part 107 is necessary because, without an exemption, the label information, including pictograms and symbols, could lead to inappropriate use of the infant formula (§ 107.50(d)(4)(iii)).

FDA has held that, for an exempt infant formula to be eligible to make label claims that deviate in any way from the requirements of subpart B of part 107, a firm must show that the labeling claims are necessary to ensure appropriate use of the product (§ 107.50(d)(4)(iii)), and that the public health will be adequately protected if these claims are made (§ 107.50(d)(4)). This showing must be made based on a persuasive medical, nutritional, scientific, or technological rationale (including any appropriate animal or human clinical studies) (§ 107.50(b)(5)). The agency has held that failure to submit information that supports that an exemption is necessary to ensure the proper use of a formula, and failure to show that the public health will be adequately protected if such an exemption is continued, provide grounds for revoking the exempt status of a formula. Revoking the exempt status of a formula would mean that its label could not deviate in any way from the labeling requirements of subpart B of part 107, and thus it would not be able to bear the claims in question. The agency solicits comments on any changes that need to be made to § 107.50 (exempt infant formulas) to ensure that the labeling of these products will be consistent with the public health and will not lead to the inappropriate use of the product.

The agency also solicits comments on any changes to subpart B of part 107 (Labeling) that may be necessary to ensure that exempt infant formulas are labeled appropriately. Further, the agency solicits comments on any changes that it needs to make in the regulations governing the labeling of exempt infant formulas to ensure that the representations made for these products are truthful and not misleading. The 1990 amendments exclude exempt infant formulas from the requirements on nutrition labeling, nutrient content claims, and health claims (section 403(q)(5)(A)(iii) and (r)(5)(A) of the act). The regulations issued in response to the 1990 amendments reflect this fact (§ 101.9(j)(7) (nutrition labeling), § 101.13(q)(4) (nutrient content claims), and § 101.14(f)(1) (health claims)). The agency solicits comments on any changes that should be made to subpart B of part 107 (Labeling) to ensure that

exempt infant formulas are labeled in a manner that will adequately protect the public health and that will ensure appropriate use of the product.

#### VI. Food Additive Regulations

The agency has identified the following candidates for changes to make the regulations on food ingredients easier to understand and to consolidate certain existing regulations under a single listing to minimize redundancy.

##### A. Carrageenan, Carrageenan With Polysorbate 80, Salts of Carrageenan, Furcelleran, and Salts of Furcelleran

In the Federal Register of October 6, 1961 (26 FR 9411 and 9412), FDA published final rules permitting the use of the food additives carrageenan, salts of carrageenan, furcelleran, and salts of furcelleran in food. The agency later published an additional final rule permitting the use of carrageenan processed with polysorbate 80 in food. The original food additive petitions requesting the use of carrageenan and furcelleran in food were submitted to FDA by competing producers of these two additives. Thus, the agency issued separate regulations for these additives even though there are similarities in the structure and functionality of carrageenan and furcelleran. It may now be appropriate to combine the regulations on carrageenan, salts of carrageenan, furcelleran, salts of furcelleran, and carrageenan with polysorbate 80 into a single regulation.

Carrageenan and furcelleran are refined hydrocolloids that are produced by extraction of certain species of red seaweed in aqueous alkali, and they are regulated for use as emulsifiers, thickeners, and stabilizers in food under §§ 172.620 and 172.660 (21 CFR 172.620 and 172.660). The functional properties of carrageenan derive from the sulfated polysaccharide that is the major component of the additive. This polysaccharide is composed of galactose and anhydrogalactose hexose units.

The primary difference between carrageenan as regulated under § 172.620 and furcelleran as regulated under § 172.660 is the degree of sulfation of the hexose units composing the polysaccharide. Furcelleran has a sulfate range of 8 to 19 percent on a dry weight basis, while carrageenan may have a sulfate content of between 20 and 40 weight percent. The degree of sulfation of the additive is believed to be the determining factor regarding the additive's ability to bind to proteins and thus determines the additive's functionality in certain food applications, including dairy

applications. In addition, the functionality of the carrageenan complying with § 172.620 is known to vary with the seaweed species used to produce the additive and with the dominant cation in aqueous solutions of the additive. This variation reflects the level of three principal polysaccharide types in commercial carrageenan. These are known as kappa, iota, and lambda carrageenan and differ in the number and location of the sulfate groups on the hexose units.

In commerce, carrageenan may consist of a relatively pure form of one of the three polysaccharides or a mixture of kappa, lambda, and iota polysaccharides along with cellulosic material, protein, and inorganic salts. The relative amounts of polysaccharides can vary naturally based on their content in the native seaweed, or carrageenan can be formulated from relatively pure kappa, lambda, and iota carrageenan either by processing or by seaweed choice. The ability to produce carrageenan consisting of relatively pure forms of one or the other of the polysaccharides facilitates the production of carrageenans with a wide variation in properties. Thus, the industry is able to develop carrageenans with specific properties for specific applications in food.

The only distinguishing characteristics that FDA incorporated into the regulations for furcelleran and carrageenan were a limitation on the degree of sulfation for the polysaccharide that is the functional component of each additive and a listing of the different seaweed sources of the additives. The differing specifications (sulfate content and seaweed source) incorporated into the regulations for carrageenan and furcelleran were included solely to differentiate between these two similar additives. There is no safety concern regarding the sulfate content of the respective additives. Given this fact, there is no reason to distinguish between the additives on the basis of sulfate content, and no reason why the sulfate specifications for the two additives could not be combined in one regulation.

The first detailed specifications that FDA adopted for furcelleran and carrageenan were the specifications included in the first edition of the Food Chemicals Codex (FCC). The specifications for furcelleran in the first edition of the FCC were identical to those for carrageenan except for the percent sulfate content of the additive and the listed seaweed sources. Subsequent editions of the FCC did not include a separate specification for

furcelleran, in part because the additive was so similar to carrageenan that it was generally considered as a form of carrageenan, and in part because the total use level of furcelleran was only a fraction of the use level of carrageenan. Indeed, the current specification for carrageenan adopted by the Food and Agriculture Organization/World Health Organization Joint Expert Committee on Food Additives (JECFA) includes the additive regulated in the United States as furcelleran. Therefore, inclusion of furcelleran under the U.S. regulation for carrageenan would be a step toward harmonizing U.S. regulations with the JECFA specification recognized internationally.

When FDA issued separate regulations for salts of carrageenan and salts of furcelleran, the agency was primarily concerned about the possibility of economic deception resulting from an artificial increase of one or more of the inorganic salts that are typically components of these additives. In addition, the agency's concern in issuing a separate regulation for carrageenan with polysorbate 80 was to ensure that carrageenan processed with polysorbate 80 would be properly labeled. At the time the regulations for carrageenan, furcelleran, salts of carrageenan, salts of furcelleran, and carrageenan with polysorbate 80 were issued, the chemistry of carrageenan and of furcelleran was well known. At that time, it was known that the addition of salts containing one or another cation would alter significantly the gelation properties of given forms of the additive.

The level of sophistication with which carrageenan and carrageenan-like substances such as furcelleran are developed, marketed, and used reflects a high degree of understanding in the industry regarding the identity and functionality when used in food. Therefore, it may well be advantageous to simplify the regulation of salts of carrageenan, furcelleran, salts of furcelleran, and carrageenan with polysorbate 80 by eliminating the separate regulations for these substances and by providing for all of them to be marketed as carrageenan. The agency is specifically soliciting comments regarding whether such a change should be made, and, if so, what changes to existing specifications, and what additional specifications, may be required in a regulation to permit the combining of referenced regulations.

#### *B. Use of Metals in Contact With Food*

FDA is considering publishing a proposal to list, in 21 CFR part 182, certain metals as generally recognized as

safe (GRAS) for use in contact with food. In addition, FDA is considering ways to make publicly available those uses of metals that have been the subject of a favorable opinion letter issued by agency employees because of the insignificant potential for the metals to migrate into food.

Historically, the use of metals as components of food-contact articles has generally resulted in low dietary exposure. The chemical inertness and hardness of many metals is such that there is little or no likelihood that the metal will migrate to food in other than insignificant amounts. In addition, because metals are typically used in the manufacture of repeat-use articles, the concentration of any migrant would be extremely low because of the large volume of food processed.

While FDA employees have issued opinion letters over the past three decades on the agency's lack of safety concern about the low exposure from such uses of metals, this information has not been made publicly available in any sort of systematic and widespread way. As a result, the agency continues to receive inquiries on the same metals that have been previously found to be acceptable for use in contact with food, either because their use is GRAS, or because the potential for them to migrate to food is insignificant.

To help alleviate this situation, the agency is considering whether to list in part 182 those metals that FDA has stated in opinion letters are GRAS for use as indirect food additives. FDA has reviewed its files and is aware of opinion letters stating that the following metals are GRAS for use in contact with food: Aluminum and aluminum foil; stainless steel (grades 302, 303, 304, 304F, 316, 321); 416 and 440C stainless steel for use as a ring on filter bags; tin plate; and iron for food contact use in breweries.

The agency is interested in information on whether other metals are GRAS when used in contact with food and the basis for such a finding.

In addition to the metals listed above, the agency is aware of opinion letters that have been written by agency employees on various metals agreeing that their use as a component of food-contact articles would not require a food additive petition or regulation because of an insignificant potential for migration to food. FDA has considered that, in some cases, the composition of some of the metal alloys that have been the subject of such letters may be confidential information. The agency is interested in comments on what procedures for making such letters publicly available would be most

effective as well as in information that would help it to determine whether data in such letters, such as the composition of alloys, are confidential, and thus not releasable, or are common information that can be made public.

FDA invites public comment on all of these matters.

#### *VII. Interstate Conveyance Sanitation (21 CFR Part 1250)*

FDA regulates the construction and operation of conveyances (trains, planes, buses, and vessels) in interstate traffic under parts 1240 and 1250 (21 CFR parts 1240 and 1250) of its regulations. These regulations cover environmental health and food safety requirements for the conveyances themselves, including their water and waste systems. They also cover the conveyance servicing areas and vehicles used for boarding drinking water and food and for offloading wastes.

In § 1250.93, FDA focuses on vessels operating in fresh water lakes and rivers and specifically prohibits the discharge of sewage and ballast or bilge water within areas adjacent to domestic water intakes.

#### *C. Concerns*

1. FDA regulates vessels in interstate traffic that operate in both fresh and salt waters.

2. These vessels generate several waste streams involving both liquid and solid wastes. Improper disposal of some of these wastes have important public health implications beyond the possible contamination of public drinking water supplies addressed by the existing regulation. One example is the possible contamination of molluscan shellfish growing and harvesting areas, which is of concern because shellfish are often consumed raw.

3. The National Research Council's Marine Board and its Committee on Shipborne Wastes, on September 6, 1995, released a new report entitled "Clean Ships, Clean Ports, Clean Oceans: Controlling Garbage and Plastic Wastes at Sea." The report concludes that U.S. activities to implement the provisions of the International Convention for the Prevention of Pollution from Ships (1973) and its 1978 protocol are far from complete and effective.

The report recommends interagency cooperation among relevant Federal agencies to promote a systems approach to enhance total management and control of vessel wastes in nine specific maritime sectors. One of these sectors is passenger day boats, casino ships, and ferries, over which FDA has regulatory

responsibility under the Public Health Service Act.

Lead Federal agencies in the matter of controlling shipborne wastes include the U. S. Coast Guard and the Environmental Protection Agency. Other Federal agencies involved include the Department of State, the National Oceanic and Atmospheric Administration and its National Marine Fisheries Service, the United States Department of Agriculture's Animal and Plant Health Inspection Service, and the Maritime Administration.

#### D. Request for Information

FDA is considering proposing to revise § 1250.93 of the Interstate Travel Sanitation regulations to prohibit discharges that would pollute salt water and shellfish growing areas as well as fresh water. Other agency objectives include harmonizing FDA's vessel waste control requirements with those of other Federal agencies and contributing to meeting U. S. obligations under ratified international agreements. FDA requests information on what changes could be made to § 1250.93 to assist the agency in establishing standards for discharges of waste from passenger boats, casino ships, and ferries. The agency requests information on the effects that any suggested changes would have on the waste discharge practices of affected vessels.

#### VIII. Comments

Interested persons may, on or before September 10, 1996, submit to the Dockets Management Branch (address above) written comments regarding this ANPRM. Two copies of any comments are to be submitted, except that individuals may submit one copy. Comments are to be identified with the docket number found in brackets in the heading of this document. Received comments may be seen in the office above between 9 a.m. and 4 p.m., Monday through Friday.

Dated: May 31, 1996.

William B. Schultz,

Deputy Commissioner for Policy.

[FR Doc. 96-14888 Filed 6-7-96; 12:17 pm]

BILLING CODE 4160-01-F

### 21 CFR Parts 101 and 730

[Docket No. 96N-0174]

RIN 0910-AA69

#### Food and Cosmetic Labeling; Revocation of Certain Regulations; Opportunity for Public Comment

AGENCY: Food and Drug Administration, HHS.

**ACTION:** Proposed rule.

**SUMMARY:** The Food and Drug Administration (FDA) is proposing to revoke certain regulations that appear to be obsolete. These regulations have been identified for revocation as a result of a page-by-page review of the agency's regulations that FDA conducted in response to the Clinton administration's "Reinventing Government" initiative, which seeks to streamline Government to ease the burden on regulated industry and consumers. The agency is providing an opportunity for comments on this proposed rule.

**DATES:** Written comments by August 26, 1996. The agency is proposing that any final rule that may issue based upon this proposal become effective 75 days following date of publication of the final rule.

**ADDRESSES:** Submit written comments to the Dockets Management Branch (HFA-305), Food and Drug Administration, rm. 1-23, 12420 Parklawn Dr., Rockville, MD 20857.

**FOR FURTHER INFORMATION CONTACT:** Corinne L. Howley, Center for Food Safety and Applied Nutrition (HFS-24), Food and Drug Administration, 200 C St., SW., Washington, DC 20204, 202-205-4272.

#### SUPPLEMENTARY INFORMATION:

##### I. Background

On March 4, 1995, President Clinton announced plans for the reform of the Federal regulatory system as part of the administration's "Reinventing Government" initiative. In his March 4, 1995, directive, the President ordered all Federal agencies to conduct a page-by-page review of all of their regulations to "eliminate or revise those that are outdated or otherwise in need of reform."

In response to this directive, FDA issued proposals to revoke a number of regulations (see, e.g., 60 FR 53480, October 13, 1995; 60 FR 56513 and 56541, November 9, 1995) and an advance notice of proposed rulemaking (ANPRM) to review standards of identity, quality, and fill of container (60 FR 67492, December 29, 1995). The agency has completed its review of its food and cosmetic regulations in response to the President's initiative and as a result is publishing two documents in this issue of the Federal Register. This document announces additional regulations that FDA is proposing to eliminate or revise, and the second document is an ANPRM that seeks information on other food and cosmetic regulations that appear to be in need of revision.

## II. The Proposal

### A. Food Labeling Regulations

FDA has identified several food labeling regulations in part 101 (21 CFR part 101) as candidates for revocation or revision and is seeking comments from interested parties regarding its tentative conclusions on these matters. The following is a list of those regulations and the agency's tentative conclusions concerning the needed changes:

#### 1. Section 101.2 Information panel of package form food

In § 101.2, paragraph (a) defines the term "information panel" as it applies to packaged food, and in paragraph (b), the regulation provides that all information required to appear on the label of any package of food under certain referenced regulations appear either on the principal display panel or on the information panel unless otherwise specified in the regulations. The referenced regulations are: § 101.4 *Food; designation of ingredients*, § 101.5 *Food; name and place of business of manufacturer, packer, or distributor*, § 101.8 *Labeling of food with number of servings*, § 101.9 *Nutrition labeling of food*, § 101.12 *Reference amounts customarily consumed per eating occasion*, § 101.13 *Nutrient content claims general principles*, § 101.17 *Food labeling warning and notice statements*, Part 101—Subpart D—Specific requirements for nutrient content claims, and Part 105—Foods for special dietary use (21 CFR 105). Paragraph (c) of § 101.2 requires that information required by the referenced regulations be in letters or numbers of at least one-sixteenth inch in height, unless otherwise exempted by regulation. Paragraph (c) of § 101.2 also provides exemptions to this type size requirement. FDA tentatively concludes that certain of these exemptions are obsolete.

#### a. Exemptions for small packages

There are exemptions in paragraphs (c)(1) through (c)(3) of § 101.2 for small packages (defined according to the surface area available to bear labeling). These exemptions were established before the enactment of the Nutrition Labeling and Education Act of 1990 (the 1990 amendments) (Pub. L. 101-535). They were designed to encourage firms to provide nutrition information in accordance with § 101.9, as well as a full list of ingredients in accordance with the regulations in § 101.4 and the agency's policy regarding declaration of ingredients on standardized foods as set out in § 101.6 (see 39 FR 15268, May 2, 1974). Before the enactment of the 1990

amendments, nutrition information was voluntary unless a nutrient was added to the food or a claim about the nutrient content of the food was made in its labeling. The agency also did not have authority under the Federal Food, Drug, and Cosmetic Act (the act) to require that all ingredients used in standardized foods be declared on the label.

The 1990 amendments amended the act to provide for, among other things, mandatory nutrition labeling of foods and complete ingredient listing on all foods. As a result, FDA amended its nutrition labeling regulations in a number of significant respects, including specifying minimum type sizes and formats for presenting the nutrition information on the label (§ 101.9). The amended nutrition labeling regulations include exemptions from the new minimum type size requirements, depending on the particular format being used and the label space available to bear the information.

Also, in response to the 1990 amendments, FDA revised the definitions and standards of identity for foods in parts 131 to 169 (21 CFR parts 131 to 169) to reflect the requirement that all food ingredients, including the mandatory ingredients of standardized foods, be listed on the label and § 101.6 be revoked (58 FR 2850 and 2888, January 6, 1993).

Because the purpose of § 101.2(c)(1), (c)(2), and (c)(3) was to encourage voluntary declaration of ingredients and nutrition information on food, FDA has tentatively concluded that they are no longer needed. Nutrition labeling is now required on most foods, and the regulations now in effect provide for flexibility in presentation of the information where space is limited. Declaration of all ingredients in standardized foods is also required. Because the exemptions in § 101.2(c)(1), (c)(2), and (c)(3) are obsolete, FDA is proposing to revoke them. If any interested person believes that there is a need to retain any of the exemptions, he or she should submit comments explaining that need in response to this proposal. Comments supporting retention of any of these exemptions should include information on specific products for which other type size exemptions are inadequate.

#### *b. Nonretail Individual Serving Size Packages*

Section 101.2(c)(5) provides that individual serving size packages of food served with meals in restaurants, institutions, and on board passenger carriers, and not intended for sale at retail, are exempt from the type-size

requirements of § 101.2(c) under the following conditions:

(i) The package has a total area of 3 square inches or less available to bear labeling;

(ii) There is insufficient area on the package available to print all required information in a type size of one-sixteenth inch in height;

(iii) The label information includes a full list of ingredients in accordance with regulations in part 101 and the policy expressed in § 101.6; and

(iv) The information required by § 101.2 (b) appears on the label in accordance with the provisions of this paragraph, except that the type size is not less than one thirty-second inch in height.

Because declaration of all ingredients in standardized foods is now required, and § 101.6 has been revoked, reference to § 101.6 is no longer meaningful. Therefore, FDA is proposing to delete that reference from § 101.2(c)(5). Specifically, FDA is proposing to revoke paragraph § 101.2(c)(5)(iii) and redesignate paragraph (5)(iv) as (5)(iii).

#### **2. Section 101.8 Labeling of foods with number of servings**

Section 101.8(a) requires that any package of food that bears a representation as to the number of servings contained in such package bear in immediate conjunction with such statement, and in the same size type as is used for such statement, a statement of the net quantity (in terms of weight, measure, or numerical count) of each such serving. However, such statement may be expressed in terms that differ from the terms used in the required statement of net quantity of contents (for example, in cups or tablespoons rather than in avoirdupois ounces) when such differing term is common to cookery and describes a constant quantity. This paragraph also requires that the statement not be misleading in any particular. It goes on to state that where nutrition labeling information is required in accordance with the provisions of § 101.9, the statement of the net quantity of each serving shall be consistent with the requirements for serving size expression set forth in that section (e.g., 10 1-cup (240 milliliters) servings). The provision also states that a statement of the number of units in a package is not in itself a statement of the number of servings.

Paragraph (b) of this regulation (§ 101.8(b)) provides that, if there exists a voluntary product standard issued by the Department of Commerce under the procedures found in 15 CFR part 10, that quantitatively defines the meaning of the term "serving" with respect to a

particular food, then any label representation as to the number of servings in such packaged food shall correspond with such quantitative definition. It also states that, "Copies of published standards are available upon request from the National Bureau of Standards, Department of Commerce, Washington, DC 20234."

The agency has tentatively concluded, based on two factors, that this regulation is obsolete. The first factor is that the description of how serving size information should appear on food labels in § 101.8(a) has been obviated by the recent extensive changes in FDA's regulations governing mandatory nutrition labeling of foods that the agency adopted in response to the 1990 amendments. Section 101.9 requires that quantitative nutrition information be declared in relation to a serving of the food as defined in paragraph (b)(1) of that section. Section 101.9(b)(1) defines a "serving" or "serving size" for the purpose of these regulations as the amount of food, expressed in a common household measure that is appropriate for the food, customarily consumed per eating occasion by persons 4 years of age and older. When the food is specially formulated or processed for use by infants or by toddlers, a serving or serving size means an amount of food customarily consumed per eating occasion by infants up to 12 months of age or by children 1 through 3 years of age, respectively. Section 101.9(b) also provides specific guidance as to how the serving or serving size is to be determined for various food products. Section § 101.12 specifies the reference amount customarily consumed per eating occasion for 139 food product categories and requires the declaration of the serving in terms of metric units and familiar household measures. Among other things, the serving size regulation provides criteria for determining the serving size based on the reference amount for the food category, thereby ensuring that reasonable and uniform serving sizes will be used in product labeling. Such uniformity in food labeling enhances consumers' ability to make nutrition comparisons among foods. With § 101.8(a), however, there is not the same specificity for determining appropriate serving sizes. Consequently, there is far less assurance under § 101.8(a) than under § 101.9 that uniform serving sizes will appear on similar products. Therefore, FDA is proposing to revoke § 101.8(a).

The second factor is that FDA is aware of no need to continue the reference in § 101.8(b) to "voluntary product standards issued by the

National Bureau of Standards of the Department of Commerce (DOC)" that quantitatively define the meaning of the term "serving." (The agency notes that the National Bureau of Standards is now known as the National Institute of Standards and Technology (NIST)). NIST has advised (Ref. 1) FDA that it no longer issues voluntary product standards, and it has been withdrawing its voluntary serving size standards for FDA-regulated food products for some time. NIST stated that its only standard for an FDA-regulated commodity is one for carbonated soft drink bottles and that standard is about to be withdrawn. Therefore, FDA is proposing to revoke § 101.8(b).

### 3. Section 101.29 Labeling of kosher and kosher-style foods

Section 101.29 is a statement of informal agency policy regarding the use of the terms "kosher" and "kosher style" in the labeling of food products. This policy was excerpted from agency correspondence and codified in part 101 (formerly codified as § 3.302, see 22 FR 9593 at page 9594, November 30, 1957) because the agency believed that it was of general interest to the public. Because it was not established through rulemaking procedures, this provision serves only as guidance and does not have the force and effect of law. If these terms are used in a manner that would render the product misbranded, the agency could take action against such products under section 403(a) of the act (21 U.S.C. 343(a)). Although § 101.29 could be removed without notice and comment rulemaking, FDA is proposing to remove it in this document to ensure that its decision is as informed as possible. The agency also solicits comments on whether it should prepare a Compliance Policy Guide that reflects the policy that has been codified in § 101.29. Compliance Policy Guides are used by FDA as informal guidance in evaluating products and accompanying label statements and in recommending regulatory actions for efficient enforcement of the act.

#### *B. Cosmetic Regulations (Part 730—21 CFR 730)*

Parts 710, 720, and 730 (21 CFR parts 710, 720, and 730) of FDA's regulations provide for the Voluntary Cosmetic Reporting Program (VCRP) for the voluntary submission of information relating to cosmetic products. Part 730 of this program provides for the voluntary filing of cosmetic product experience reports (VCPE) by the cosmetics industry. In the Federal Register of October 17, 1973 (38 FR 28914), FDA, in response to a petition

from the Cosmetic, Toiletry and Fragrance Association, Inc. (CTFA), issued regulations for the voluntary filing of cosmetic product experiences. The petitioner believed that the VCPE would serve: "(1) To provide reliable baseline information against which to assess or evaluate products or their ingredients, and (2) prompt information where specific public health questions may be presented." The regulation was implemented in 1974 as the Voluntary Cosmetic Experience Program. FDA recodified these regulations in 1974 (39 FR 10054, 10062, March 15, 1974) and modified them in 1981 (46 FR 38073, July 24, 1981) and 1986 (51 FR 25687, July 16, 1986).

During the 23 years the CVRP has been in place, companies have submitted information about adverse reactions that consumers have reported to them. FDA has performed a statistical assessment of the data to calculate the "baseline" adverse reactions (expected number of reactions per million units distributed) that occur for the different cosmetic product categories identified in the program.

While the VCPE has provided useful information regarding relative adverse reaction baseline rates, it has suffered from some serious limitations. Industry participation in this portion of the program has historically been very limited and selective, the reports lack sufficient details to be useful, and annual reports are sent in long after the occurrence of an adverse reaction. This limited participation has persisted even though the program has been modified several times over the years to make it easier for companies to participate. In this regard, the VCPE provides a false impression about the ability of the voluntary program to ensure the safety of cosmetics. Thus, the VCPE program no longer provides any new information about cosmetic adverse reactions, and it no longer serves the important purpose of helping to find harmful cosmetics and to remove them from the marketplace.

With current budgetary constraints on FDA, it is difficult to justify the continuation of a program that does not contribute directly to increasing the safety of cosmetics or protecting the public health. Adding data to the information that FDA has obtained over 20 years about baseline adverse reaction rates will be unlikely to have any value. Thus, FDA is proposing to revoke part 730. FDA intends to perform a thorough evaluation of information received over the years and will prepare an in-depth report that will be useful to both the cosmetic industry and the public in understanding adverse reaction trends

for different product categories and the baseline rates of adverse reactions. Companies will be able to use this in-depth report for assessing their own individual products without having to report their information to FDA.

The agency is interested in comments on whether the VCPE should be eliminated in its entirety, reduced in scope, or some other alternative. For example, one alternative would be to revoke part 730 but maintain the availability of reporting forms or other means of access (e.g., electronic). These forms could be used for the prompt reporting of any unusually severe adverse reactions or for reporting an unusually high number of adverse reactions of moderate severity. In addition to comments on the issues discussed in this proposal, FDA requests comments on any other related matters that would assist FDA in fulfilling its mission to protect the interests of consumers.

### III. Environmental Impact

The agency has determined under 21 CFR 25.24(a)(11) and (a)(8), respectively, that the actions to revoke or revise several food labeling regulations in part 101, and to eliminate or modify part 730 of the cosmetic regulations, are of a type that do not individually or cumulatively have a significant effect on the environment. Therefore, neither an environmental assessment nor an environmental impact statement is required.

### IV. Economic Impact

FDA has examined the economic impact of the proposed rule as required by Executive Order 12866 and the Regulatory Flexibility Act (Pub. L. 96-354). Executive Order 12866 directs agencies to assess all costs and benefits of available regulatory alternatives and, when regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health, safety, distributive, and equity effects). The Regulatory Flexibility Act requires analyzing options for regulatory relief for small businesses. FDA finds that the proposed rule does not constitute a major rule as defined by Executive Order 12866. FDA also finds that the proposed rule will not have a significant impact on small businesses.

The proposed rule will remove or revise several provisions in part 101 and all of part 730. The proposed removals include: (1) Certain type-size exemptions, (2) the labeling of foods with number of servings other than as specified in the 1990 amendments, (3) guidance on use of the term "kosher",

and (4) elimination of the Voluntary Cosmetic Experience Program. Except for the "kosher" guidance, all of the targeted provisions have been rendered obsolete or counterproductive by more recent regulations and other changes. The "kosher" guidance is not obsolete, but, as mentioned earlier in this preamble, because it does not have the force and effect of law, it is not necessary for it to be codified in Title 21.

FDA anticipates that the labeling provisions of the proposed rule will not change the availability of health and safety information to consumers. Although some labels may change as a result of revising § 101.2(c) and removing § 101.8, the main effect of the proposal will be to make FDA's regulations less complicated and easier to follow. Removing the kosher labeling guidance in § 101.29 should not affect information used for religious purposes because the agency will still be providing the same guidance but most likely in the form of an FDA Compliance Policy Guide. Any information loss that might result would likely arise from recognition by the affected industry that the policy does not carry the force and effect of law. Nevertheless, such a loss would not affect health or safety.

FDA estimates the economic effects of labeling with a general model described in the November 27, 1991 Federal Register (56 FR 60856). The net benefits of labeling rules are the difference between the benefits to consumers of the information on labels and the cost to producers (and, ultimately, to consumers) of providing that information. The benefits from labeling can be estimated to be the monetary value of the health and safety improvements that can be attributed to better-informed consumers. The costs of labeling regulations include administrative, analytical, printing, inventory, and product reformulation costs. FDA believes that the proposed labeling revisions will not reduce the nutrition and safety information available to consumers. The health and safety benefits from the labeling rules in part 101 therefore will not change.

The primary economic effect of the proposal will be changes in costs. FDA expects compliance costs of labeling to decline, mainly because the proposed rule will reduce administrative costs. The administrative costs include interpreting labeling regulations and determining how they apply to individual products. The more complicated and confusing the regulations, the more costly it is to interpret them. For example, the

existence of type size exemptions in § 101.2(c) that differ from those in § 101.9 forces firms to study both sections before determining how the rules apply to their products. Even if there were no differences in labeling requirements between sections, firms would have to interpret both sections to assure themselves perhaps at considerable cost, that no differences exist.

By streamlining and consolidating labeling rules, the labeling directions in part 101 will be more user friendly, which in turn will substantially reduce compliance costs. Although FDA does not possess enough data to quantify the reduction in costs, the agency is confident that the compliance cost of labeling regulations will indeed fall as a result of the proposal.

Eliminating voluntary cosmetic experience reporting will generate net benefits by reducing costs. FDA receives an average of 125 submissions annually from firms in the industry. The annual cost to FDA of reviewing, evaluating, summarizing, and storing the experience reports is approximately \$12,000. The annual cost to participating firms is approximately \$12,000. Eliminating the program would therefore reduce annual agency and industry costs by approximately \$24,000, without affecting public health. FDA tentatively concludes that because it will reduce the costs but not the benefits of labeling and voluntary reporting regulations, the proposed rule will generate positive net benefits. FDA finds no reason to expect the proposal to impose burdens on small businesses, whose compliance costs could fall.

#### V. Paperwork Reduction Act

FDA tentatively concludes that this proposed rule contains no reporting, recordkeeping, labeling or other third party disclosure requirements. Thus there is no "information collection" necessitating clearance by the Office of Management and Budget. However, to ensure the accuracy of this tentative conclusion, FDA is asking for comment on whether this proposed rule to revoke certain regulations that it believes are obsolete imposes any paperwork burden.

#### IV. References

The following reference has been placed on display in the Dockets Management Branch (HFA-305, Food and Drug Administration, rm. 1-23, 12420 Parklawn Dr., Rockville, MD 20857, and may be seen by interested persons between 9 a.m. and 4 p.m., Monday through Friday.

1. Memorandum to James Taylor, Center for Food Safety and Applied Nutrition, FDA, from Joan Roenig, the National Institutes of Standards and Technology, April 2, 1996.

#### List of Subjects

##### 21 CFR Part 101

Food labeling, Nutrition, Reporting and recordkeeping requirements.

##### 21 CFR Part 730

Cosmetics, Reporting and recordkeeping requirements.

Therefore, under the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner of Food and Drugs, it is proposed that 21 CFR parts 101 and 730 be amended as follows:

#### PART 101—FOOD LABELING

1. The authority citation for 21 CFR part 101 continues to read as follows:

Authority: Secs. 4, 5, 6 of the Fair Packaging and Labeling Act (15 U.S.C. 1453, 1454, 1455); secs. 201, 301, 402, 403, 409, 701 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 321, 331, 342, 343, 348, 371).

2. Section 101.2 *Information panel of package form food* is amended by removing paragraphs (c)(1) through (c)(3) and (c)(5)(iii); and by redesignating paragraphs (c)(4) and (c)(5) as paragraphs (c)(1) and (c)(2) respectively.

##### § 101.8 [Removed]

3. Section 101.8 *Labeling of food with number of servings* is removed.

##### § 101.29 [Removed]

4. Section 101.29 *Labeling kosher and kosher-style foods* is removed.

#### PART 730—VOLUNTARY FILING OF COSMETIC PRODUCT EXPERIENCES

##### Part 730 [Removed]

5. Part 730 is amended by removing it in its entirety.

Dated: May 31, 1996.

William B. Schultz,

*Deputy Commissioner for Policy.*

[FR Doc. 96-14887 Filed 6-10-96; 12:17 pm]

BILLING CODE 4160-01-F

**21 CFR Parts 170, 171, 172, 173, 175, 176, 177, 178, 182, and 184**

[Docket 96N-0177]

RIN 0910-AA58

#### Reinvention of Certain Food Additive Regulations

AGENCY: Food and Drug Administration, HHS.

**ACTION:** Advance notice of proposed rulemaking.

**SUMMARY:** The Food and Drug Administration (FDA) is seeking public comment on possible ways to streamline various food additive regulations as the result of a page-by-page review of the agency's regulations. This regulatory review is part of the administration's "Reinventing Government" initiative which seeks to streamline Government and to ease the burden on regulated industry and consumers.

**DATES:** Written comments by September 10, 1996.

**ADDRESSES:** Submit written comments to the Dockets Management Branch (HFA-305), Food and Drug Administration, 12420 Parklawn Dr., rm. 1-23, Rockville, MD 20857.

**FOR FURTHER INFORMATION CONTACT:**

Regarding information concerning the regulations: George H. Pauli, Center for Food Safety and Applied Nutrition (HFS-205), Food and Drug Administration, 200 C St. SW., Washington, DC 20204, 202-418-3090.

Regarding general information on FDA's "reinventing initiative": Lisa M. Helmanis, Regulations Policy and Management Staff (HF-26), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301-443-3480.

**SUPPLEMENTARY INFORMATION:** On March 4, 1995, President Clinton announced plans for reforming the Federal regulatory system as part of his "Reinventing Government" initiative. In his March 4 directive, the President ordered all Federal agencies to conduct a page-by-page review of all of their regulations and to "eliminate or revise those that are outdated or otherwise in need of reform." This notice, which seeks public comment on possible "reinventions", represents FDA's continuing effort to implement the President's plan. In previous issues of the Federal Register, FDA proposed revoking or revising other regulations, and the agency expects to issue future reinvention proposals in upcoming issues.

In this document, FDA is seeking comments on ways in which the following food additive regulations could be updated or revised in order to make them more understandable. The agency is also seeking any other comments regarding parts 170-184 that would assist FDA in fulfilling its mission to protect the interest of consumers. The following is a section-by-section analysis of the regulations that FDA is considering "reinventing."

**I. Section-by-Section Analysis:**

The agency's section-by-section analysis of the regulations listed in parts 170, 171, 172, 173, 175, 176, 177, 178, 182, and 184 (21 CFR parts 170, 171, 172, 173, 175, 176, 177, 178, 182, and 184) has identified candidate regulations to be considered for change, according to the similarity of the regulatory action. The consolidation of multiple listings under one heading would be intended to make the regulations easier to find and use by the regulated industry. Eliminating required analytical methodology would allow more flexibility to use improved methods. Rewriting some sections would be intended to make the regulations easier to understand.

The agency recognizes, however, that apparently simple revisions can inadvertently change the original intent of a regulation. Therefore, care must be taken when revising language to avoid unintended changes. Also, while revising the regulations would not entail reevaluation of the scientific data underlying an approval, it would require agency resources that would otherwise be spent on reviewing petitions and promulgating regulations authorizing uses of other food additives. Additionally, the agency recognizes that while simplification or shortening of the regulations is a useful goal, some users may prefer the detail currently in the regulations. Therefore, before committing further resources to develop proposed changes, FDA is seeking comment on the importance to the regulated community of the various actions under consideration so that the agency can establish appropriate priorities for its reform efforts. The agency is interested in comments both on whether the regulatory actions should be pursued and, for those changes that are needed, any recommendations regarding the specific changes to be made in the regulation and the relative importance of these revisions to interested persons. The agency notes that, due to their technical nature, some of the changes suggested below could be accomplished in a final rule; others may require both a proposed rule and a final rule stage. In some instances, the agency has suggested a reinvention approach.

**II. Consolidate and Delete Regulations**

The following additives have been selected as candidates possible for single listing to minimize redundancy.

**A. Food Additives**

Glycine is listed in §§ 170.50 *Glycine (aminoacetic acid) in food for human*

*consumption*, 172.320 *Amino acids*, and 172.812 *Glycine*. Should these regulations be consolidated and, if so, how?

**B. Food Additives Permitted for Direct Addition to Food for Human Consumption**

Sections 172.836 *Polysorbate 60*, 172.838 *Polysorbate 65*, 172.840 *Polysorbate 80*, and 172.842 *Sorbitan monostearate* could be simplified by deleting references to specific combinations of entries of substances listed within the regulation.

Sections 172.860 *Fatty acids*, 172.862 *Oleic acid derived from tall oil fatty acids*, and 172.863 *Salts of fatty acids* could be combined and simplified under one section. Tests and methods could also be simplified.

Section 172.866 *Synthetic glycerin produced by the hydrogenolysis of carbohydrates* could be combined with § 182.1320 to eliminate the apparent redundancy.

**C. Secondary Direct Food Additives Permitted in Food for Human Consumption**

Sections 173.160 *Candida guilliermondii* and 173.165 *Candida lipolytica* could be combined and simplified under one section.

**D. Indirect Food Additives: Adhesives and Components of Coatings**

Sections 175.360 *Vinylidene chloride copolymer coatings for nylon film* and 175.365 *Vinylidene chloride copolymer coatings for polycarbonate film* could be combined and simplified under one section.

**E. Indirect Food Additives: Adjuvants, Production Aids, and Sanitizers**

Section 178.2010 *Antioxidants and/or stabilizers for polymers* contains a listing of antioxidants. Thus the information in § 178.2550 *4-Hydroxymethyl-2,6-di-tert-butylphenol* could be added to the listing in § 178.2010.

Sections 178.3530 *Isoparaffinic petroleum hydrocarbons, synthetic* and 178.3650 *Odorless light petroleum hydrocarbons* are related substances which could be combined under one section.

Section 178.3600 *Methyl glucoside-coconut oil ester* could be deleted and the substance listed as a processing aid under 21 CFR 172.816 and 178.3520.

Sections 178.3610 *Methylstyrene-vinyltoluene resin, hydrogenated* and 178.3930 *Terpene resins* could be deleted and the substances listed as components for use in olefin polymers under § 177.1520.

Sections 178.3700 *Petrolatum*, 178.3710 *Petroleum wax* and 178.3720 *Petroleum wax synthetic* could be simplified and combined under one section.

Section 178.3860 *Release agents* contains a listing of release agents. Thus, the information in 21 CFR 178.3290 could be added to the listing in § 178.3860.

#### F. Direct Food Substances Affirmed as Generally Recognized as Safe

Sections 184.1271 *L-Cysteine* and 184.1272 *L-Cysteine monohydrochloride* could be simplified under one section.

### III. Proposed Deletion of Descriptions of Analytical Methods

Lengthy descriptions of the analytical methods may not be necessary. Each reference to a method could state that copies are available from the Center for Food Safety and Applied Nutrition (CFSAN) and could also specify that equivalent methods are acceptable. Thus, the descriptions of methods could be deleted from the following regulations:

#### A. Indirect Food Additives: Paper and Paperboard Components

Section 176.170 *Components of Paper and Paperboard in Contact with Aqueous and Fatty Foods*.

#### B. Indirect Food Additives: Polymers

Section 177.1010 *Acrylic and modified acrylic plastics, semirigid and rigid*.

Section 177.1050 *Acrylonitrile/styrene copolymer modified with butadiene/styrene elastomer*.

Section 177.1315 *Ethylene-1, 4-cyclohexylene dimethylene terephthalate copolymers*.

Section 177.1330 *Ionomeric resins*.

Section 177.1500 *Nylon resins*.

Section 177.1520 *Olefin polymers*.

Section 177.1640 *Polystyrene and rubber-modified polystyrene*.

Section 177.1950 *Vinyl chloride-ethylene copolymers*.

Section 177.1970 *Vinyl chloride-lauryl vinyl ether copolymers*.

Section 177.1980 *Vinyl chloride-propylene copolymers*.

#### C. Indirect Food Additives: Adjuvants, Production Aids, and Sanitizers

Section 178.1010 *Sanitizing solutions*.

Section 178.3620 *Mineral oil*.

Section 178.3770 *Polyhydric alcohol esters of oxidatively refined (Gersthofen process) montan wax acids*.

Section 178.3910 *Surface lubricants used in the manufacture of metallic articles*.

### IV. Methodology

The methodology in the following regulations could be simplified.

#### A. Food Additives Permitted for Direct Addition to Food for Human Consumption

The method and descriptions in § 172.133 *Dimethyl dicarbonate* could be simplified.

The analytical specification in § 172.250 *Petroleum naphtha* could be simplified.

In § 172.695 *Xanthan gum*, the tests as specified in paragraph (d) could be eliminated.

In § 172.820 *Polyethylene glycol (mean molecular weight 200–9,500)*, the analytical method referenced for determining ethylene glycol and diethylene glycol could be simplified.

Section 172.859 *Sucrose fatty acid esters* could be rewritten to clarify preparation and methods.

In § 172.864 *Synthetic fatty alcohols* paragraphs (a) and (c) could be revised, and refer to analytical methods that are available from CFSAN.

Section 172.886 *Petroleum wax* could be simplified and refer to the analytical procedures that are available from CFSAN.

#### B. Secondary Direct Food Additives Permitted in Food for Human Consumption

Section 173.350 *Combustion product gas* could be simplified and could state that analytical procedures were available from CFSAN.

### V. General provisions applicable to indirect additives

The statement on good manufacturing practice and the general list of acceptable components in articles that contact food, as referenced in § 174.5, are applicable to indirect food additives in general. Therefore, similar statements could be deleted in the following individual regulations:

#### A. Indirect Food Additives: Adhesives and Components of Coatings

Section 175.105 *Adhesives*.

Section 175.125 *Pressure-sensitive adhesives*.

Section 175.230 *Hot-melt strippable food coatings*.

Section 175.300 *Resinous and polymeric coatings*.

Section 175.320 *Resinous and polymeric coatings for polyolefin films*.

Section 175.350 *Vinyl acetate/crotonic acid copolymer*.

Section 175.390 *Zinc-silicon dioxide matrix coatings*.

#### B. Indirect Food Additives: Paper and Paperboard Components

Section 176.130 *Anti-offset substances*.

Section 176.170 *Components of paper and paperboard in contact with aqueous and fatty foods*.

Section 176.200 *Defoaming agents used in coatings*.

Section 176.210 *Defoaming agents used in the manufacture of paper and paperboard*.

Section 176.300 *Slimicides*.

#### C. Indirect Food Additives: Polymers

Section 177.1010 *Acrylic and modified acrylic plastics, semirigid and rigid*.

Section 177.1030 *Acrylonitrile/butadiene/styrene/methyl methacrylate copolymer*.

Section 177.1040 *Acrylonitrile/styrene copolymer*.

Section 177.1200 *Cellophane*.

Section 177.1210 *Closures with sealing gaskets for food containers*.

Section 177.1240 *1,4-Cyclohexylene dimethylene terephthalate and 1,4-cyclohexylene dimethylene isophthalate copolymer*.

Section 177.1310 *Ethylene-acrylic acid copolymers*.

Section 177.1320 *Ethylene-ethyl acrylate copolymers*.

Section 177.1350 *Ethylene-vinyl acetate copolymers*.

Section 177.1400 *Hydroxyethyl cellulose film, water-insoluble*.

Section 177.1520 *Olefin polymers*.

Section 177.1550 *Perfluorocarbon resins*.

Section 177.1630 *Polyethylene phthalate polymers*.

Section 177.1635 *Poly(p-methylstyrene) and rubber-modified poly(p-methylstyrene)*.

Section 177.1640 *Polystyrene and rubber-modified polystyrene*.

Section 177.1650 *Polysulfide polymer-polyepoxy resins*.

Section 177.1660 *Poly(tetramethylene terephthalate)*.

Section 177.1970 *Vinyl chloride-lauryl vinyl ether copolymers*.

Section 177.1980 *Vinyl chloride-propylene copolymers*.

Section 177.1990 *Vinylidene chloride/methyl acrylate copolymers*.

Section 177.2000 *Vinylidene chloride/methyl acrylate/methyl methacrylate polymers*.

Section 177.2400 *Perfluorocarbon cured elastomers*.

Section 177.2460 *Poly(2,6-dimethyl-1,4-phenylene) oxide resins*.

Section 177.2470 *Polyoxymethylene copolymer*.

Section 177.2480 *Polyoxymethylene homopolymer*.

Section 177.2550 *Reverse osmosis membranes.*

Section 177.2600 *Rubber articles intended for repeated use.*

Section 177.2800 *Textiles and textile fibers.*

**D. Indirect Food Additives: Adjuvants, Production Aids, and Sanitizers**

Section 178.1005 *Hydrogen peroxide solution.*

Section 178.3120 *Animal glue.*

Section 178.3570 *Lubricants with incidental food contact.*

Section 178.3850 *Reinforced wax.*

**VI. Regulations Reinvented for Clarity**

The agency has noted that some of its food additive regulations could be rewritten to provide clearer guidance.

**A. Food Additives Permitted for Direct Addition to Food for Human Consumption**

The labeling directions in § 172.725 *Gibberellic acid and its potassium salt* could be rewritten for clarity.

Section 172.177 *Sodium nitrite used in processing smoked chub* could be revised to achieve greater consistency with 21 CFR 172.175.

**B. Secondary Direct Food Additives Permitted in Food for Human Consumption**

Section 173.357 *Materials used as fixing agents in the immobilization of enzyme preparations* could be revised to give a clearer statement of components that may be safely used.

Section 173.395 *Trifluoromethane sulfonic acid* could be revised for clarity.

**C. Indirect Food Additives: General**

Section 174.5 *General provisions applicable to indirect food additives* could be revised to achieve greater clarity in paragraph (d)(l) and in the restrictions placed on GRAS substances authorized for use in this part.

**D. Indirect Food Additives: Polymers**

In § 177.1560 *Polyarylsulfone resins*, the agency could add a definition for "normal baking temperature."

In § 177.2490 *Polyphenylene sulfide resins*, the agency could add a definition for "normal baking and frying temperature."

**E. Direct Food Substances Affirmed as Generally Recognized as Safe**

In §§ 184.1257 *Clove and its derivatives* and 184.1259 *Cocoa butter substitute primarily from palm oil*, the description of the additives could be simplified.

Section 184.1287 *Enzyme-modified fats* does not contain general

requirements for enzyme preparations. FDA could reinvent this section to be consistent with the agency's general enzyme provisions.

In § 184.1333 *Gum ghatti*, the agency could eliminate the specifications under paragraph (b) and incorporate by reference the specifications in the Food Chemicals Codex.

In § 184.1408 *Licorice and licorice derivatives* could be revised to achieve greater clarity and the regulation could state that methods of analysis are available from CFSAN.

The description of the additives in § 184.1685 *Rennet (animal-derived) and chymosin preparation (fermentation-derived)* could be simplified.

**VII. Request for Comments**

Interested persons may, on or before, September 10, 1996, submit to the Dockets Management Branch (address above) written comments regarding this notice. Two copies of any comments are to be submitted, except that individuals may submit one copy. Comments are to be identified with the docket number found in brackets in the heading of this document. Received comments may be seen in the office above between 9 a.m. and 4 p.m., Monday through Friday.

Dated: June 6, 1996.

William B. Schultz,

Deputy Commissioner for Policy

[FR Doc. 96-14889 Filed 6-7-96; 3:02 pm]

BILLING CODE 4160-01-F

**DEPARTMENT OF THE TREASURY**

**Internal Revenue Service**

**26 CFR Part 26**

[PS-22-96]

RIN 1545-AU26

**Generation-Skipping Transfer Tax**

**AGENCY:** Internal Revenue Service (IRS), Treasury.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** This document contains proposed regulations relating to the final generation-skipping transfer (GST) tax regulations under chapter 13 of the Internal Revenue Code (Code). This document proposes a change to the final regulations and is necessary to provide guidance to taxpayers so that they may comply with chapter 13 of the Code.

**DATES:** Written comments and requests for a public hearing must be received by September 10, 1996.

**ADDRESSES:** Send submissions to: CC:DOM:CORP:R (PS-22-96), 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 a.m. and 5 p.m. to: CC:DOM:CORP:R (PS-22-96), Courier's Desk, Internal Revenue Service, 1111 Constitution NW., Washington, DC 20224.

**FOR FURTHER INFORMATION CONTACT:** Concerning the proposed regulation, James F. Hogan, (202) 622-3090 (not a toll-free number); concerning submissions, Christina Vasquez, (202) 622-7180, (not a toll-free number).

**SUPPLEMENTARY INFORMATION:**

**Background**

On December 24, 1992, the IRS published a notice of proposed rulemaking in the Federal Register (57 FR 61356) containing proposed regulations under sections 2611, 2612, 2613, 2632, 2641, 2642, 2652, 2653, 2654, and 2663. On December 27, 1995, the IRS published final regulations in the Federal Register (60 FR 66898) under sections 2611, 2612, 2613, 2632, 2641, 2642, 2652, 2653, 2654, and 2663. This proposed regulation will delete § 26.2652-1(a)(4) and two related examples.

**Explanation of Provision**

Section 2652(a)(1) provides generally, that the term *transferor* means—(A) in the case of any property subject to the tax imposed by chapter 11, the decedent, and (B) in the case of any property subject to the tax imposed by chapter 12, the donor. An individual is treated as transferring any property with respect to which the individual is the transferor. Under § 26.2652-1(a)(2), a transfer is subject to Federal gift tax if a gift tax is imposed under section 2501(a) and is subject to Federal estate tax if the value of the property is includable in the decedent's gross estate determined under section 2031 or section 2103. Under § 26.2652-1(a)(4), the exercise of a power of appointment that is not a general power of appointment is also treated as a transfer subject to Federal estate or gift tax by the holder of the power if the power is exercised in a manner that may postpone or suspend the vesting, absolute ownership, or power of alienation of an interest in property for a period, measured from the date of the creation of the trust, extending beyond any specified life in being at the date of creation of the trust plus a period of 21 years plus, if necessary, a reasonable period of gestation.

The purpose of the rule in § 26.2652-1(a)(4) was to apply the GST tax when

it may not otherwise have applied. It was never intended to (nor could it) prevent the application of the tax pursuant to the statutory provisions that apply based on the original taxable transfer. To eliminate any uncertainty concerning the proper application of the GST tax, the regulations under section 2652(a) will be clarified by eliminating § 26.2652-1(a)(4) and *Example 9* and *Example 10* in § 26.2652-1(a)(6) from the final regulations.

#### Proposed Effective Date

These amendments apply to transfers to trusts on or after June 12, 1996.

#### Special Analysis

It has been determined that this notice of proposed rulemaking is not a significant regulatory action as defined in EO 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, the notice of proposed rulemaking preceding these regulations was submitted to the Small Business Administration for comment on its impact on small business.

#### Comments and Requests for a Public Hearing

Before this proposed regulation is adopted as a final regulation, consideration will be given to any written comments (a signed original and eight (8) copies) that are submitted timely to the IRS. All comments will be available for public inspection and copying. A public hearing may be scheduled if requested in writing by a person that timely submits written comments. If a public hearing is scheduled, notice of the date, time, and place for the hearing will be published in the Federal Register.

#### Drafting Information

The principal author of this proposed regulation is James F. Hogan, Office of the Chief Counsel, IRS. Other personnel from the IRS and Treasury Department participated in its development.

#### List of Subjects in 26 CFR Part 26

Estate taxes, Reporting and recordkeeping requirements.

#### Adoption of Amendments to the Regulations

Accordingly, 26 CFR part 26 is proposed to be amended as follows:

### **PART 26—GENERATION-SKIPPING TRANSFER TAX REGULATIONS UNDER THE TAX REFORM ACT OF 1986**

Paragraph 1. The authority citation for part 26 continues to read, in part, as follows:

Authority: 26 U.S.C. 7805 \* \* \*

Par. 2. Section 26.2652-1 is amended as follows:

#### **§ 26.2652-1 [Amended]**

1. Paragraph (a)(4) is removed and paragraphs (a)(5) and (a)(6) are redesignated as paragraphs (a)(4) and (a)(5), respectively.

2. In newly designated paragraph (a)(5), *Examples 9* and *10* are removed and *Example 11* is redesignated as *Example 9*.

Margaret Milner Richardson,

*Commissioner of Internal Revenue.*

[FR Doc. 96-13858 Filed 6-11-96; 8:45 am]

BILLING CODE 4830-01-U

### **DEPARTMENT OF JUSTICE**

#### **28 CFR Part 74**

#### **Redress Provisions for Persons of Japanese Ancestry: Guidelines Under *Ishida v. United States***

**AGENCY:** Department of Justice.

**ACTION:** Notice of extension of deadline for public comment.

**SUMMARY:** On April 22, 1996, the Department of Justice published in the Federal Register (61 FR 17667) a proposed rule to amend the Department's regulation governing redress provisions for persons of Japanese ancestry. This change will amend the standards of the Civil Liberties Act of 1988 to make eligible for payments of \$20,000 those persons who were born after their parents "voluntarily" evacuated from the prohibited military zones of the West Coast of the United States as a result of military proclamations issued pursuant to Executive Order 9066. This change will also make eligible for redress those persons who were born outside the prohibited military zones in the United States after their parents were released from internment camps during the defined war period and whose parents had resided in the prohibited military zones on the West Coast immediately prior to their internment.

The period for accepting comments was published as ending on June 6, 1996. Due to a clerical mistake, however, the period for accepting

comments should end on June 20, 1996, upon the expiration of the standard sixty day comment period. Due to this mistake and requests from interested parties to have the full sixty day period in which to submit comments, the comment period is extended through June 20, 1996.

**DATES:** The comment period is extended to June 20, 1996.

**ADDRESSES:** Written comments may be mailed to the Office of Redress Administration, P.O. Box 66260, Washington, D.C. 20035-6260.

**FOR FURTHER INFORMATION CONTACT:** Tink D. Cooper or Emlei M. Kuboyama, Office of Redress Administration, Civil Rights Division, U.S. Department of Justice, P.O. Box 66260, Washington, D.C. 20035-6260; (202) 219-6900 (voice) or (202) 219-4710 (TDD). These are not toll-free numbers.

**SUPPLEMENTARY INFORMATION:** The proposed rule published in the Federal Register on April 22, 1996, would amend the regulation of the Department of Justice governing redress provisions for persons of Japanese ancestry. A number of persons have asserted claims for redress based on their parents' evacuation or internment by the United States Government prior to their birth and their subsequent inability to legally return to their parents' original place of residence in the prohibited military zones on the West Coast. Based on section 108 of the Civil Liberties Act of 1988, Public Law No. 100-383 (codified at 50 U.S.C. app 1989 *et seq.*, as amended) and 28 CFR 74.4, the Civil Rights Division found these persons ineligible for redress. Approximately 1,000 persons who were born after their parents "voluntarily" evacuated from the prohibited military zones or after their parents were released from internment camps claimed compensation under the Act. Most of these claimants were born prior to midnight on January 2, 1945, the effective date of Proclamation Number 21, which rescinded the prohibited military zones on the West Coast and lifted the general exclusion restrictions on persons of Japanese ancestry. However, the United States Court of Appeals for the Federal Circuit determined that the Civil Rights Division's policy of denying such claims was inconsistent with the terms of the Act. *Ishida v. U.S.*, No. 94-5151 (Fed. Cir., July 6, 1995). In order to conform to the court decision, the Civil Rights Division proposed this revision to the regulation.

To be assured of consideration, comments must be in writing and must be received on or before June 20, 1996.

\* \* \* \* \*

Dated: June 4, 1996.

Deval Patrick,

Assistant Attorney General.

[FR Doc. 96-14638 Filed 6-11-96; 8:45 am]

BILLING CODE 4410-01-M

## 28 CFR Part 74

[AG Order No. 2033-96]

RIN 1190-AA42

### Redress Provisions for Persons of Japanese Ancestry: Guidelines for Individuals Who Relocated to Japan as Minors During World War II

AGENCY: Department of Justice.

ACTION: Proposed rule.

**SUMMARY:** The Department of Justice ("Department") hereby proposes a change to the regulations governing redress provisions for persons of Japanese ancestry. This change will amend the standards of the Civil Liberties Act of 1988 to make eligible for payments of \$20,000 those persons who are otherwise eligible for redress under these regulations, but who involuntarily relocated during World War II to a country with which the United States was at war. In practice, this amendment will make potentially eligible those persons who were evacuated, relocated, or interned by the United States Government; who, as minors, relocated to Japan during World War II, and otherwise were unemancipated and lacked the legal capacity to leave the custody and control of their parents (or legal guardians) who chose to relocate to Japan during the war; and who did not enter active military service on behalf of the Japanese Government or another enemy government during the statutorily-defined war period.

**DATES:** Comments must be submitted on or before July 12, 1996.

**ADDRESSES:** Comments may be mailed to the Office of Redress Administration, PO Box 66260, Washington, DC 20035-6260.

**FOR FURTHER INFORMATION CONTACT:**

Tink D. Cooper or Emlei Kuboyama, Office of Redress Administration, Civil Rights Division, U.S. Department of Justice, PO Box 66260, Washington, DC 20035-6260; (202) 219-6900 (voice) or (202) 219-4710 (TDD). These are not toll-free numbers.

**SUPPLEMENTARY INFORMATION:**

**I. Background**

The Civil Liberties Act of 1988, Pub. L. No. 100-383 (codified at 50 U.S.C. app. 1989 *et seq.*, as amended) ("the Act"), enacted into law the recommendations of the Commission on Wartime Relocation and Internment of Civilians ("Commission") established by Congress in 1980. See Commission on Wartime Relocation and Internment of Civilians Act, Pub. L. No. 96-317 (1980). This bipartisan commission was established: (1) To review the facts and circumstances surrounding Executive Order 9066, issued February 19, 1942, and the impact of that Executive Order on American citizens and permanent resident aliens of Japanese ancestry; (2) to review directives of United States military forces requiring the relocation and, in some cases, detention in internment camps of these American citizens and permanent resident aliens; and (3) to recommend appropriate remedies. The Commission submitted to Congress in February 1983 a unanimous report, *Personal Justice Denied*, which extensively reviewed the history and circumstances of the decisions to exclude, remove, and then to detain Japanese Americans and Japanese resident aliens from the West Coast, as well as the treatment of Aleuts during World War II. Redress Provisions for Persons of Japanese Ancestry, 54 FR 34,157 (1989). The final part of the Commission's report, *Personal Justice Denied Part 2: Recommendations*, concluded that these events were influenced by racial prejudice, war hysteria, and a failure of political leadership, and recommended remedial action to be taken by Congress and the President. *Id.*

On August 10, 1988, President Ronald Reagan signed the Act into law. The purposes of the Act were to acknowledge and apologize for the fundamental injustice of the evacuation, relocation, and internment of Japanese Americans and permanent resident aliens of Japanese ancestry, to make restitution, and to fund a public education program to prevent the recurrence of any similar event in the future. 50 U.S.C. app. 1989-1989a.

Section 105 of the Act makes the Attorney General responsible for identifying, locating, an authorizing payment of redress to eligible individuals. *Id.* 1989b-4. The Attorney General delegated the responsibilities and duties assigned to her to the Assistant Attorney General for Civil Rights, who, in keeping with precedent, has designated ORA in the Civil Rights Division to carry out the execution of

the responsibilities and duties under the Act. The regulations governing the eligibility and restitution were drafted by ORA and published under the authority of the Justice Department in 1989. 54 FR 34,157 (1989) (final rule) (codified at 28 CFR part 74).

ORA is charged with the responsibility of identifying and locating persons eligible for redress under the Act. To date, restitution has been paid to a total of 79,911 Japanese Americans and permanent resident aliens of Japanese ancestry.

Section 108 of the Act articulates the standards for redress eligibility. 50 U.S.C. app. 1989b-7(2). Among those excluded from eligibility under that section are those "who, during the period beginning on December 7, 1941, and ending on September 2, 1945, relocated to a country while the United States was at war with that country \* \* \*." *Id.* As part of a citizen exchange program during World War II, the United States returned formerly interned persons of Japanese ancestry to Japan on two occasions. On June 18, 1942, approximately 1,083 persons of Japanese ancestry returned to Japan aboard the M.S. *Gripsholm*, and on September 2, 1943, the *Gripsholm* returned another 1,340 persons of Japanese ancestry to Japan. A number of these persons asserted claims for redress based on their evacuation and internment by the United States Government prior to their return to Japan. However, based on section 108 of the Act and 28 CFR 74.4, ORA found them ineligible for redress. 54 FR 34,162 (1989). In all, 175 persons who returned to Japan aboard the *Gripsholm* claimed compensation under the Act; approximately 124 of these claimants were persons who were under the age of 21 upon their departure from the United States. ORA's denial of redress to these claimants was upheld during the administrative appeal process set forth in 28 CFR 74.17. 54 FR 34,164-65 (1989).

It is helpful to describe the circumstances of these individuals. The West Coast voluntary evacuation period began with the issuance of Proclamation No. 1, on March 2, 1942, and ended with the issuance of Proclamation No. 4, effective on March 29, 1942. After this date, persons of Japanese ancestry were prohibited from leaving the West Coast because the Government was preparing to forcibly relocate and intern them later. Over 120,000 Japanese Americans were eventually interned. Of these 120,000, approximately 124 were minor children whose parents decided to depart the United States for Japan during the war on one of the M.S.

*Gripsholm* sailings prior to September 2, 1945. The majority of the passengers on the first sailing were Japanese diplomats, while many of the passengers on the second sailing were American citizens or permanent resident aliens. Also aboard were some Japanese nationals who had left Japan to live and work in the United States and who, by law, were ineligible to apply for United States citizenship. Many of these individuals returned to Japan with their American-born children.

These American children persevered through an arduous period during which they were forcibly evacuated from their homes on the West Coast and interned with their parents. The minors were unable legally to return to their homes in the prohibited military zones on the West Coast and were required to travel to Japan with their parents on a long and difficult journey.

The loyalty of most of these American children, however, apparently never waned. According to ORA research, the vast majority of them did not enter into the active military service on behalf of an enemy government during World War II. Furthermore, almost all returned to the United States after the war. Out of the approximately 124 minors who have filed for redress, and who relocated to Japan with their parents during World War II, 108 subsequently returned to the United States, while only 16 remained in Japan.

## II. Revised Interpretation

Following publication of the draft regulations in 1989, the Department received 61 comments concerning the eligibility of persons who, as minors, returned to Japan aboard the *Gripsholm*. Based on the comments received at that time, however, it found no reason to differentiate between adults who returned to Japan during World War II and minors. As a result, in the preamble of the final regulation, the Department stated that "the exclusionary language of the Act would preclude from eligibility the minors, as well as adults, who were relocated to Japan during [the relevant] time period." 54 FR 34,160 (1989).

The Department, based on an argument not previously presented, now proposes to revise its interpretation regarding the eligibility of persons who relocated to Japan during World War II. Specifically, it proposes to revise its determination of eligibility with regard to persons who were under the age of 21 and not emancipated as of their dates of departures from the United States, who did not participate in the active military service on behalf of an enemy government during World War II, and

who are otherwise eligible for redress under these regulations.

In proposing this revision, the Department is operating within the established framework of *Chevron v. N.R.D.C.*, 467 U.S. 837, 842-43. Under *Chevron*, an agency must give effect to the unambiguously expressed intent of Congress when interpreting a statute. However, where an act is silent or ambiguous with respect to a specific issue, Congress has assigned to the agency the responsibility to elucidate a specific provision of the statute by regulation. *Id.* at 843-44. For the reasons set forth below, the Department believes that the proscription of section 108 is ambiguous with respect to its coverage of the class of individuals described above, and that the proposed revision is a reasonable interpretation of the statute.

As enacted, section 108 expressly excludes from eligibility "any individual who, during the period beginning on December 7, 1941, and ending on September 2, 1945, *relocated* to (another) country while the United States was at war with that country." 50 U.S.C. app. 1989b-7 (emphasis added). This language does not specifically resolve whether the exclusion applies to individuals who relocated involuntarily.

This issue is suggested on the face of the statute when it is read as a whole because, while the statute uses the active voice in section 108's exclusion clause, the eligibility clauses of the statute use the passive voice. For example, section 108 begins by defining an "eligible individual" as a person of Japanese ancestry "who, during the evacuation, relocation and internment period—\* \* \* was confined, held in custody, relocated, or otherwise deprived of liberty or property as a result of \* \* \* (various Executive Orders and Acts)." 50 U.S.C. app. 1989b-7(2) (emphasis added). Title II of the Act, which provides reparations to Aleuts evacuated from their home islands during World War II, similarly defines an eligible Aleut as a person "who, as a civilian, was relocated by authority of the United States from his or her home village \* \* \* to an internment camp \* \* \*." 50 U.S.C. app. 1989c-1(5) (emphasis added). The contrasting use of the active voice in the exclusion clause suggests the possibility that section 108 might be read to exclude only those individuals who voluntarily relocated to an enemy country during the war.

This possibility is consistent with judicial decisions. The United States Courts of Appeals for the District of Columbia and the Ninth Circuits have deemed the use of the active as opposed

to the passive voice relevant for purposes of statutory interpretation. *Dickson v. Office of Personnel Mgmt.*, 828 F.2d 32, 37 (D.C. Cir. 1987) (isolated use of passive voice in phrase defining liability is significant and allows suit against Office of Personnel Management whenever an adverse determination "is made," even if by another agency); *United States v. Arrellano*, 812 F.2d 1209, 1212 (9th Cir. 1987) (clause of statute defining criminal intent phrased in active voice applies to conduct of the accused, while second clause phrased in passive voice applies only to the conduct of others). Thus, the statutory language creates an ambiguity as to whether eligibility decisions should distinguish between voluntary relocatees and involuntary relocatees. For the reasons that follow, we believe the better interpretation is to exclude only individuals who relocated voluntarily.

The Act's legislative history provides very little significant insight into congressional intent regarding the eligibility of involuntary relocatees. As originally introduced, neither the House nor the Senate bill included a relocation exclusion provision in the section defining eligible individuals. Entering conference, the House version of the Act contained the exclusion, while the Senate version contained no such provision. The conferees agreed to adopt the House provision, which excluded "those individuals who, during the period from December 7, 1941, through September 2, 1945, relocated to a country at war with the United States." H.R. Conf. Rep. No. 785, 100th Cong., 2d Sess. 22 (1988). There is no additional discussion of the relocation exclusion in the conference report.

A discussion of whether individuals who returned to Japan should be included in the definition of "eligible individuals" is contained in a witness statement submitted to the House and Senate subcommittees considering the legislation. In testimony opposing the enactment of the bill, the Assistant Attorney General for the Civil Division, Richard K. Willard, noted that as then written (without the relocation exclusion), the breadth of the definition would cover any individual who had been subject to exclusion, relocation, or internment, including persons living outside the United States. In the Department's view, this overlooked the fact that at least several hundred of the detainees were "fanatical pro-Japanese, \* \* \* and (had) voluntarily sought repatriation to Japan after the end of the war." The Department believed that allowing these disloyal individuals to receive the benefit of the legislation

would be unfair to the United States and to loyal persons of Japanese descent. To Accept the Findings and to Implement the Recommendations of the Commission on Wartime Relocation and Internment of Civilians: Hearing on S. 1009 Before the Subcomm. on Federal Services, Post Office, and Civil Service of the Senate Comm. on Governmental Affairs, 100th Cong., 1st Sess. 281, 296 (1987) (Hearings). This statement, however, does not reveal or suggest an opinion that the bill ought to exclude from redress persons who *involuntarily* relocated to an enemy country.

In sum, the Department believes that section 108's exclusion of persons who relocated to an enemy country during World War II is susceptible to the interpretation that it does not apply to persons who relocated involuntarily, that so interpreting the statute gives effect to the principles Congress meant to embody in the exclusionary provision, and that this interpretation is otherwise a reasonable construction of the statute.

The Department further notes that the determination of whether a person relocated voluntarily to an enemy country during World War II is extraordinarily difficult to determine at this late date, over half a century since the period during which the actions that are relevant to a determination about the state of mind of individual relocatees took place. Under these circumstances, the Department has discretion to structure the process for determining redress eligibility in a manner that avoids the inherent inaccuracy of any attempt to engage in a case-by-case inquiry into the subjective factor of state of mind, as well as the potential administrative burdens associated with case-by-case inquiry, by articulating some reasonable objective criteria to guide the process.

To that end, the Department proposes two bright line rules to administer section 108's exclusion provision. First, any person who was 21 years of age or older, or otherwise emancipated by petition of the court or by marriage, as of the date of his or her departure from the United States, shall be irrebuttably presumed to have relocated voluntarily, and will be ineligible for redress under the Act. Second, any person who served in the Japanese military, or the military of another enemy country, during the statutorily-defined war period shall be irrebuttably presumed to have relocated voluntarily and, therefore, will be ineligible for redress. All otherwise eligible persons falling outside these categories, that is, persons who were minors and not otherwise emancipated as of the dates of their departures from

the United States and who did not serve in the Japanese military or the military of another enemy government during the statutorily-defined war period, shall be considered involuntary relocatees and therefore eligible for redress under the Act.

The Supreme Court has affirmed the ability of agencies to employ generally applicable rules as an alternative to case-by-case adjudication. See e.g., *American Hospital Ass'n v. NLRB*, 499 U.S. 606, 611 (1991) ("[Prior decisions of this Court] confirm that, even if a statutory scheme requires individualized determinations, the decision-maker has the authority to rely on rulemaking to resolve certain issues of general applicability unless Congress clearly expresses an intent to withhold that authority."). In particular, the Court has noted that the Congress is free to use prophylactic rules despite their "inherent imprecision" when it wishes to avoid "the expense and other difficulties of individual determinations." *Weinberger v. Salfi*, 422 U.S. 749, 777 (1975).

The Department believes that under *American Hospital Ass'n* and other authorities agencies enjoy a similar latitude to that enunciated in *Weinberger*. As in *Weinberger*, justifying the use of such bright-line rules does not require determining whether the rules "precisely filter() out those, and only those, who are in the factual position which generated the congressional concern \* \* \* (n) or \* \* \* whether (they) filter( ) out a substantial part of the class which caused the \* \* \* concern, or whether (they) filter() out more members of the class than nonmembers." *Id.* Rather, the question is whether the Department could "rationally have concluded both that \* \* \* particular (rules) would protect against (the abuse Congress sought to avoid), and that the expense and other difficulties of individualized determinations justified (their) inherent imprecision." *Id.* For the reasons that follow, the proposed rules satisfy this standard.

As stated above, the Department proposes to apply an irrebuttable presumption that persons who were 21 years of age or older, or otherwise emancipated by petition of the court or by marriage, as of the dates of their departures from the United States, were voluntary relocatees. The Department proposes to apply this irrebuttable presumption because adult relocatees were more likely than minor relocatees to have been able to assent freely to their return to Japan. The age of 21 as of the date of departure was chosen because, during the period covered by

the Act's relocation exclusion, the legal age of majority in most states was 21.

Noting the dearth of legislative history pertaining to the Act's exclusion clause, the United States Court of Federal Claims stated in *Suzuki v. United States*, 29 Fed. Cl. 688 (1993), that Congress may have enacted the exclusion clause in an effort to deny benefits to individuals who had either been disloyal to the United States or "who, despite possible continued loyalty to the United States, had aided an enemy country during war." *Id.* at 695. Nothing in the Department's revised interpretation of section 108 is inconsistent with this observation, since both of the possible purposes cited by the court assume volition on the part of the relocatee to leave the United States and relocate to Japan. If, by contrast, an individual relocatee was not free to assent to his or her relocation on account of his or her minority status, it is reasonable for the Department to conclude that such individual was not the type of person against whom Congress intended to apply section 108's exclusion provision. By itself, the relocation of minors during World War II does not raise doubts or inferences concerning disloyalty. In fact, most American-born minor relocatees returned to the United States following the war.

Examples of distinctions in the treatment of minors and adults abound in our law. See *Thompson v. Oklahoma*, 487 U.S. 815, 823 (1988) (plurality opinion). Accordingly, it is reasonable for the Department to apply such a distinction in determining whether individuals who related to Japan during the statutorily-defined war period did so voluntarily.

The Department also proposes to apply an irrebuttable presumption that individuals who served in the military of an enemy government during the statutorily-defined war period relocated voluntarily because the Department believes that evidence that an individual entered into the active military service on behalf of an enemy government following his or her departure from the United States is a strong indication that the individual relocated voluntarily. In view of that reasonable belief and the fact that it is difficult at this time to determine with complete certainty the motivations of individuals who joined the active military service against the United States during World War II, and in light of the increased administrative burdens associated with individualized efforts to ascertain the 50-year-old motivations of such individuals, the Department believes it is appropriate to interpret the

fact that an individual served in the military of an enemy government following his or her relocation as evidence that the individual relocated voluntarily.

The Department will thus require individuals who apply for redress under the Act and who relocated to Japan during the statutorily-defined war period to provide information as to their ages and emancipation status upon their dates of departure from the United States to relocate to Japan, and to state whether or not they participated in the active military service on behalf of an enemy government, including the Japanese Government, during World War II. If such individuals state that they were 21 years of age or older, or emancipated minors, as of the dates of their departures, they will be deemed ineligible for redress under the Act. Similarly, if such individuals state that they participated in the active military service on behalf of an enemy government during World War II, they also will be deemed ineligible. In contrast, otherwise eligible relocatees who were under the age of 21 and not otherwise emancipated upon the dates of their departures from the United States, and who did not serve in the military on behalf of an enemy government during World War II, will be eligible for redress under the Act.

### III. Regulatory Impact Analysis

The Office of Management and Budget has determined that this proposed rule is a significant regulatory action under Executive Order No. 12866 and, accordingly, this proposed rule has been reviewed and approved by the Office of Management and Budget. Information collection associated with this regulation has been approved by the Office of Management and Budget, OMB No. 1190-0010. Comments about this collection can be filed with the Clearance Officer, Office of Redress Administration, PO Box 66260, Washington, DC 20035-6260, and the Desk Officer, Office of Information and Regulatory Affairs, Office of Management and Budget, New Executive Office building, Washington, DC 20503.

#### List of Subjects in 28 CFR Part 74

Administrative practice and procedure, Aliens, Archives and records, Citizenship and naturalization, Civil rights, Indemnity payments, Minority groups, Nationality, War claims.

For the reasons set forth in the preamble and by the authority vested in me, including 28 U.S.C. 509 and 510, chapter I of title 28, part 74, of the Code

of Federal Regulations is proposed to be amended as follows:

### PART 74—CIVIL LIBERTIES ACT REDRESS PROVISION

1. The authority citation for Part 74 continues to read as follows:

Authority: 50 U.S.C. app. 1989b.

2. In subpart B, § 74.4 is revised to read as follows:

#### Subpart B—Standards of Eligibility

##### § 74.4 Individuals excluded from compensation pursuant to section 108(B) of the Act.

(a) The Term "eligible individual" does not include any individual who, during the period beginning on December 7, 1941, and ending on September 2, 1945, relocated to a country while the United States was at war with that country.

(b) Nothing in paragraph (a) of this section is meant to exclude from eligibility any person who, during the period beginning on December 7, 1941, and ending on September 2, 1945, relocated to a country while the United States was at war with that country, and who had not yet reached the age of 21 and was not emancipated as of the date of departure from the United States, provided that such person is otherwise eligible for redress under these regulations and the following standards:

(1) Persons who were 21 years of age or older, or emancipated minors, on the date they departed the United States for Japan are subject to an irrebuttable presumption that they relocated to Japan voluntarily and will be ineligible.

(2) Persons who served in the active military service on behalf of the Government of Japan or an enemy government during the period beginning on December 7, 1941 and ending on September 2, 1945, are subject to an irrebuttable presumption that they departed the United States voluntarily for Japan. If such individuals served in the active military service of an enemy country, they must inform the Office of such service and, as a result, will be ineligible.

Dated: June 5, 1996.

Janet Reno,

Attorney General.

[FR Doc. 96-14721 Filed 6-11-96; 8:45 am]

BILLING CODE 4410-10-M

### ENVIRONMENTAL PROTECTION AGENCY

#### 40 CFR Part 50

[AD-FRL-5519-4]

#### National Ambient Air Quality Standards for Ozone and Particulate Matter

AGENCY: Environmental Protection Agency.

ACTION: Advance Notice of Proposed Rulemaking.

**SUMMARY:** In accordance with sections 108 and 109 of the Clean Air Act, the Environmental Protection Agency (EPA) is nearing completion in its reviews of the air quality criteria and national ambient air quality standards (NAAQS) for ozone (O<sub>3</sub>) and particulate matter (PM). This action announces the Agency's plans to propose decisions on whether to retain or revise the O<sub>3</sub> and PM NAAQS under the same schedule, by November 29, 1996, with final action scheduled for mid-1997. Further, this action announces the Agency's process for developing integrated strategies for the implementation of potential new O<sub>3</sub> and PM NAAQS, as well as a regional haze program. This action reflects the Agency's recognition of important scientific and technical factors with both these pollutants, associated standards, and implementation strategies to meet such standards. Through this action, the Agency is providing advance notice of key issues that are being considered in the reviews of these standards to allow more time for the public to develop input and comments beyond that which will be provided following the notices of proposed rulemaking.

**FOR FURTHER INFORMATION CONTACT:** Dr. David McKee on the O<sub>3</sub> NAAQS review, MD-15, Air Quality Standards and Strategies Division, Office of Air Quality Planning and Standards, U.S. Environmental Protection Agency, Research Triangle Park, North Carolina 27711 (919-541-5288); Dr. Jane Caldwell on the PM NAAQS review, same address (919-541-0328); and Ms. Denise Gerth on the integrated implementation strategy development process, same address (919-541-5550).

#### SUPPLEMENTARY INFORMATION:

Availability of Related Information

A. Documents Related to the O<sub>3</sub> and PM NAAQS Reviews

The Air Quality Criteria for Ozone and Other Photochemical Oxidants (EPA/600/P-93-004aF thru EPA/600/P-93-004cF); Review of the National

Ambient Air Quality Standards for Ozone: Assessment of Scientific and Technical Information: OAQPS Staff Paper (EPA-452/R-96-007); the Air Quality Criteria for Particulate Matter (EPA/600/P-95-001aF thru EPA/600/P-95-001cF); and Review of the National Ambient Air Quality Standards for Particulate Matter: Policy Assessment of Scientific and Technical Information: OAQPS Staff Paper (EPA-452/R-96-xxx) are now available on the Agency's Office of Air Quality Planning and Standards' (OAQPS) Technology Transfer Network (TTN) Bulletin Board System (BBS). The telephone number for the TTN BBS is (919) 541-5742. To access the bulletin board a modem and communications software are necessary. The following parameters on the communications software are required: Data Bits-8; Parity-N; and Stop Bits-1. The documents will be located on the Clean Air Act Amendments BBS, under Title I, Policy/Guidance Documents. If assistance is needed in accessing the system, call the help desk at (919) 541-5384 in Research Triangle Park, NC.

Copies of each of these documents are available for public inspection at the EPA Air Docket and the EPA library, both at Headquarters, Waterside Mall, 401 M Street, Washington, DC. EPA Air Docket hours, in Room M1500 of Waterside Mall, are 8 a.m. to 5:30 p.m., Monday through Friday, excluding holidays. EPA Library hours are from 10 a.m. until 2 p.m., excluding holidays. The EPA docket numbers for the O<sub>3</sub> and PM NAAQS reviews are A-95-58 and A-95-54, respectively.

A limited number of copies of other technical support documents for these standard reviews, such as documents pertaining to air quality, human exposure, health risk, and economic analyses, are available and can be obtained from: U.S. Environmental Protection Agency Library (MD-35), Research Triangle Park, NC 27711, telephone (919) 541-2777. These and other related documents are also available for inspection in the EPA dockets identified above.

#### *B. Documents Related to the Development of Integrated Implementation Strategies*

Documents associated with the development of integrated implementation strategies are filed in EPA docket number A-95-38, and are available from this docket as described above.

#### **Background and Schedules**

The Clean Air Act requires the establishment, review, and revision of NAAQS, and directs the Administrator

to identify pollutants which "may reasonably be anticipated to endanger public health and welfare" and to issue air quality criteria for them (42 U.S.C. 7408, 7409). These air quality criteria are to "accurately reflect the latest scientific knowledge useful in indicating the kind and extent of all identifiable effects on public health or welfare which may be expected from the presence of [a] pollutant in the ambient air \* \* \*." The Administrator is directed to propose and promulgate both "primary" and "secondary" NAAQS for such pollutants. A primary standard is defined as one "the attainment and maintenance of which, in the judgment of the Administrator, based on the criteria and allowing an adequate margin of safety, [is] requisite to protect the public health." A secondary standard must "specify a level of air quality the attainment and maintenance of which, in the judgment of the Administrator, based on [the] criteria, is requisite to protect the public welfare from any known or anticipated adverse effects associated with the presence of [the] pollutant in the ambient air."<sup>1</sup>

The Act requires periodic review and, if appropriate, revision of existing air quality criteria and NAAQS. The Act also requires appointment of an independent scientific review committee to review criteria and standards and recommend to the Administrator new standards or revisions of existing criteria and standards, as appropriate. This committee is known as the Clean Air Scientific Advisory Committee (CASAC), a standing committee of EPA's Science Advisory Board.

The EPA initiated action to update the air quality criteria documents for O<sub>3</sub> in August 1992 (57 FR 38832) and for PM in April 1994 (59 FR 17375). As discussed more fully in the next two sections of this notice, both reviews have included a series of peer-review workshops on the air quality criteria, as well as CASAC and public reviews of draft air quality criteria documents and staff papers. The staff papers evaluate the policy implications of key studies and scientific information contained in the criteria documents; identify factors relevant to the evaluation of current primary and secondary NAAQS; summarize air quality, exposure, and risk analyses, to the extent possible, of

<sup>1</sup> Welfare effects as defined by the Act include, but are not limited to, effects on soils, water, crops, vegetation, manmade materials, animals, wildlife, weather, visibility and climate, damage to and deterioration of property, and hazards to transportation, as well as effects on economic values and on personal comfort and well-being.

alternative standards; and present staff conclusions and recommendations of suggested options for the Administrator to consider in her review of the NAAQS.

In conjunction with the reviews of the O<sub>3</sub> and PM NAAQS, the EPA has also initiated action to address strategies for the implementation of potential new NAAQS. This action includes examining the ramifications of any changes to the NAAQS on current implementation efforts, and, if appropriate, developing new implementation control strategies. In addition, the EPA is reviewing options to ensure a smooth transition for implementation of any new NAAQS. A process for providing significant stakeholder involvement in the development of such strategies and options is outlined in the final section of this notice.

These ongoing reviews and related implementation strategy activities to date have brought out important common factors between O<sub>3</sub> and PM. Several similar health effects have been associated with exposure to O<sub>3</sub> and PM, including for example aggravation of respiratory disease (e.g., asthma), increased respiratory symptoms, and increased hospital admissions and emergency room visits for respiratory causes. Other similarities in pollutant sources, formation, and control exist between O<sub>3</sub> and PM, in particular the fine fraction of particles addressed by the current PM NAAQS.<sup>2</sup> These similarities include (1) atmospheric residence times of several days, leading to regional-scale transport of the pollutants; (2) similar gaseous precursors, including compounds of nitrogen (NO<sub>x</sub>) and volatile organic compounds (VOC), which contribute to the formation of both O<sub>3</sub> and PM in the atmosphere; (3) similar combustion-related source categories, such as coal and oil-fired power generation and industrial boilers and mobile sources, which emit particles directly as well as gaseous precursors of particles (e.g., SO<sub>x</sub>, NO<sub>x</sub>, VOC) and O<sub>3</sub> (e.g., NO<sub>x</sub>, VOC); and (4) similar atmospheric chemistry driven by the same chemical reactions and intermediate chemical species which favor both high O<sub>3</sub> and fine particle levels. High fine particle levels are also associated with significant impairment of visibility on a regional scale. These similarities provide opportunities for optimizing technical analysis tools (i.e., monitoring

<sup>2</sup> The current PM NAAQS addresses particles with an aerodynamic diameter less than or equal to a nominal 10 microns (PM<sub>10</sub>). The fine fraction of such particles is generally taken to address particles with an aerodynamic diameter less than or equal to a nominal 2.5 microns (PM<sub>2.5</sub>).

networks, emission inventories, air quality models) and integrated emission reduction strategies to yield important co-benefits across various air quality management programs. This integration could result in a net reduction of the regulatory burden on some source category sectors that would otherwise be impacted separately by O<sub>3</sub>, PM, and visibility protection control strategies.

In recognition of the potential benefits of integrating the Agency's approaches to providing for appropriate protection of public health and welfare from exposure to O<sub>3</sub> and PM, the Agency plans to complete these NAAQS reviews and develop associated implementation strategies under coordinated schedules. Thus, the Agency plans to propose decisions on whether to retain or revise the O<sub>3</sub> and PM NAAQS by November 29, 1996, with final action planned for June 1997, consistent with the current schedule established by court order for the PM NAAQS review.<sup>3</sup> Proposal of various key aspects of integrated implementation strategies for potential new NAAQS is planned for June 1997, consistent with final action on the NAAQS reviews, with proposal of full implementation strategies planned for June 1998.

The EPA encourages involvement of interested parties in these regulatory actions and is providing opportunities for public participation and comment throughout the processes. The Agency also recognizes that these schedules are accelerated relative to past NAAQS reviews and is thus providing this advance notice to alert potential participants in the reviews to the important considerations and key issues which the Administrator will take into account in making decisions in these actions.

#### Review of the Ozone NAAQS

The CASAC has completed its review of the O<sub>3</sub> Criteria Document and O<sub>3</sub> Staff Paper, and has advised the Administrator that the documents provide an adequate review of the available scientific data and relevant studies, as well as an adequate scientific basis for making regulatory decisions concerning primary and secondary O<sub>3</sub> standards (Wolff, 1995a,b, 1996b). Thus, the Administrator is primarily focusing attention on the staff conclusions and range of staff recommendations presented in the O<sub>3</sub> Staff Paper, together

<sup>3</sup>In response to a suit filed by the American Lung Association in February 1994 to compel EPA to complete the present review of the PM NAAQS, the U.S. District Court for the District of Arizona has issued orders requiring publication of proposed and final decisions by November 29, 1996 and June 28, 1997, respectively.

with specific CASAC recommendations outlined below for the primary and secondary standards.

#### A. Primary Standard Issues

In selecting a primary standard, the Administrator must specify an averaging time, O<sub>3</sub> concentration (i.e., level), and form (i.e., the air quality statistic to be used as a basis for determining compliance with the standard). The key factors outlined in the Staff Paper for selecting these elements of a primary O<sub>3</sub> standard reflect an integration of information on acute<sup>4</sup> and chronic<sup>5</sup> health effects associated with exposure to ambient O<sub>3</sub>, expert judgments on the adversity of such effects for individuals, and policy judgments, informed by air quality and human exposure analyses and quantitative risk assessment when possible, as to the point at which risks would be reduced sufficiently to achieve protection of public health with an adequate margin of safety. Such an approach has been endorsed by CASAC and is consistent with its advice to the Administrator (Wolff, 1995b) that "ozone may elicit a continuum of biological responses down to background concentrations." In such a case, CASAC has advised that the traditional paradigm of standard setting cannot be applied in the usual way, and that "EPA's risk assessments must play a central role in identifying an appropriate level." Thus, the Administrator is giving preliminary consideration to the task of selecting a standard level that will reduce risks sufficiently to protect public health with an adequate margin of safety, based on her understanding that a zero-risk standard is neither possible nor required by the Act.

#### 1. Consideration of New 8-Hour Primary Standard

The Administrator is giving strong preliminary consideration to the unanimous recommendation of CASAC "that the present 1-hr standard be eliminated and replaced with an 8-hr standard" (Wolff, 1995b). This recommendation reflects the consensus CASAC view that an 8-hr standard is more appropriate for a human health-

<sup>4</sup>Acute effects associated with short-term (1-3 hr) and prolonged (6-8 hr) exposures to O<sub>3</sub> include transient pulmonary function decrements, increased respiratory symptoms, and effects on exercise performance, as well as increased airway responsiveness, susceptibility to respiratory infection, increased hospital admissions and emergency room visits for respiratory causes (e.g., asthma), and acute pulmonary inflammation.

<sup>5</sup>Chronic effects for which evidence suggests associations with long-term (months to years) exposure to O<sub>3</sub> include structural damage to lung tissue and accelerated decline in baseline lung function which could result in decreased quality of life in later years.

based standard since 8-hr average exposures to O<sub>3</sub> are more directly associated with health effects of concern at lower ambient O<sub>3</sub> concentrations than are 1-hr average exposures. In considering an appropriate level for a possible new 8-hr standard, the Administrator notes that during the last review of the O<sub>3</sub> criteria and standards<sup>6</sup>, CASAC concluded that the existing 1-hr standard, set at a level of 0.12 parts per million (ppm) O<sub>3</sub>, provided "little, if any, margin of safety" (McClellan, 1989). The Administrator also notes the CASAC consensus that 0.07 ppm to 0.09 ppm is an appropriate range for consideration for a new 8-hr standard, and further, that none of the CASAC panel members have expressed an opinion that such a standard should be set at a level below 0.08 ppm (Wolff, 1995b). In addition, a number of CASAC panel members have recommended that, since there is no apparent threshold for responses and no "bright line" in the risk assessment, a pollution warning system be initiated to allow particularly sensitive individuals to take appropriate action, potentially building upon the Agency's Pollutant Standards Index or on infrastructures already in place in many areas of the country for designating days when voluntary emission reduction measures may be encouraged locally.

#### 2. New Approaches to Defining the Form of the Primary Standard

In giving preliminary consideration to the form of a possible new 8-hr standard, the Administrator is aware that since promulgation of the current NAAQS in 1979, a number of concerns have been raised about the current 1-expected-exceedance form. These concerns include, in particular, the year-to-year stability of the number of exceedances and, thus, the stability of the attainment status of an area; data handling conventions, including the procedures for adjusting for missing data; and the evaluation of air quality on a site-by-site basis rather than some form of population-weighted averaging across monitoring sites within an area. The CASAC has advised that such concerns should be addressed by considering a more robust, concentration-based form to "provide some insulation from the impacts of extreme meteorological events." (Wolff, 1995b) In particular, all CASAC panel members who expressed their opinions in this area favored a form of the standard that allowed for multiple

<sup>6</sup>The last review concluded in March 1993 with a final decision that revisions to the O<sub>3</sub> standards were not appropriate at that time (58 FR 13008).

exceedances within the range of 1 to 5 exceedances recommended in the Staff Paper.

In light of historic concerns and recent advice from CASAC, the Agency is evaluating new approaches to defining the form of the primary standard. Such approaches include the use of less extreme and concentration-based air quality statistics, the specification of a range of air quality rather than a single measure, and the use of some form of population-weighted measure of air quality combining data across monitors. In particular, the Agency is examining potential advantages of a concentration-based form over an expected-exceedance-based form. A principal advantage is that a concentration-based form is more directly related to the ambient O<sub>3</sub> concentrations that are associated with health effects; that is, the degree and extent to which public health is affected is related to the concentration of O<sub>3</sub> in the ambient air, not just whether that concentration is above or below some specific level. Further, a concentration-based form has greater temporal stability than the expected-exceedance form, and, thus, would facilitate the development of more stable implementation programs by the States. The specification of a range rather than a single value may facilitate individual and/or regulatory agency efforts to provide additional safeguards against responses that may, in a small number of particularly sensitive individuals, occur at levels even below the level of a standard that protects public health with an adequate margin of safety.

Any consideration of some form of population-weighted measure of air quality raises issues about environmental equity, the adequacy of the current monitoring network, and the specificity of monitoring siting requirements. On the other hand, such a conceptual approach may better reflect population exposure and risk. As part of its review of the primary standard, the Agency will be interested in particular in analyses that inform questions about appropriate criteria for using data from multiple monitors in developing population-weighted measures of air quality and the distribution of public health protection that would result from such an approach.

### *B. Secondary Standard Issues*

The Agency's review of a secondary O<sub>3</sub> standard has focused on effects on vegetation<sup>7</sup>, including agricultural crops

and native vegetation, recognizing that such effects can indirectly impact natural ecosystem components such as soils, water, animals, and wildlife. The key factors outlined in the O<sub>3</sub> Staff Paper for selecting a secondary standard include vegetation effects information in the O<sub>3</sub> Criteria Document, including information on biologically relevant measures of exposure; analyses of air quality, particularly in rural areas; and rough estimates of vegetation exposure to ambient O<sub>3</sub> and potential risks in terms of the extent of impacts and, where possible, the economic values associated with such risks. The Agency is also considering the potential degree of vegetation protection that may be afforded by a possible new primary standard.

The Administrator is giving strong preliminary consideration to the unanimous conclusion of CASAC "that damage is occurring to vegetation and natural resources at concentrations below the present 1-hr national ambient air quality standard," and to its unanimous recommendation "that a secondary NAAQS, more stringent than the present primary standard, was necessary to protect vegetation from ozone" (Wolff, 1996b). Further, CASAC recognizes that vegetation response to ambient O<sub>3</sub> is cumulative, suggesting that a secondary standard with some cumulative, perhaps seasonal, form would better reflect biologically relevant measures of exposure than a short-term average concentration form. The Administrator also recognizes, however, that there remains a diversity of views within the scientific community in general and the CASAC panel members in particular as to an appropriate level and measure of exposure for such a standard. This diversity of views is consistent with the consensus view that significant uncertainties remain in understanding the nature, degree, and long-term patterns of responses to O<sub>3</sub> exposures across the large number of species of annual and perennial plants and trees that are part of the commercial and native vegetation to be addressed by a national O<sub>3</sub> standard.

In light of the consensus that the current secondary standard is not sufficiently protective of vegetation, as well as the diversity of views with regard to an appropriate level and form for a new standard, the Agency is giving preliminary consideration to two approaches to selecting a standard. The first approach is to consider the degree of protection that may be afforded by a

possible new primary standard, while recognizing that such a form would be only a surrogate for more biologically relevant cumulative exposure measures. Alternatively, the Agency is also considering cumulative forms and seasonal averaging times within the ranges of options presented in the Staff Paper to identify a reasonable policy choice for such a standard, recognizing that no one form could reflect all biologically relevant factors across the broad range of species being addressed. These alternative approaches are consistent with the range of views expressed by the CASAC panel members (Wolff, 1996b).

CASAC has also provided the Administrator with its insights as to why there are such divergent opinions on the selection of a new secondary standard, citing the lack of sufficient rural O<sub>3</sub> data and the lack of relevant plant exposure studies under field conditions as the main reasons (Wolff, 1996b). The Agency recognizes the importance not only of additional vegetation effects research, but also of enhancing the existing O<sub>3</sub> monitoring network to provide better coverage in more rural areas of agricultural and ecological importance, regardless of the regulatory approach taken in this review. Thus, the Agency will be interested in information and analyses that would inform future decisions as to how to enhance the O<sub>3</sub> monitoring network on an appropriate spatial scale and in a cost-effective manner. Based on such information, consideration could also be given to spatially integrating O<sub>3</sub> concentrations across multiple monitors in conjunction with establishing a form for a secondary standard that could provide a more representative indication of relevant vegetation exposures over appropriate spatial scales.

### *Review of PM NAAQS*

CASAC has completed its review of the PM Criteria Document and is nearing completion on the PM Staff Paper. CASAC has advised the Administrator that the PM Criteria Document included an excellent integrative summary of the state of knowledge about the health effects of airborne PM, and that, as revised to reflect CASAC's final comments, the document provides an adequate review of the available scientific data and relevant studies of PM and scientific basis for regulatory decisions on PM (Wolff, 1996a). The schedule calls for CASAC to complete its review and advice to the Administrator on the PM Staff Paper and recommendations on

<sup>7</sup>Vegetation effects that have been associated with O<sub>3</sub> exposures include visible foliar injury, growth

reductions and yield loss in annual crops, growth reductions in tree seedlings and mature trees, and ecosystem level impacts.

possible new or revised PM standards by mid-June.

#### *A. Primary Standard Issues: Consideration of Fine Particle Standards*

Based on CASAC's review of the PM Criteria Document, the Agency is focusing on the primary conclusions highlighted in that document as a basis for its preliminary consideration of possible new PM primary standards. In particular, the PM Criteria Document concludes that newly emerging studies of the effects of community air pollution provide reasonably consistent results indicative of increased mortality and morbidity effects, including hospital admissions and respiratory illness, associated with short- and long-term exposures to ambient air containing PM concentrations currently found in many U.S. urban areas, including areas which comply with the current 24-hr and annual PM standards. Further, the PM Criteria Document concludes that analyses of the epidemiological evidence suggest stronger associations of mortality and some morbidity effects with fine particles than with the coarse particles within PM<sub>10</sub>. For this and other reasons, the PM Criteria Document concludes that fine and coarse fraction particles, which together comprise the mix of particles in PM<sub>10</sub>, should be considered as separate pollutants. This conclusion was supported by many CASAC panel members (Wolff, 1996a, Shy et al., 1996), with others noting important uncertainties to be addressed in using this conclusion as a basis for selecting possible new fine particle standards. The PM Criteria Document also concludes that coarse fraction particles have been more directly associated with some morbidity effects.

In selecting a primary standard or suite of standards for PM, the Administrator must specify an indicator or indicators to define the pollutant in terms of which particles, within the broad class of chemically and physically diverse substances that comprise airborne PM, a given standard addresses. Based on the conclusions and CASAC advice outlined above, the Agency is giving preliminary consideration to the task of selecting a suite of standards that would focus risk management approaches so as to provide appropriate public health protection across the range of effects that have been associated with both the fine and coarse fraction particles within the particle mix that comprises PM<sub>10</sub>. The Agency is interested in information and analyses that will inform decisions as to the most effective and efficient suite of standards for providing the

regquisite degree of health protection. Further, new approaches to defining the form of short-term primary standards, as discussed above in the section on the O<sub>3</sub> primary standard, are also of interest to the Agency in considering alternative PM standards.

#### *B. Secondary Standard Issues*

The Agency's review of a secondary PM standard is focusing on visibility impairment that has been associated in particular with fine particles. The PM Criteria Document notes that the level of this impairment varies greatly from eastern to western U.S. regions as do background levels of fine particles and other factors that are associated with visibility impairment. Because of significant regional variations in visibility conditions and the problems this presents in establishing a uniform national standard, the Agency is giving strong consideration to addressing visibility impairment through a new regional haze program, under section 169A of Act, rather than through a secondary NAAQS.

#### *Development of Integrated Implementation Strategies*

The Agency has initiated a process designed to provide for significant stakeholder involvement in the development of integrated implementation strategies for possible new or revised O<sub>3</sub> and PM NAAQS and a new regional haze program. As described below, this process involves a new subcommittee of the Agency's Clean Air Act Advisory Committee (CAAAC), established in accordance with the Federal Advisory Committee Act (FACA) (5 U.S.C. App.2).

#### *A. Background*

The FACA was enacted in 1972 to open the advisory committee process to public scrutiny and to protect against undue influence by special interest groups over government decision making. Federal Advisory Committees may be established by statute, the President, or by the head of a Federal Agency. An advisory committee or subcommittee is established under FACA to obtain advice or recommendations from advisory groups established by or closely tied to the Federal Government.

The CAAAC was established to provide independent advice and counsel to the EPA on policy and technical issues associated with the implementation of the Act. The CAAAC advises EPA on the development, implementation, and enforcement of several of the new and expanded

regulatory and market-based programs required by the Act.

The CAAAC advises on issues that cut across several program areas. The programs falling under the purview of the CAAAC include those for meeting national ambient air quality standards (NAAQS), reducing emissions from vehicles and vehicle fuels, reducing air toxic emissions, issuing operating permits and collecting fees, and carrying out new and expanded compliance authorities. The CAAAC holds meetings, analyzes issues, conducts reviews, performs studies, produces reports, makes recommendations, and undertakes other activities necessary to meet its responsibilities. Comments, evaluations, and recommendations of the CAAAC and responses from the EPA are made available for public review, in accordance with Section 10 of FACA.

A new subcommittee of the CAAAC, the Subcommittee for Ozone, Particulate Matter, and Regional Haze Implementation Programs (the Subcommittee), was established in August 1995 to address integrated strategies for the implementation of potential new O<sub>3</sub> and PM NAAQS, as well as a regional haze program. The Subcommittee is composed of representatives selected from among state, local, and tribal organizations; environmental groups; industry; consultants; science/academia; and federal agencies. Recommendations made by the Subcommittee will be submitted to EPA through CAAAC. To facilitate communication between the Subcommittee and CAAAC, some members of CAAAC are on the Subcommittee.

#### *B. Purpose of the Subcommittee on Integrated Implementation Strategies*

The Subcommittee is charged with providing advice and recommendations to EPA on developing new, integrated approaches for implementing potential revised NAAQS for O<sub>3</sub> and PM, as well as for implementing a new regional haze reduction program. The Subcommittee is expected to examine key aspects of the implementation programs for O<sub>3</sub> and PM, to provide for more flexible and cost-effective implementation strategies, as well as to provide new approaches that could integrate broad regional and national control strategies with more localized efforts. In addition, the Subcommittee will consider new and innovative approaches to implementation including market-based incentives. The focus of the Subcommittee will be on assisting EPA in developing implementation control strategies, preparing supporting analyses, and identifying and resolving

impediments to the adoption of the resulting programs.

Issues involved in possible revision of the O<sub>3</sub> and PM NAAQS, such as the averaging time, level, and form of any revised standards, are being addressed in accordance with the NAAQS review process described in the above sections, including review by CASAC, and are not within the Subcommittee's charge. CASAC is charged with providing advice and recommendations to the Administrator on all matters pertaining to the review of and possible revisions to the NAAQS. Similarly, selection of the appropriate indicator or units of measurement for quantifiable changes in visibility are being addressed through an independent, scientific peer-review process and, thus, will not be a subject for recommendations by the Subcommittee.

### C. Subcommittee Structure

The organization of the Subcommittee includes a coordination group and four work groups that will address specific issues. The coordination and work groups consist of members of the Subcommittee, as well as others recommended by the Subcommittee.

#### 1. Coordination Group

The coordination group is responsible for assuring that the outputs of the various work groups are coordinated and support the overall project goals. This group serves as the communication link between the full Subcommittee and the work groups. It sets the agendas for the Subcommittee meetings and coordinates presentations of key issues and related options to the full Subcommittee. The coordination group provides direction to work group chairs in determining priority issues to be considered by the full Subcommittee and in setting time frames for addressing issues and options with the Subcommittee. This group serves as a "sounding board" on potential work group products, resource needs, and any potential impediments to the progress of the work groups. It ensures that adequate progress is made by work groups and that issues are appropriately identified and addressed in accordance with established time lines. Finally, the coordination group provides a forum for determining the extent to which work groups address similar or related issues.

#### 2. Base Program Analyses and Policies Group

The Base Program Analyses and Policies Group is responsible for conducting a reexamination of the existing base regulatory program to take into account the potential new NAAQS,

as well as the regional haze program, and to better integrate broader-based regional and national control programs including the perspective of both receptors and generators of emissions. This includes reexamination of the designation and classification process to better reflect the associated health risks and definition of air quality problems. An important component of this group's assignment is the development of recommendations that will facilitate moving from existing to new programs.

#### 3. National and Regional Strategies Group

The National and Regional Strategies Group is responsible for development of broad regional and national strategies for addressing transport issues. This group examines broad-based market and trading approaches and other innovative strategies for achieving emission reductions. To do this, the group has to consider the technical, policy, and institutional issues associated with these types of approaches from the perspective of both generators and receptors of emissions.

#### 4. Communications and Outreach Group

The Communications and Outreach Group is responsible for developing a focus on the education of the general public to the nature and extent of air quality problems and the associated health and welfare impacts. This includes providing explanations of the measures being taken now and in the future to address these problems and summaries of associated costs and benefits. The initial focus of the group was to explain the current understanding of health and welfare effects information. This includes the steps EPA is taking to address health and welfare effects through possible new NAAQS and the regional haze program. Finally, this group describes how EPA, through the Subcommittee, is developing new integrated approaches to assure that public health and environmental objectives are attained as effectively and efficiently as possible.

#### 5. Science and Technical Support Group

The Science and Technical Support Group is responsible for preparing an assessment of the current state of the art with respect to emission inventories, air quality models, meteorological models, and analysis of air quality monitoring data to provide a scientific basis for decisions on integrated implementation strategies. These efforts are coordinated with the ongoing work of the Ozone Transport Assessment Group (OTAG), the Grand Canyon Visibility Transport Commission (GCVTC), the Southern

Appalachian Mountains Initiative (SAMI), and the North American Regional Strategies for Tropospheric Ozone (NARSTO). The Science and Technical Support Group assessment is expected to be a short-term effort to provide baseline information to the other working groups. In the longer term, this group will provide scientific and technical support to the other groups as requested.

### D. Ongoing Process and Schedule for Addressing Issues

The work groups will develop options and recommendations, and present these to the Subcommittee for further consideration. When consensus is not obtained on recommendations, minority and majority options will be presented to the Subcommittee via the coordination group. The Subcommittee will then forward its recommendations to the CAAAC for consideration and recommendation to EPA.

The integrated implementation programs for O<sub>3</sub>, PM, and regional haze will be developed in a two-phased approach. In Phase I, the Subcommittee and work groups will address air quality management framework issues. EPA plans to propose the resulting Phase I strategy in June 1997. Phase II of the integrated implementation strategy will focus on more detailed control strategy development. EPA plans to propose the Phase II strategy in June 1998.

Generally, Phase I implementation issues include: (1) designations for new NAAQS and regional haze planning areas, (2) mechanisms to address regional strategies, (3) integration of NAAQS and regional haze implementation programs, (4) regional haze program definition, (5) new source review, and (6) dates for potential new NAAQS and regional haze programs. Phase II implementation issues include: (1) classifications, (2) control requirements, (3) economic incentives, (4) State implementation plan requirements, (5) overall control program integration, (6) measure of progress, and (7) institutional process.

#### List of Subjects in 40 CFR Part 50

Environmental protection, Air pollution control, Carbon monoxide, Lead, Nitrogen dioxide, Ozone, Particulate matter, Sulfur oxides.

Dated: May 31, 1996.

Mary D. Nichols,

*Assistant Administrator for Air and Radiation.*

#### References

McClellan, R.O. (1989) Letter from Chairman of Clean Air Scientific Advisory Committee to the EPA Administrator concerning "closure" on the Ozone Criteria Document Supplement and the Ozone Staff Paper, dated May 1, 1989.

Shy, C.; Lippmann, M.; Stolwijk, J.; and Speizer, F. (1996). Letter to Administrator Carol M. Browner regarding Supplement to the Closure Letter from the Clean Air Scientific Advisory Committee. March 20, 1996.

Wolff, G.T. (1995a) Letter from George T. Wolff, Chair, Clean Air Scientific Advisory Committee (CASAC) to Administrator Carol M. Browner. Closure letter by CASAC on the Air Quality Criteria for Ozone and Related Photochemical Oxidants. November 28, 1995.

Wolff, G.T. (1995b) Letter from George T. Wolff, Chair, Clean Air Scientific Advisory Committee (CASAC) to Administrator Carol M. Browner. Closure letter by CASAC on the Primary Standard Portion of the Staff Paper for Ozone. November 30, 1995.

Wolff, G.T. (1996a) Letter from George T. Wolff, Chair, Clean Air Scientific Advisory Committee (CASAC) to Administrator Carol M. Browner. Closure letter by CASAC on draft Air Quality Criteria for Particulate Matter. March 15, 1996.

Wolff, G.T. (1996b) Letter from George T. Wolff, Chair, Clean Air Scientific Advisory Committee (CASAC) to Administrator Carol M. Browner. Closure letter by CASAC on the Secondary Standard Portion of the Staff Paper for Ozone. April 4, 1996.

[FR Doc. 96-14912 Filed 6-11-96; 8:45 am]

BILLING CODE 6560-50-P

#### 40 CFR Part 52

[CA 014-0003b; FRL-5464-5]

#### Approval and Promulgation of State Implementation Plans; California State Implementation Plan Revision, Five Local Air Pollution Control Districts

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Proposed rule.

**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 graphic arts 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). In the Final Rules Section of this Federal Register, the EPA is approving the state's SIP revision as a direct final rule without prior proposal because the Agency views this as a noncontroversial revision and anticipates no adverse comments. A detailed rationale for this approval is set forth in the direct final rule. If no adverse comments are received in response to this proposed rule, no further activity is contemplated in relation to this rule. If EPA receives adverse comments, the direct final rule will be withdrawn and all public comments received will be addressed in a subsequent final rule based on this proposed rule. The EPA will not institute a second comment period on this action. Any parties interested in commenting on this action should do so at this time.

**DATES:** Comments on this proposed rule must be received in writing by July 12, 1996.

**ADDRESSES:** Written comments on this action should be addressed to: Daniel A. Meer, Rulemaking Section (A-5-3), Air and Toxics Division, U.S. Environmental Protection Agency, Region 9, 75 Hawthorne Street, San Francisco, CA 94105-3901.

Copies of the 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 95812  
El Dorado County APCD, 2850 Fairlane  
Court, Placerville, CA 95667  
Kern County APCD, 2700 M. Street,  
Suite 290, Bakersfield, CA 93301  
Placer County APCD, 11464 B. Avenue,  
Auburn, CA 95603  
Santa Barbara County APCD, 26  
Castilian Drive, B-23, Goleta, CA  
93117  
South Coast AQMD, 21865 E. Copley  
Drive, Diamond Bar, CA 91765-4182

**FOR FURTHER INFORMATION CONTACT:** Erik H. Beck, Rulemaking Section (A-5-3), Air and Toxics Division, U.S.

Environmental Protection Agency,  
Region 9, 75 Hawthorne Street, San  
Francisco, CA 94105-3901, Telephone:  
(415) 744-1190, Internet E-Mail:  
beck.erik@epamail.epa.gov.

**SUPPLEMENTARY INFORMATION:** This action concerns: El Dorado County Air Pollution Control District (EDCAPCD) Rule 231 "Graphic Arts Operations"; Kern County Air Pollution Control

District (KCAPCD) Rule 410.7, "Graphic Arts"; Placer County Air Pollution Control District (PCAPCD) Rule 239 "Graphic Arts Operations"; Santa Barbara County Air Pollution Control District (SBCAPCD) Rule 354, "Graphic Arts"; and South Coast Air Quality Management District (SCAQMD) Rule 1130.1, "Screen Printing Operations". These rules were submitted by the California Air Resources Board (CARB) to EPA on the following dates in respective order: November 30, 1994; May 30, 1991; October 13, 1995; July 13, 1994; and November 18, 1993. For further information, please see the information provided in the Direct Final action which is located in the Rules Section of this Federal Register.

Authority: 42 U.S.C. 7401-7671q.

Dated: April 13, 1996.

Felicia Marcus,

*Regional Administrator.*

[FR Doc. 96-14785 Filed 6-11-96; 8:45 am]

BILLING CODE 6560-50-W

#### 40 CFR Part 62

[TN-115-01-9616b; FRL-5519-7]

#### Approval and Promulgation of Air Quality Implementation Plans; Tennessee; Approval of Revisions to Process Emission Standards for Total Reduced Sulfur Emissions From Kraft Mills

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Proposed rule.

**SUMMARY:** The EPA proposes to approve the State implementation plan (SIP) revision submitted by the State of Tennessee for the purpose of revising the current regulations for Total Reduced Sulfur (TRS) from Kraft Mills. In the final rules section of this Federal Register, the EPA is approving the State's SIP revision as a direct final rule without prior proposal because the Agency views this as a noncontroversial revision amendment and anticipates no adverse comments. A detailed rationale for the approval is set forth in the direct final rule. If no adverse comments are received in response to this proposed rule, no further activity is contemplated in relation to this proposed rule. If EPA receives adverse comments, the direct final rule will be withdrawn and all public comments received will be addressed in a subsequent final rule based on this proposed rule. The EPA will not institute a second comment period on this document. Any parties interested in commenting on this document should do so at this time.

**DATES:** To be considered, comments must be received by July 12, 1996.

**ADDRESSES:** Written comments on this action should be addressed to Karen Borel, at the EPA Regional Office listed below. Copies of the documents relative to this action are available for public inspection during normal business hours at the following locations. The interested persons wanting to examine these documents should make an appointment with the appropriate office at least 24 hours before the visiting day.

Air and Radiation Docket and Information Center (Air Docket 6102), U.S. Environmental Protection Agency, 401 M Street, SW, Washington, DC 20460.

Environmental Protection Agency, Region 4 Air Programs Branch, 345 Courtland Street, NE, Atlanta, Georgia 30365.

Tennessee Department of Environment and Conservation, Division of Air Pollution Control, 9th Floor L & C Annex, 401 Church Street, Nashville, Tennessee 37243-1531.

**FOR FURTHER INFORMATION CONTACT:**

Interested persons wanting to examine documents relative to this action should make an appointment with the Region 4 Air Programs Branch at least 24 hours before the visiting day. To schedule the appointment or to request additional information, contact Karen Borel, Regulatory Planning and Development Section, Air Programs Branch, Air, Pesticides & Toxics Management Division, Region 4 EPA, 345 Courtland Street, NE, Atlanta, Georgia 30365. The telephone number is 404/347-3555 extension 4197. Reference file TN115-01-9616.

**SUPPLEMENTARY INFORMATION:** For additional information see the direct final rule which is published in the rules section of this Federal Register.

Dated: May 28, 1996.

A. Stanley Meiburg,

*Acting Regional Administrator.*

[FR Doc. 96-14910 Filed 6-11-96; 8:45 am]

**BILLING CODE** 6560-50-P

**40 CFR Part 81**

[ID14-6994b; FRL-5515-2]

**Approval and Promulgation of State Implementation Plans: Idaho**

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Proposed rule, correction.

**SUMMARY:** The EPA proposes to correct EPA's announcement of the boundary of the Power-Bannock Counties PM-10

nonattainment area (particulate matter with an aerodynamic diameter less than or equal to a nominal 10 micrometers) in the State of Idaho to exclude that portion east of the Inkom Gap, a geographic feature separating the Inkom area from the rest of the nonattainment area. In the Final Rules Section of this Federal Register, the EPA is approving the State's SIP revision as a direct final rule without prior proposal because the Agency views this as a noncontroversial revision amendment and anticipates no adverse comments. A detailed rationale for the approval is set forth in the direct final rule. If no adverse comments are received in response to this proposed rule, no further activity is contemplated in relation to this rule. If the EPA receives adverse comments, the direct final rule will be withdrawn and all public comments received will be addressed in a subsequent final rule based on this proposed rule. The EPA will not institute a second comment period on this action.

**DATES:** Comments on this proposed rule must be received in writing by July 12, 1996.

**ADDRESSES:** Written comments should be addressed to Steven K. Body, Office of Air Quality, at the EPA Regional Office listed below. Copies of the documents relevant to this proposed rule are available for public inspection during normal business hours at the following locations. The interested persons wanting to examine these documents should make an appointment with the appropriate office at least 24 hours before the visiting day.

U.S. Environmental Protection Agency, Region 10, Office of Air Quality, 1200 6th Avenue, Seattle, WA 98101.

Idaho Division of Environmental Quality, 1410 N. Hilton, Boise, Idaho 83720.

**FOR FURTHER INFORMATION CONTACT:**

Steve Body, Office of Air Quality, (206) 553-0782, or by mail at the Region 10 address above.

**SUPPLEMENTARY INFORMATION:** See the information provided in the Direct Final action which is located in the Rules Section of this Federal Register.

Dated: May 29, 1996.

Carol M. Browner,

*U.S. EPA Administrator.*

[FR Doc. 96-14454 Filed 6-11-96; 8:45 am]

**BILLING CODE** 6560-50-P

**DEPARTMENT OF COMMERCE**

**National Oceanic and Atmospheric Administration**

**50 CFR Part 675**

[Docket No. 960603156-6156-01; I.D. 052896A]

**RIN 0648-A158**

**Groundfish Fishery of the Bering Sea and Aleutian Islands; Delay of Pollock Season**

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

**ACTION:** Proposed rule; request for comments.

**SUMMARY:** NMFS proposes to delay from August 15 to September 1 of each fishing year, the opening of the second (non-roe) directed fishing season for pollock in the Bering Sea and Aleutian Islands management area (BSAI). This action is necessary to allow some pollock processor vessels and shoreside processing plants to more fully realize potential salmon processing opportunities, particularly for late-run pink salmon. This action is intended to further the objectives of the Fishery Management Plan for the Groundfish Fishery of the Bering Sea and Aleutian Island Area (FMP).

**DATES:** Comments must be received by July 8, 1996.

**ADDRESSES:** Comments may be sent to Ronald J. Berg, Chief, Fisheries Management Division, Alaska Region, NMFS, P.O. Box 21668, Juneau, AK 99802, Attn: Lori Gravel or delivered to the Federal Building, 709 West 9th Street, Juneau, AK.

Copies of the environmental assessment/regulatory impact review/final regulatory flexibility analysis (EA/RIR/FRFA) prepared for the original 1993 "B" season delay or the supplemental EA/RIR prepared for this action may be obtained from the North Pacific Fishery Management Council, 605 West 4th Ave., Suite 306, Anchorage, AK 99510-2252; telephone: 907-271-2809.

**FOR FURTHER INFORMATION CONTACT:** Kaja Brix, 907-586-7228.

**SUPPLEMENTARY INFORMATION:**

Fishing for groundfish by U.S. vessels in the exclusive economic zone of the BSAI is managed by NMFS according to the FMP. The FMP was prepared by the North Pacific Fishery Management Council (Council) under the Magnuson Fishery Conservation and Management Act (Magnuson Act) and is implemented

by regulations that appear at 50 CFR parts 675 and 676. General regulations that also govern U.S. fisheries appear at 50 CFR part 620.

Under regulations at § 675.20(a)(2)(ii), the initial total allowable catch (TAC) amounts specified for pollock in the Bering Sea and Aleutian Islands subareas, and the Bogoslof district are divided into two seasonal allowances. Subject to other regulatory provisions, the first seasonal allowance is available for directed fishing from January 1 until noon, A.L.T., April 15 (the "roe" or "A" season). The second seasonal allowance is available for directed fishing from noon A.L.T., August 15 through the end of the fishing year (the "non-roe" or "B" season). NMFS annually apportions the initial pollock TACs between the roe and non-roe seasons after consultation with the Council during the annual groundfish TAC specification process set forth at § 675.20(a).

Prior to 1993 the opening of the non-roe season was June 1. However, at its December 1992 meeting, the Council requested an analysis to examine the alternatives for delaying the June 1 opening date of the pollock "B" season. The original EA/RIR/FRFA, dated February 2, 1993, contains a comprehensive examination of alternatives to delay the pollock "B" season from June 1 to either July 1, August 1, or September 1. Based on the February 2, 1993, EA/RIR/FRFA, the Council recommended a delayed opening date of August 15 for the pollock "B" season. This action was implemented by NMFS for the 1993 "B" season (58 FR 30997, May 28, 1993) and was intended to increase the value of the pollock harvested during the "B" season by delaying the directed fishery for pollock until pollock flesh quality and product recovery rates were improved. The original delay also was intended to provide participants in the pollock fishery increased opportunities to fish in other groundfish fisheries and to develop salmon processing capabilities during summer months.

Recent high abundance of Alaska pink salmon as well as poor salmon market conditions, have caused renewed interest by the salmon industry and groundfish processors to explore opportunities for new salmon product types and markets. This interest has prompted the Council to reconsider the opening date of the pollock "B" season to provide pollock processors the opportunity to participate in the processing operations for late-run pink salmon.

At its December 1995 meeting, the Council directed staff to prepare an additional analysis for delaying the

opening date of the pollock "B" season to September 1. An analysis was prepared to supplement the original EA/RIR/FRFA prepared in 1993. This supplemental analysis includes: (1) A summary of the original analysis from 1993 that resulted in the current opening date of August 15, and (2) supplementary information relevant to the current proposal to delay the opening an additional 2 weeks until September 1.

After considering the original and supplemental analyses at its April 1996 meeting, the Council recommended the September 1 opening date for the pollock "B" season for both the inshore and the offshore components, with a fixed season ending date of November 1 of each year. Vessels participating in the Community Development Quota (CDQ) directed pollock fishery would be exempt from the season ending date restriction.

The Council's action also included a measure that would prohibit vessels from participating in the directed pollock fishery during the 7 days after the September 1 opening (i.e., from noon A.L.T. September 1 until noon A.L.T. September 8) if the vessel participated in any groundfish fishery in either the BSAI or the Gulf of Alaska (GOA) during any portion of the 7-day period prior to the opening of the pollock "B" season (i.e., from noon A.L.T., August 25th until noon, September 1, A.L.T.). Vessels participating in the directed CDQ pollock fishery would be exempt from this measure.

#### "B" Season Delay

The impact of delaying the "B" season until September 1 was examined in detail in the EA/RIR/FRFA (February 2, 1993) prepared for the original season delay implemented in 1993. Additional information is presented in the March 22, 1996, supplemental analysis prepared for the current action (see ADDRESSES).

The 1993 analysis indicates that the impacts of a "B" season delay would vary widely between different regions and species, as well as from year to year. That analysis also indicates that, if the B season is delayed until September 1, floating processors who participated in the pollock "B" season would generally tend to benefit from an additional economic opportunity to process salmon. Onshore processors could lose as a result of increased competition in the processing sector, which might lead to increased ex-vessel prices. Salmon fishermen could benefit, at least in the short term, from additional markets and increased competition, which might result in higher ex-vessel prices. The

effect on local Alaskan communities can not be determined at the present time. It would depend on the net effects of the "B" season delay on fishermen and processors and the relative economic contribution of each to the communities.

A delay of the "B" season until September 1 could have impacts on salmon bycatch. In previous years, the incidence of high chum salmon bycatch has been greater around the opening of the pollock "B" season compared to the incidence of chinook salmon bycatch that generally has occurred later in the pollock "B" season. Shifting the opening of the pollock "B" season to September 1 could decrease the likelihood of high chum salmon bycatch and increase the likelihood of chinook salmon bycatch. However, much of the bycatch occurrence is dependent on the spatial and temporal distribution of the bycatch species and can change from year to year. The impacts of shifting the pollock "B" season 2 weeks later in the year are difficult to quantify.

#### November 1 "B" Season End Date

Some concern exists about the potential effects of the continuation of the pollock fishery later in the year when the pollock resource is critical to the sea lion population. During the midwinter months of the year (November, December, and January), pollock is a particularly important element of the juvenile sea lion diet, as alternative prey species are less available during this period. Juvenile sea lions also are learning to forage on their own at this time and may be dependent on concentrations of prey species to forage successfully.

To mitigate any potential adverse impacts on the sea lion population, the Council recommended a "B" season ending date of November 1, regardless of whether the directed pollock total allowable catch (TAC) is taken by that time. Current estimates indicate that the pollock fisheries for both the inshore and offshore sectors would likely be completed by early October.

From a fisheries management perspective, placing a season ending date of November 1 on the pollock "B" season could limit NMFS ability to provide for a "C" season or "clean-up" fishery, which has in the past been designed to allow harvest of remaining pollock TAC.

Typically, after the closure of the "B" season, the in-season catch data from the pollock fishery are analyzed to determine if any pollock TAC remains available for a directed fishery. Should sufficient amounts remain, then NMFS can announce a "C" season opening.

However, under the circumstances of a delayed opening, which could extend the "B" season into early October, reassessing the status of the pollock TAC and announcing and possibly prosecuting a "C" season fishery before the November 1 deadline may be difficult.

Seven-day "No-trawl" Measure

Data from the yellowfin sole fishery indicate that the amount of halibut bycatch is much greater during the 2 weeks prior to the August 15 opening of the pollock "B" season than the amount of halibut bycatch in subsequent weeks. This high halibut bycatch appears to be due to a few vessels that experienced higher halibut bycatch than other vessels fishing in the yellowfin sole fishery prior to the opening of the "B" season. Crowding effects of the pollock vessels in the yellowfin sole fishery may cause some vessels to fish in areas where more halibut occur. High halibut bycatch in the yellowfin sole fishery can cause a premature closure of the yellowfin sole fishery due to the halibut prohibited species catch allowance being reached before the yellowfin sole TAC is reached.

The high halibut bycatch and the Council's concerns about preemption in the yellowfin sole fishery prompted the Council to recommend a "no-trawl" fishing prohibition for vessels participating in the pollock "B" season to reduce the likelihood that the pollock vessels would participate in the yellowfin sole fisheries or redistribute fishing effort to other trawl fisheries prior to the opening of the pollock "B" season. Any vessel that fishes for groundfish with trawl gear in the BSAI or GOA, during any portion of the 7 days prior to the September 1 opening date of the pollock "B" season would be prohibited from directed fishing for pollock in the 7 days after September 1. Vessels participating in the CDQ directed pollock fishery would be exempt from this prohibition.

Classification

The Council prepared an EA/RIR/FRFA in 1993, and a supplemental analysis was prepared in 1996. The 1993 analysis, as supplemented, was reviewed, and the economic analysis was found to be still valid. These documents combine to comprise an initial regulatory flexibility analysis for this action. The analysis indicates that the impacts could vary across regions and from year to year. However, in general, as stated above, floating processors who participate in the pollock B season would tend to benefit from an additional economic

opportunity to process salmon. Onshore processors could lose revenues as a result of increased competition among pollock processors. Finally, the effect on local Alaskan communities can not be reliably determined at present and would depend on the net impact of the delay. A copy of the 1993 EA/RIR/FRFA and the 1996 supplement are available from the Council (see ADDRESSES).

An informal section 7 consultation under the Endangered Species Act was initiated for the proposed rule to determine any adverse effects of the BSAI "B" season delay on Steller sea lions. The consultation determined that the proposed delay in the fishery and the November 1 ending date of the "B" season would not likely result in any adverse effects on Steller sea lions or critical habitat.

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

List of Subjects in 50 CFR Part 675

Fisheries, Reporting and recordkeeping requirements

Dated: June 7, 1996.

Gary Matlock,

Program Management Officer, National Marine Fisheries Service.

For the reasons set out in the preamble, 50 CFR part 675 is proposed to be amended as follows:

**PART 675—GROUND FISH OF THE BERING SEA AND ALEUTIAN ISLANDS AREA**

1. The authority citation for part 675 continues to read as follows:

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

2. In § 675.20, paragraph (a)(2)(ii) is revised to read as follows:

**§ 675.20 General limitations.**

- (a) \* \* \*
- (2) \* \* \*

(ii) The TAC of pollock in each subarea or district will be divided, after subtraction of reserves, into two allowances. The first allowance will be available for directed fishing from January 1 until noon, Alaska local time (A.l.t.), April 15. The second allowance will be available for directed fishing from noon, A.l.t., September 1 until noon A.l.t., November 1, of each fishing year. Within any fishing year, unharvested amounts of the first allowance will be added to the second allowance, and harvests in excess of the first allowance will be deducted from the second allowance.

\* \* \* \* \*

3. In § 675.23, paragraph (e) is revised to read as follows:

**§ 675.23 Seasons.**

\* \* \* \* \*

(e) *Directed fishing for pollock.* (1) Subject to other provisions of this part, and except as provided in paragraphs (e)(2) and (e)(3) of this section, directed fishing for pollock is authorized from 00:01 a.m., A.l.t., January 1, until noon, A.l.t., April 15, and from noon A.l.t., September 1 until noon A.l.t., November 1, of each fishing year.

(2) *Applicable through December 31, 1998.* (i) Subject to other provisions of this part and except as provided in paragraphs (e)(2)(ii) and (e)(2)(iii) of this section, directed fishing for pollock by the offshore component, defined at § 672.2 of this chapter, or by vessels delivering pollock to the offshore component, is authorized from noon A.l.t., January 26, until noon A.l.t., April 15. Directed fishing for pollock under the Western Alaska Community Development Quota program pursuant to § 675.27 of this part is authorized from January 1, through the end of the fishing year.

(ii) Directed fishing for pollock by the offshore component, as defined at § 672.2 of this chapter, or vessels delivering pollock to the offshore component is prohibited until noon, A.l.t., February 5, for those vessels that are used to fish prior to noon, A.l.t., January 26, for groundfish in the Bering Sea and Aleutian Islands management area, groundfish in the Gulf of Alaska, as defined at § 672.2 of this chapter, or king or Tanner crab in the Bering Sea and Aleutian Islands area, as defined at § 671.2 of this chapter.

(iii) Neither paragraphs (e)(2)(ii) nor (e)(3) of this section apply to vessels used to fish exclusively in a directed fishery for pollock prior to noon, A.l.t., January 26, or during the period that extends from noon, A.l.t., August 25, through noon A.l.t., September 1, under the Western Alaska Community Development Quota program pursuant to § 675.27.

(3) Directed fishing for pollock is prohibited during the second pollock season defined at paragraph (e)(1) of this section until noon, A.l.t., September 8, for any vessel that is used to fish with trawl gear for groundfish in the Bering Sea and Aleutian Islands management area or the Gulf of Alaska as defined at § 672.2 of this chapter, between noon A.l.t., August 25, and noon A.l.t., September 1.

[FR Doc. 96-14926 Filed 6-7-96; 1:29 pm]

**50 CFR Part 676**

[I.D. 060496A]

RIN 0648-A157

**Limited Access Management of Federal Fisheries In and Off of Alaska; Quota Shares and Individual Fishing Quota**

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

**ACTION:** Notice of availability of amendments to fishery management plans; request for comments.

**SUMMARY:** The North Pacific Fishery Management Council (Council) has submitted Amendment 42 to the Fishery Management Plan (FMP) for the Bering Sea/Aleutian Islands Groundfish and Amendment 42 to the Fishery Management Plan for the Gulf of Alaska Groundfish Fishery. The Council recommended these amendments to alleviate certain restrictions in the Individual Fishing Quota (IFQ) Program. If approved, these FMP amendments would allow quota shares (QS) and IFQ assigned to vessels in larger size categories to be used on smaller vessels. The Council intends these amendments to increase the flexibility of QS use and transfer while maintaining the

management goals of the IFQ Program and, thus, provide small boat fishermen with more opportunities to improve the profitability of their operations. Comments are requested from the public.

**DATES:** Comments on the proposed FMP amendments must be received by August 6, 1996.

**ADDRESSES:** Send comments to Ronald J. Berg, Chief, Fisheries Management Division, Attn: Lori Gravel, Alaska Region, National Marine Fisheries Service, P.O. Box 21668, Juneau, AK 99802. Copies of the proposed Amendments, and the Environmental Assessment/Regulatory Impact Review/Initial Regulatory Flexibility Analysis for this action may be obtained from the North Pacific Fishery Management Council, Suite 306, 605 West 4th Avenue, Anchorage, AK 99501-2252.

**FOR FURTHER INFORMATION CONTACT:** James Hale, 907-586-7228.

**SUPPLEMENTARY INFORMATION:****Background**

The Magnuson Fishery Conservation and Management Act (Magnuson Act) requires that each Regional Fishery Management Council submit any fishery management plan or plan amendment it prepares to NMFS for review and approval, disapproval, or partial disapproval. The Magnuson Act also

requires that NMFS, upon reviewing the plan or amendment, must immediately publish a notice that the plan or amendment is available for public review and comment.

Amendment 42 to each of the FMPs governing Federal fisheries in and off of Alaska would redefine IFQ vessel categories to allow QS and IFQ assigned to larger vessel categories to be used on smaller vessels. An exception to this change would prohibit QS or IFQ assigned to vessel category B in regulatory areas 2C (for halibut) and east of 140° W. long. (for sablefish) to be used on vessels less than 60 ft (18.3 m) length overall except in QS blocks equivalent to less than 5,000 lb (2.3 mt).

NMFS will consider the public comments received during the comment period in determining whether to approve the proposed amendments. The proposed regulations are scheduled to be published within 15 days of this document.

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

Dated: June 6, 1996.

Richard W. Surdi,

*Acting Director, Office of Fisheries Conservation and Management, National Marine Fisheries Service.*

[FR Doc. 96-14927 Filed 6-7-96; 3:52 pm]

**BILLING CODE 3510-22-F**

# Notices

Federal Register

Vol. 61, No. 114

Wednesday, June 12, 1996

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

### Natural Resources Conservation Service

#### Browns Creek Watershed, Mississippi

**AGENCY:** Natural Resources Conservation Service, USDA.

**ACTION:** Notice of intent to deauthorize Federal funding.

**SUMMARY:** Pursuant to the Watershed Protection and Flood Prevention Act, Public Law 83-566, and the Natural Resources Conservation Service Guidelines (7 CFR 622), the Natural Resources Conservation Service gives notice of the intent to deauthorize Federal funding for the Browns Creek Watershed project, Prentiss, Itawamba, and Tishomingo Counties, Mississippi.

**FOR FURTHER INFORMATION CONTACT:** Homer L. Wilkes, State Conservationist, Natural Resources Conservation Service, Suite 1321, Federal Building, 100 West Capitol Street, Jackson, Mississippi 39269, telephone 601-965-5205.

*Browns Creek Watershed, Mississippi  
Notice of Intent To Deauthorize Federal Funding*

**SUPPLEMENTARY INFORMATION:** A determination has been made by Paul Johnson, Chief, Natural Resources Conservation Service that because of an inadequate benefit cost ratio, significant concerns which cannot be answered, and the lack of plans to complete the project in a timely manner by the local sponsor, Federal funding will be withdrawn from this project. The sponsoring local organizations have not concurred in this recommendation. Information regarding this determination may be obtained from Homer L. Wilkes, State Conservationist, at the above address and telephone number.

No administrative action on implementation of the proposed

deauthorization will be taken until 60 days after the date of this publication in the Federal Register.

(Catalog of Federal Domestic Assistance Program No. 10.904, Watershed Protection and Flood Prevention. Office of Management and Budget Circular A-95 regarding state and local clearinghouse review of Federal and federally assisted programs and projects is applicable)

Dated: May 24, 1996.

Homer L. Wilkes,

*State Conservationist.*

[FR Doc. 96-14804 Filed 6-11-96; 8:45 am]

**BILLING CODE 3410-16-M**

## DEPARTMENT OF COMMERCE

### Bureau of the Census

#### BC-170, Census Employment Inquiry

**ACTION:** Proposed agency information collection activity; Comment request.

**SUMMARY:** The Department of Commerce, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104-13 (44 U.S.C. 3506(c)(2)(A)).

**DATES:** Written comments must be submitted on or before August 12, 1996.

**ADDRESSES:** Direct all written comments to Dan Haigler, Acting Departmental Forms Clearance Officer, Department of Commerce, Room 5327, 14th and Constitution Avenue, NW, Washington, DC 20230.

**FOR FURTHER INFORMATION CONTACT:** Requests for additional information or copies of the information collection instrument(s) and instruction(s) should be directed to Karen S. Seebold, Bureau of the Census, 3701 St. Barnabas Road, Silver Hill Executive Plaza, Room 2A, Washington, DC 20233-6500, (301) 763-8416.

#### SUPPLEMENTARY INFORMATION:

##### I. Abstract

The BC-170, Census Employment Inquiry, is used by the Census Bureau to collect personal information such as, work experience from job applicants.

This form will be completed by job applicants before or at the time they are tested. Selecting officials will review the information shown on the form to determine the best qualified applicants.

##### II. Method of Collection

We collect this information at the time of testing for Census positions.

##### III. Data

*OMB Number:* 0607-0139.

*Form Number:* BC-170.

*Type of Review:* Regular submission.

*Affected Public:* Individuals.

*Estimated Number of Respondents:* 104,650 annually.

*Estimated Time Per Response:* 15 minutes.

*Estimated Annual Burden Hours:* 26,162 hours.

*Estimated Total Cost:* The total cost to the individual is his/her time for completing the BC-170. The total cost to administer the BC-170 is approximately \$113,750.

##### IV. Requests for Comments

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of burden (including hours and cost) of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including the use of automated collection techniques or other forms of information technology.

Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval of this information collection; they also will become a matter of public record.

Dated: June 7, 1996.

Dan Haigler,

*Acting Departmental Forms Clearance Officer, Office of Management and Organization.*

[FR Doc. 96-14931 Filed 6-11-96; 8:45 am]

**BILLING CODE: 3510-07-P**

## Minority Business Development Agency

### Solicitation of Business Development Center Applications for Inglewood, East Los Angeles, and West Los Angeles

**AGENCY:** Minority Business Development Agency, Commerce.

**ACTION:** Notice.

**SUMMARY:** In accordance with Executive Order 11625 and 15 U.S.C. 1512, the Minority Business Development Agency (MBDA) is soliciting competitive applications from organizations to operate the Minority Business Development Centers (MBDC) listed in this document.

The purpose of the MBDC Program is to provide business development assistance to persons who are members of groups determined by MBDA to be socially or economically disadvantaged, and to business concerns owned and controlled by such individuals. To this end, MBDA funds organizations to identify and coordinate public and private sector resources on behalf of minority individuals and firms; to offer a full range of client services to minority entrepreneurs; and to serve as a conduit of information and assistance regarding minority business.

In accordance with the Interim Final Policy published in the Federal Register on May 31, 1996, the cost-share requirement for the MBDCs listed in this notice has been increased to 40%. The Department of Commerce will fund up to 60% of the total cost of operating an MBDC on an annual basis. The MBDC operator is required to contribute at least 40% of the total project cost (the "cost-share requirement"). Cost-sharing contributions may be in the form of cash, client fees, third party in-kind contributions, non-cash applicant contributions or combinations thereof. In addition to the traditional sources of an MBDC's cost-share contribution, the 40% may be contributed by local, state and private sector organizations. It is anticipated that some organizations may apply jointly for an award to operate the center. For administrative purposes, one organization must be designated as the recipient organization.

**DATES:** The closing date for applications for each MBDC is July 15, 1996.

**PRE-APPLICATION CONFERENCE:** A pre-application conference will be held. For the exact date, time, and location, contact the San Francisco Regional Office at (415) 744-3001.

Proper identification is required for entrance into any Federal building.

**ADDRESSES:** Completed application packages should be submitted to the U.S. Department of Commerce, Minority Business Development Agency, MBDA Executive Secretariat, 14th and Constitution Avenue, NW., Room 5073, Washington, DC 20230.

**SUPPLEMENTARY INFORMATION:** The following are MBDCs for which applications are solicited:

1. *MBDC application:* Inglewood. *Metropolitan Area Serviced:* Inglewood, California.

The cities within this boundary include, but are not limited to: Inglewood, Culver City, Hawthorne, Gardena, Lawndale, Torrance, Compton, South Gate, Downey, Lakewood, Bellflower, Bell Gardens, Norwalk, Cerritos, Carson, San Pedro, Manhattan Beach, El Segundo, Hermosa Beach, Redondo Beach, Santa Monica and the City of Long Beach. A portion of the City of Los Angeles will also be included. The boundaries for the Inglewood MBDC are designated as follows: South of the Santa Monica Freeway (Freeway 10); bounded on the East by the Santa Ana Freeway (Freeway 5); bounded on the South by the Los Angeles County Line.

*Award Number:* 09-10-96006-01. *For Further Information and an Application Package, Contact:* Melda Cabrera, Regional Director, at (415) 744-3001.

Contingent upon the availability of Federal funds, the cost of performance for the first budget period (13 months) from October 1, 1996 to October 30, 1997, is estimated at \$691,112. The total Federal amount is \$414,667 and is composed of \$404,553 plus the Audit Fee amount of \$10,114. The application must include a minimum cost share of 40%, \$276,445 in non-federal (cost-sharing) contributions for a total project cost of \$691,112.

2. *MBDC Application:* East Los Angeles.

*Metropolitan Area Serviced:* East Los Angeles, California.

Cities within this boundary include, but are not limited to: East Los Angeles, Pasadena, Monrovia, Whittier, Montebello, Ico Rivera, Temple City, Arcadia, Covina, West Covina, Glendora, Azusa, San Dimas, La Verne, Claremont, Pomona, Diamond Bar, La Puente, Baldwin Park, El Monte, South El Monte, Monterey Park and Temple City. A portion of the City of Los Angeles will also be included. The boundaries for the East Los Angeles MBDC are designated as follows: North of the Santa Ana Freeway (Freeway 5); bounded on the West by the Pasadena Freeway (Freeway 110) and the City of

Pasadena; and bounded on the North, the South and the East by the Los Angeles County Line.

*Award Number:* 09-10-96007-01.

*For Further Information and an Application Package, Contact:* Melda Cabrera, Regional Director, at (415) 730-3300.

Contingent upon the availability of Federal funds, the cost of performance for the first budget period (13 months) from October 1, 1996 to October 30, 1997, is estimated at \$691,112. The total Federal amount is \$414,667 and is composed of \$404,553 plus the Audit Fee amount of \$10,114. The application must include a minimum cost share of 40%, \$276,445 in non-federal (cost-sharing) contributions for a total project cost of \$691,112.

3. *MBDC Application:* West Los Angeles.

*Metropolitan Area Serviced:* West Los Angeles, California.

Cities within this boundary include, but are not limited to: Burbank, Glendale, Beverly Hills, Northridge, Sepulveda, Encino, Van Nuys, Hollywood and North Hollywood, Santa Monica, Pasadena, South Pasadena & the San Fernando Valley. A portion of the City of Los Angeles will also be included. The boundaries for the West Los Angeles MBDC are designated as follows: North of the Santa Monica Freeway (Freeway 5); bounded on the East by the Pasadena Freeway (Freeway 110) and the City of Pasadena; and bounded on the West and the North side by the Los Angeles County Line.

*Award Number:* 09-10-96008-01.

*For Further Information and an Application Package, Contact:* Melda Cabrera, Regional Director, at (415) 744-3001.

Contingent upon the availability of Federal funds, the cost of performance for the first budget period (13 months) from October 1, 1996 to October 30, 1997, is estimated at \$691,112. The total Federal amount is \$414,667 and is composed of \$404,553 plus the Audit Fee amount of \$10,114. The application must include a minimum cost share of 40%, \$276,445 in non-federal (cost-sharing) contributions for a total project cost of \$691,112.

### Standard Paragraphs

The following information and requirements are applicable to the listed MBDCs: Inglewood, East Los Angeles, and West Los Angeles.

The funding instrument for this project will be a cooperative agreement. If the recommended applicant is the current incumbent organization, the award will be for 12 months. For those applicants who are not incumbent

organizations or who are incumbents that have experienced closure due to a break in service, a 30-day start-up period will be added to their first budget period, making it a 13-month award. Competition is open to individuals, non-profit and for-profit organizations, state and local governments, American Indian tribes and educational institutions.

Applications will be evaluated on the following criteria: the knowledge, background and/or capabilities of the firm and its staff in addressing the needs of the business community in general and, specifically, the special needs of minority businesses, individuals and organizations (45 points), the resources available to the firm in providing business development services (10 points); the firm's approach (techniques and methodologies) to performing the work requirements included in the application (25 points); and the firm's estimated cost for providing such assistance (20 points). In accordance with Interim Final Policy published in the Federal Register on May 31, 1996, the scoring system will be revised to add ten (10) bonus points to the application of community-based organizations. Each qualifying application will receive the full ten points. Community-based applicant organizations are those organizations whose headquarters and/or principal place of business within the last five years have been located within the geographic service area designated in the solicitation for the award. Where an applicant organization has been in existence for fewer than five years or has been present in the geographic service area for fewer than five years, the individual years of experience of the applicant organization's principals may be applied toward the requirement of five years of organization experience. The individual years of experience must have been acquired in the geographic service area which is the subject of the solicitation. An application must receive at least 70% of the points assigned to each evaluation criteria category to be considered programmatically acceptable and responsive. Those applications determined to be acceptable and responsive will then be evaluated by the Director of MBDA. Final award selections shall be based on the number of points received, the demonstrated responsibility of the applicant, and the determination of those most likely to further the purpose of the MBDA program. Negative audit findings and recommendations and unsatisfactory performance under prior Federal awards

may result in an application not being considered for award. The applicant with the highest point score will not necessarily receive the award. Periodic reviews culminating in year-to-date evaluations will be conducted to determine if funding for the project should continue. Continued funding will be at the total discretion of MBDA based on such factors as the MBDC's performance, the availability of funds and Agency priorities.

The MBDC shall be required to contribute at least 40% of the total project cost through non-federal contributions. To assist in this effort, the MBDC may charge client fees for services rendered. Fees may range from \$10 to \$60 per hour based on the gross receipts of the client's business.

Anticipated processing time of this award is 120 days. Executive order 12372, "Intergovernmental Review of Federal Programs," is not applicable to this program. Federal funds for this project include audit funds for non-CPA recipients. In event that a CPA firm wins the competition, the funds allocated for audits are not applicable. Questions concerning the preceding information can be answered by the contact person indicated above, and copies of application kits and applicable regulations can be obtained at the above address. Notwithstanding any other provision of the law, no person is required to respond to, nor shall any person be subject to a penalty for failure to comply with a collection of information, subject to the requirements of the PRA, unless that collection of information displays a currently valid OMB Control Number. The collection of information requirements for this project have been approved by the Office of Management and Budget (OMB) and assigned OMB control number 0640-0006.

Awards under this program shall be subject to all Federal laws, and Federal and Departmental regulations, policies, and procedures applicable to Federal financial assistance awards.

**Pre-Award Costs**—Applicants are hereby notified that if they incur any costs prior to an award being made, they do so solely at their own risk of not being reimbursed by the Government. Notwithstanding any verbal assurance that an applicant may have received, there is no obligation on the part of the Department of Commerce to cover pre-award costs.

**Outstanding Account Receivable**—No award of Federal funds shall be made to an applicant who has an outstanding delinquent Federal debt until either the delinquent account is paid in full, repayment schedule is established and

at least one payment is received, or other arrangements satisfactory to the Department of Commerce are made.

**Name Check Policy**—All non-profit and for-profit applicants are subject to a name check review process. Name checks are intended to reveal if any key individuals associated with the applicant have been convicted of or are presently facing criminal charges such as fraud, theft, perjury or other matters which significantly reflect on the applicant's management honesty or financial integrity.

**Award Termination**—The Departmental Grants Officer may terminate any grant/cooperative agreement in whole or in part at any time before the date of completion whenever it is determined that the award recipient has failed to comply with the conditions of the grant/cooperative agreement. Examples of some of the conditions which can cause termination are failure to meet cost-sharing requirements; unsatisfactory performance of the MBDC work requirements; and reporting inaccurate or inflated claims of client assistance. Such inaccurate or inflated claims may be deemed illegal and punishable by law.

**False Statements**—A false statement on an application for Federal financial assistance is grounds for denial or termination of funds, and grounds for possible punishment by a fine or imprisonment as provided in 18 U.S.C. 1001.

**Primary Applicant Certifications**—All primary applicants must submit a completed Form CD-511, "Certifications Regarding Debarment, Suspension and Other Responsibility Matters; Drug-Free Workplace Requirements and Lobbying."

**Nonprocurement Debarment and Suspension**—Prospective participants (as defined at 15 CFR Part 26, Section 26.105) are subject to 15 CFR Part 26, "Nonprocurement Debarment and Suspension" and the related section of the certification form prescribed above applies.

**Drug Free Workplace**—Grantees (as defined at 15 CFR Part 26, Section 26.605) are subject to 15 CFR Part 26, Subpart F, "Governmentwide Requirements for Drug-Free Workplace (Grants)" and the related section of the certification form prescribed above applies.

**Anti-Lobbying**—Persons (as defined at 15 CFR Part 28, Section 28.105) are subject to the lobbying provisions of 31 U.S.C. 1352, "Limitation on use of appropriated funds to influence certain Federal contracting and financial transactions," and the lobbying section

of the certification form prescribed above applies to applications/bids for grants, cooperative agreements, and contracts for more than \$100,000, and loans and loan guarantees for more than \$150,000 or the single family maximum mortgage limit for affected programs, whichever is greater.

**Anti-Lobbying Disclosures**—Any applicant that has paid or will pay for lobbying using any funds must submit an SF-LLL, "Disclosure of Lobbying Activities," as required under 15 CFR Part 28, Appendix B.

**Lower Tier Certifications**—Recipients shall require applications/bidders for subgrants, contracts, subcontracts, or other lower tier covered transactions at any tier under the award to submit, if applicable, a completed Form CD-512, "Certifications Regarding Debarment, Suspension, Ineligibility and Voluntary Exclusion-Lower Tier Covered Transactions and Lobbying" and disclosure form, SF-LLL, "Disclosure of Lobbying Activities." Form CD-512 is intended for the use of recipients and should not be transmitted to DOC. SF-LLL submitted by any tier recipient or subrecipient should be submitted to DOC in accordance with the instructions contained in the award document.

**Buy American-made Equipment or Products**—Applicants are hereby notified that they are encouraged, to the extent feasible, to purchase American-made equipment and products with funding provided under this program.

11.800 Minority Business Development Center

(Catalog of Federal Domestic Assistance)

Dated: June 7, 1996.

Donald L. Powers,

*Federal Register Liaison Officer, Minority Business Development Agency.*

[FR Doc. 96-14883 Filed 6-11-96; 8:45 am]

BILLING CODE 3510-21-P

### **Solicitation of Business Development Center Applications for Anaheim, Las Vegas, Oxnard, and San Francisco**

**AGENCY:** Minority Business Development Agency, Commerce.

**ACTION:** Notice.

**SUMMARY:** In accordance with Executive Order 11625 and 15 U.S.C. 1512, the Minority Business Development Agency (MBDA) is soliciting competitive applications from organizations to operate the Minority Business Development Centers (MBDC) listed in this document.

The purpose of the MBDC Program is to provide business development assistance to persons who are members of groups determined by MBDA to be

socially or economically disadvantaged, and to business concerns owned and controlled by such individuals. To this end, MBDA funds organizations to identify and coordinate public and private sector resources on behalf of minority individuals and firms; to offer a full range of client services to minority entrepreneurs; and to serve as a conduit of information and assistance regarding minority business.

In accordance with the Interim Final Policy published in the Federal Register on May 31, 1996, the cost-share requirement for the MBDCs listed in this notice has been increased to 40%. The Department of Commerce will fund up to 60% of the total cost of operating an MBDC on an annual basis. The MBDC operator is required to contribute at least 40% of the total project cost (the "cost-share requirement"). Cost-sharing contributions may be in the form of cash, client fees, third party in-kind contributions, non-cash applicant contributions or combinations thereof. In addition to the traditional sources of an MBDC's cost-share contribution, the 40% may be contributed by local, state and private sector organizations. It is anticipated that some organizations may apply jointly for an award to operate the center. For administrative purposes, one organization must be designated as the recipient organization.

**DATES:** The closing date for applications for each MBDC is July 15, 1996.

**PRE-APPLICATION CONFERENCE:** A pre-application conference will be held. For the exact date, time, and location, contact the San Francisco Regional Office at (415) 744-3001.

Proper identification is required for entrance into any Federal Building.

**ADDRESSES:** Completed application packages should be submitted to the U.S. Department of Commerce, Minority Business Development Agency, MBDA Executive Secretariat, 14th and Constitution Avenue, N.W., Room 5073, Washington, D.C. 20230.

**SUPPLEMENTARY INFORMATION:** The following are MBDCs for which applications are solicited:

1. **MBDC Application:** Anaheim. *Metropolitan Area Served:* Anaheim, California.

*Award Number:* 09-10-96004-01. *For Further Information and an Application Package, Contact:* Melda Cabrera, Regional Director, at (415) 744-3001.

Contingent upon the availability of Federal funds, the cost of performance for the first budget period (13 months) from October 1, 1996 to October 31, 1997, is estimated at \$550,938. The total Federal amount is \$330,563 and is composed of \$322,500 plus the Audit

Fee amount of \$8,063. The application must include a minimum cost share of 40%, \$220,375 in non-federal (cost-sharing) contributions for a total project cost of \$550,938.

2. **MBDC Application:** Las Vegas. *Metropolitan Area Served:* Las Vegas, Nevada.

*Award Number:* 09-10-96005-01. *For Further Information and an Application Package, Contact:* Melda Cabrera, Regional Director, at (415) 744-3001.

Contingent upon the availability of Federal funds, the cost of performance for the first budget period (13 months) from October 1, 1996 to October 31, 1997, is estimated at \$281,875. The total Federal amount is \$169,125 and is composed of \$165,000 plus the Audit Fee amount of \$4,125. The application must include a minimum cost share of 40%, \$112,750 in non-federal (cost-sharing) contributions for a total project cost of \$281,875.

3. **MBDC Application:** Oxnard. *Metropolitan Area Served:* Oxnard, California.

*Award Number:* 09-10-96009-01. *For Further Information and an Application Package, Contact:* Melda Cabrera, Regional Director, at (415) 744-3001.

Contingent upon the availability of Federal funds, the cost of performance for the first budget period (13 months) from October 1, 1996 to October 31, 1997, is estimated at \$314,778. The total Federal amount is \$188,867 and is composed of \$184,260 plus the Audit Fee amount of \$4,607. The application must include a minimum cost share of 40%, \$125,911 in non-federal (cost-sharing) contributions for a total project cost of \$314,778.

4. **MBDC Application:** San Francisco. *Metropolitan Area Served:* San Francisco, California.

*Award Number:* 09-10-96010-01. *For Further Information and an Application Package, Contact:* Melda Cabrera, Regional Director, at (415) 744-3001.

Contingent upon the availability of Federal funds, the cost of performance for the first budget period (13 months) from October 1, 1996 to October 31, 1997, is estimated at \$681,740. The total Federal amount is \$409,044 and is composed of \$400,500 plus the Audit Fee amount of \$8,544. The application must include a minimum cost share of 40%, \$272,696 in non-federal (cost-sharing) contributions for a total project cost of \$681,740.

Standard Paragraphs

The following information and requirements are applicable to the listed

MBDCs: Anaheim, Las Vegas, Oxnard, and San Francisco.

The funding instrument for this project will be a cooperative agreement. If the recommended applicant is the current incumbent organization, the award will be for 12 months. For those applicants who are not incumbent organizations or who are incumbents that have experienced closure due to a break in service, a 30-day start-up period will be added to their first budget period, making it a 13-month award. Competition is open to individuals, non-profit and for-profit organizations, state and local governments, American Indian tribes and educational institutions.

Applications will be evaluated on the following criteria: the knowledge, background and/or capabilities of the firm and its staff in addressing the needs of the business community in general and, specifically, the special needs of minority businesses, individuals and organizations (45 points), the resources available to the firm in providing business development services (10 points); the firm's approach (techniques and methodologies) to performing the work requirements included in the application (25 points); and the firm's estimated cost for providing such assistance (20 points). In accordance with Interim Final Policy published in the Federal Register on May 31, 1996, the scoring system will be revised to add ten (10) bonus points to the application of community-based organizations. Each qualifying application will receive the full ten points. Community-based applicant organizations are those organizations whose headquarters and/or principal place of business within the last five years have been located within the geographic service area designated in the solicitation for the award. Where an applicant organization has been in existence for fewer than five years or has been present in the geographic service area for fewer than five years, the individual years of experience of the applicant organization's principals may be applied toward the requirement of five years of organization experience. The individual years of experience must have been acquired in the geographic service area which is the subject of the solicitation. An application must receive at least 70% of the points assigned to each evaluation criteria category to be considered programmatically acceptable and responsive. Those applications determined to be acceptable and responsive will then be evaluated by the Director of MBDA. Final award selections shall be based on the number

of points received, the demonstrated responsibility of the applicant, and the determination of those most likely to further the purpose of the MBDA program. Negative audit findings and recommendations and unsatisfactory performance under prior Federal awards may result in an application not being considered for award. The applicant with the highest point score will not necessarily receive the award. Periodic reviews culminating in year-to-date evaluations will be conducted to determine if funding for the project should continue. Continued funding will be at the total discretion of MBDA based on such factors as the MBDC's performance, the availability of funds and Agency priorities.

The MBDC shall be required to contribute at least 40% of the total project cost through non-federal contributions. To assist in this effort, the MBDC may charge client fees for services rendered. Fees may range from \$10 to \$60 per hour based on the gross receipts of the client's business.

Anticipated processing time of this award is 120 days. Executive order 12372, "Intergovernmental Review of Federal Programs," is not applicable to this program. Federal funds for this project include audit funds for non-CPA recipients. In event that a CPA firm wins the competition, the funds allocated for audits are not applicable. Questions concerning the preceding information can be answered by the contact person indicated above, and copies of application kits and applicable regulations can be obtained at the above address. Notwithstanding any other provision of the law, no person is required to respond to, nor shall any person be subject to a penalty for failure to comply with a collection of information, subject to the requirements of the PRA, unless that collection of information displays a currently valid OMB Control Number. The collection of information requirements for this project have been approved by the Office of Management and Budget (OMB) and assigned OMB control number 0640-0006.

Awards under this program shall be subject to all Federal laws, and Federal and Departmental regulations, policies, and procedures applicable to Federal financial assistance awards.

**Pre-Award Costs**—Applicants are hereby notified that if they incur any costs prior to an award being made, they do so solely at their own risk of not being reimbursed by the Government. Notwithstanding any verbal assurance that an applicant may have received, there is no obligation on the part of the

Department of Commerce to cover pre-award costs.

**Outstanding Account Receivable**—No award of Federal funds shall be made to an applicant who has an outstanding delinquent Federal debt until either the delinquent account is paid in full, repayment schedule is established and at least one payment is received, or other arrangements satisfactory to the Department of Commerce are made.

**Name Check Policy**—All non-profit and for-profit applicants are subject to a name check review process. Name checks are intended to reveal if any key individuals associated with the applicant have been convicted of or are presently facing criminal charges such as fraud, theft, perjury or other matters which significantly reflect on the applicant's management honesty or financial integrity.

**Award Termination**—The Departmental Grants Officer may terminate any grant/cooperative agreement in whole or in part at any time before the date of completion whenever it is determined that the award recipient has failed to comply with the conditions of the grant/cooperative agreement. Examples of some of the conditions which can cause termination are failure to meet cost-sharing requirements; unsatisfactory performance of the MBDC work requirements; and reporting inaccurate or inflated claims of client assistance. Such inaccurate or inflated claims may be deemed illegal and punishable by law.

**False Statements**—A false statement on an application for Federal financial assistance is grounds for denial or termination of funds, and grounds for possible punishment by a fine or imprisonment as provided in 18 U.S.C. 1001.

**Primary Applicant Certifications**—All primary applicants must submit a completed Form CD-511, "Certifications Regarding Debarment, Suspension and Other Responsibility Matters; Drug-Free Workplace Requirements and Lobbying."

**Nonprocurement Debarment and Suspension**—Prospective participants (as defined at 15 CFR Part 26, Section 26.105) are subject to 15 CFR Part 26, "Nonprocurement Debarment and Suspension" and the related section of the certification form prescribed above applies.

**Drug Free Workplace**—Grantees (as defined at 15 CFR Part 26, Section 26.605) are subject to 15 CFR Part 26, Subpart F, "Governmentwide Requirements for Drug-Free Workplace (Grants)" and the related section of the

certification form prescribed above applies.

**Anti-Lobbying**—Persons (as defined at 15 CFR Part 28, Section 28.105) are subject to the lobbying provisions of 31 U.S.C. 1352, "Limitation on use of appropriated funds to influence certain Federal contracting and financial transactions," and the lobbying section of the certification form prescribed above applies to applications/bids for grants, cooperative agreements, and contracts for more than \$100,000, and loans and loan guarantees for more than \$150,000 or the single family maximum mortgage limit for affected programs, whichever is greater.

**Anti-Lobbying Disclosures**—Any applicant that has paid or will pay for lobbying using any funds must submit an SF-LLL, "Disclosure of Lobbying Activities," as required under 15 CFR Part 28, Appendix B.

**Lower Tier Certifications**—Recipients shall require applications/bidders for subgrants, contracts, subcontracts, or other lower tier covered transactions at any tier under the award to submit, if applicable, a completed Form CD-512, "Certifications Regarding Debarment, Suspension, Ineligibility and Voluntary Exclusion-Lower Tier Covered Transactions and Lobbying" and disclosure form, SF-LLL, "Disclosure of Lobbying Activities." Form CD-512 is intended for the use of recipients and should not be transmitted to DOC. SF-LLL submitted by any tier recipient or subrecipient should be submitted to DOC in accordance with the instructions contained in the award document.

**Buy American-made Equipment or Products**—Applicants are hereby notified that they are encouraged, to the extent feasible, to purchase American-made equipment and products with funding provided under this program.

11.800 Minority Business Development Center  
(Catalog of Federal Domestic Assistance)

Dated: June 7, 1996.

Donald L. Powers,  
*Federal Register Liaison Officer, Minority Business Development Agency.*

[FR Doc. 96-14885 Filed 6-11-96; 8:45 am]

BILLING CODE 3510-21-P

### Solicitation of Business Development Center Applications for Chicago and Cincinnati

**AGENCY:** Minority Business Development Agency, Commerce.

**ACTION:** Notice.

**SUMMARY:** In accordance with Executive Order 11625 and 15 U.S.C. 1512, the

Minority Business Development Agency (MBDA) is soliciting competitive applications from organizations to operate the Minority Business Development Centers (MBDC) listed in this document.

The purpose of the MBDC Program is to provide business development assistance to persons who are members of groups determined by MBDA to be socially or economically disadvantaged, and to business concerns owned and controlled by such individuals. To this end, MBDA funds organizations to identify and coordinate public and private sector resources on behalf of minority individuals and firms; to offer a full range of client services to minority entrepreneurs; and to serve as a conduit of information and assistance regarding minority business.

In accordance with the Interim Final Policy published in the Federal Register on May 31, 1996, the cost-share requirement for the MBDCs listed in this notice has been increased to 40%. The Department of Commerce will fund up to 60% of the total cost of operating an MBDC on an annual basis. The MBDC operator is required to contribute at least 40% of the total project cost (the "cost-share requirement"). Cost-sharing contributions may be in the form of cash, client fees, third party in-kind contributions, non-cash applicant contributions or combinations thereof. In addition to the traditional sources of an MBDC's cost-share contribution, the 40% may be contributed by local, state and private sector organizations. It is anticipated that some organizations may apply jointly for an award to operate the center. For administrative purposes, one organization must be designated as the recipient organization.

**DATES:** The closing date for applications for each MBDC is July 15, 1996.

**PRE-APPLICATION CONFERENCE:** A pre-application conference will be held. For the exact date, time, and location, contact the Chicago Regional Office at (312) 353-0182.

Proper identification is required for entrance into any Federal building.

**ADDRESSES:** Completed application packages should be submitted to the U.S. Department of Commerce, Minority Business Development Agency, MBDA Executive Secretariat, 14th and Constitution Avenue, N.W., Room 5073, Washington, D.C. 20230.

**SUPPLEMENTARY INFORMATION:** The following are MBDCs for which applications are solicited:

1. **MBDC Application:** Chicago.  
*Metropolitan Area Served:* Chicago, Illinois.

*Award Number:* 05-10-96001-01.

*For Further Information and an Application Package, Contact:* David Vega, Regional Director, at (312) 353-0182.

Contingent upon the availability of Federal funds, the cost of performance for the first budget period (13 months) from October 1, 1996 to October 31, 1997, is estimated at \$921,667. The total Federal amount is \$553,000 and is composed of \$539,512 plus the Audit Fee amount of \$13,488. The application must include a minimum cost share of 40%, \$368,667 in non-federal (cost-sharing) contributions for a total project cost of \$921,667.

2. **MBDC Application:** Cincinnati.  
*Metropolitan Area Served:* Cincinnati, Ohio.

*Award Number:* 05-10-96002-01.  
*For Further Information and an Application Package, Contact:* David Vega, Regional Director, at (312) 353-0182.

Contingent upon the availability of Federal funds, the cost of performance for the first budget period (13 months) from October 1, 1996 to October 31, 1997, is estimated at \$281,875. The total Federal amount is \$169,125 and is composed of \$165,000 plus the Audit Fee amount of \$4,125. The application must include a minimum cost share of 40%, \$112,750 in non-federal (cost-sharing) contributions for a total project cost of \$281,875.

#### Standard Paragraphs

The following information and requirements are applicable to the listed MBDCs: Chicago and Cincinnati.

The funding instrument for this project will be a cooperative agreement. If the recommended applicant is the current incumbent organization, the award will be for 12 months. For those applicants who are not incumbent organizations or who are incumbents that have experienced closure due to a break in service, a 30-day start-up period will be added to their first budget period, making it a 13-month award. Competition is open to individuals, non-profit and for-profit organizations, state and local governments, American Indian tribes and educational institutions.

Applications will be evaluated on the following criteria: the knowledge, background and/or capabilities of the firm and its staff in addressing the needs of the business community in general and, specifically, the special needs of minority businesses, individuals and organizations (45 points), the resources available to the firm in providing business development services (10 points); the firm's approach (techniques and methodologies) to performing the

work requirements included in the application (25 points); and the firm's estimated cost for providing such assistance (20 points). In accordance with Interim Final Policy published in the Federal Register on May 31, 1996, the scoring system will be revised to add ten (10) bonus points to the application of community-based organizations. Each qualifying application will receive the full ten points. Community-based applicant organizations are those organizations whose headquarters and/or principal place of business within the last five years have been located within the geographic service area designated in the solicitation for the award. Where an applicant organization has been in existence for fewer than five years or has been present in the geographic service area for fewer than five years, the individual years of experience of the applicant organization's principals may be applied toward the requirement of five years of organization experience. The individual years of experience must have been acquired in the geographic service area which is the subject of the solicitation. An application must receive at least 70% of the points assigned to each evaluation criteria category to be considered programmatically acceptable and responsive. Those applications determined to be acceptable and responsive will then be evaluated by the Director of MBDA. Final award selections shall be based on the number of points received, the demonstrated responsibility of the applicant, and the determination of those most likely to further the purpose of the MBDA program. Negative audit findings and recommendations and unsatisfactory performance under prior Federal awards may result in an application not being considered for award. The applicant with the highest point score will not necessarily receive the award. Periodic reviews culminating in year-to-date evaluations will be conducted to determine if funding for the project should continue. Continued funding will be at the total discretion of MBDA based on such factors as the MBDC's performance, the availability of funds and Agency priorities.

The MBDC shall be required to contribute at least 40% of the total project cost through non-federal contributions. To assist in this effort, the MBDC may charge client fees for services rendered. Fees may range from \$10 to \$60 per hour based on the gross receipts of the client's business.

Anticipated processing time of this award is 120 days. Executive order 12372, "Intergovernmental Review of

Federal Programs," is not applicable to this program. Federal funds for this project include audit funds for non-CPA recipients. In event that a CPA firm wins the competition, the funds allocated for audits are not applicable. Questions concerning the preceding information can be answered by the contact person indicated above, and copies of application kits and applicable regulations can be obtained at the above address. Notwithstanding any other provision of the law, no person is required to respond to, nor shall any person be subject to a penalty for failure to comply with a collection of information, subject to the requirements of the PRA, unless that collection of information displays a currently valid OMB Control Number. The collection of information requirements for this project have been approved by the Office of Management and Budget (OMB) and assigned OMB control number 0640-0006.

Awards under this program shall be subject to all Federal laws, and Federal and Departmental regulations, policies, and procedures applicable to Federal financial assistance awards.

**Pre-Award Costs**—Applicants are hereby notified that if they incur any costs prior to an award being made, they do so solely at their own risk of not being reimbursed by the Government. Notwithstanding any verbal assurance that an applicant may have received, there is no obligation on the part of the Department of Commerce to cover pre-award costs.

**Outstanding Account Receivable**—No award of Federal funds shall be made to an applicant who has an outstanding delinquent Federal debt until either the delinquent account is paid in full, repayment schedule is established and at least one payment is received, or other arrangements satisfactory to the Department of Commerce are made.

**Name Check Policy**—All non-profit and for-profit applicants are subject to a name check review process. Name checks are intended to reveal if any key individuals associated with the applicant have been convicted of or are presently facing criminal charges such as fraud, theft, perjury or other matters which significantly reflect on the applicant's management honesty or financial integrity.

**Award Termination**—The Departmental Grants Officer may terminate any grant/cooperative agreement in whole or in part at any time before the date of completion whenever it is determined that the award recipient has failed to comply with the conditions of the grant/cooperative agreement. Examples of

some of the conditions which can cause termination are failure to meet cost-sharing requirements; unsatisfactory performance of the MBDC work requirements; and reporting inaccurate or inflated claims of client assistance. Such inaccurate or inflated claims may be deemed illegal and punishable by law.

**False Statements**—A false statement on an application for Federal financial assistance is grounds for denial or termination of funds, and grounds for possible punishment by a fine or imprisonment as provided in 18 U.S.C. 1001.

**Primary Applicant Certifications**—All primary applicants must submit a completed Form CD-511, "Certifications Regarding Debarment, Suspension and Other Responsibility Matters; Drug-Free Workplace Requirements and Lobbying."

**Nonprocurement Debarment and Suspension**—Prospective participants (as defined at 15 CFR Part 26, Section 26.105) are subject to 15 CFR Part 26, "Nonprocurement Debarment and Suspension" and the related section of the certification form prescribed above applies.

**Drug Free Workplace**—Grantees (as defined at 15 CFR Part 26, Section 26.605) are subject to 15 CFR Part 26, Subpart F, "Governmentwide Requirements for Drug-Free Workplace (Grants)" and the related section of the certification form prescribed above applies.

**Anti-Lobbying**—Persons (as defined at 15 CFR Part 28, Section 28.105) are subject to the lobbying provisions of 31 U.S.C. 1352, "Limitation on use of appropriated funds to influence certain Federal contracting and financial transactions," and the lobbying section of the certification form prescribed above applies to applications/bids for grants, cooperative agreements, and contracts for more than \$100,000, and loans and loan guarantees for more than \$150,000 or the single family maximum mortgage limit for affected programs, whichever is greater.

**Anti-Lobbying Disclosures**—Any applicant that has paid or will pay for lobbying using any funds must submit an SF-LLL, "Disclosure of Lobbying Activities," as required under 15 CFR Part 28, Appendix B.

**Lower Tier Certifications**—Recipients shall require applications/bidders for subgrants, contracts, subcontracts, or other lower tier covered transactions at any tier under the award to submit, if applicable, a completed Form CD-512, "Certifications Regarding Debarment, Suspension, Ineligibility and Voluntary Exclusion-Lower Tier Covered

Transactions and Lobbying" and disclosure form, SF-LLL, "Disclosure of Lobbying Activities." Form CD-512 is intended for the use of recipients and should not be transmitted to DOC. SF-LLL submitted by any tier recipient or subrecipient should be submitted to DOC in accordance with the instructions contained in the award document.

**Buy American-made Equipment or Products**—Applicants are hereby notified that they are encouraged, to the extent feasible, to purchase American-made equipment and products with funding provided under this program.

11.800 Minority Business Development Center

(Catalog of Federal Domestic Assistance)

Dated: June 7, 1996.

Donald L. Powers,

*Federal Register Liaison Officer, Minority Business Development Agency.*

[FR Doc. 96-14884 Filed 6-11-96; 8:45 am]

BILLING CODE 3510-21-P

### **Solicitation of Business Development Center Applications for Charleston, San Diego, and Stockton**

**AGENCY:** Minority Business Development Agency, Commerce.

**ACTION:** Notice.

**SUMMARY:** In accordance with Executive Order 11625 and 15 U.S.C. 1512, the Minority Business Development Agency (MBDA) is soliciting competitive applications from organizations to operate the Minority Business Development Center (MBDC) listed in this document.

The purpose of the MBDC Program is to provide business development services to the minority business community to help establish and maintain viable minority businesses. To this end, MBDA funds organizations to identify and coordinate public and private sector resources on behalf of minority individuals and firms; to offer a full range of client services to minority entrepreneurs; and to serve as a conduit of information and assistance regarding minority business.

Proper identification is required for entrance into any federal building.

**DATES:** The closing date for applications for each MBDC is listed below:

**ADDRESSES:** Completed application packages should be submitted on or before the closing date to the U.S. Department of Commerce, Minority Business Development Agency, MBDA Executive Secretariat, 14th and Constitution Avenue, N.W., Room 5073, Washington, D.C. 20230.

**SUPPLEMENTARY INFORMATION:** The following are MBDCs for which applications are solicited:

1. **MBDC Application:** Charleston.

**Metropolitan Area Served:** Charleston, South Carolina.

**Award Number:** 04-10-97001-01.  
**Closing Date for Applications:** August 12, 1996.

**For Further Information and an Application Package, Contact:** Robert Henderson, Regional Director at (404) 730-3300.

**Pre-Application Conference:** Wednesday, June 19, 1996, at 9:00 a.m., at the Atlanta Regional Office, 401 W. Peachtree Street, N.W., Suite 1715, Atlanta, Georgia 30308-3516.

**Cost of Performance Information:** Contingent upon the availability of Federal funds, the cost of performance for the first budget period (13 months) from October 1, 1996 to October 31, 1997, is estimated at \$198,971. The total Federal amount is \$169,125 and is composed of \$165,000 plus the Audit Fee amount of \$4,125. The application must include a minimum cost share of 15%, \$29,846 in non-federal (cost-sharing) contributions for a total project cost of \$198,971. Cost-sharing contributions may be in the form of cash, client fees, third party in-kind contributions, non-cash applicant contributions or combinations thereof.

2. **MBDC Application:** San Diego.

**Metropolitan Area Served:** San Diego, California.

**Award Number:** 09-10-97001-01.  
**Closing Date for Applications:** August 12, 1996.

**For Further Information and an Application Package, Contact:** Steven Saho, (415) 744-3001.

**Pre-Application Conference:** A pre-application conference will be held. Please contact the San Francisco Regional Office for the exact date, time, and location: (415) 744-3001.

**Cost of Performance Information:** Contingent upon the availability of Federal funds, the cost of performance for the first budget period (13 months) from October 1, 1996 to October 31, 1997, is estimated at \$333,125. The total Federal amount is \$283,156 and is composed of \$276,250 plus the Audit Fee amount of \$6,906. The application must include a minimum cost share of 15%, \$49,969 in non-federal (cost-sharing) contributions for a total project cost of \$333,125. Cost-sharing contributions may be in the form of cash, client fees, third party in-kind contributions, non-cash applicant contributions or combinations thereof.

3. **MBDC Application:** Stockton.

**Metropolitan Area Served:** Stockton, California.

**Award Number:** 09-10-97002-01.

**Closing Date for Applications:** August 12, 1996.

**For Further Information and an Application Package, Contact:** Steven Saho, (415) 744-3001.

**Pre-Application Conference:** A pre-application conference will be held. Please contact the San Francisco Regional Office for the exact date, time, and location: (415) 744-3001.

**Cost of Performance Information:** Contingent upon the availability of Federal funds, the cost of performance for the first budget period (13 months) from October 1, 1996 to October 31, 1997, is estimated at \$198,971. The total Federal amount is \$169,125 and is composed of \$165,000 plus the Audit Fee amount of \$4,125. The application must include a minimum cost share of 15%, \$29,846 in non-federal (cost-sharing) contributions for a total project cost of \$198,971. Cost-sharing contributions may be in the form of cash.

### **Standard Paragraphs**

The following information and requirements are applicable to the above-listed MBDCs.

The funding instrument for this project will be a cooperative agreement. If the recommended applicant is the current incumbent organization, the award will be for 12 months. For those applicants who are not incumbent organizations or who are incumbents that have experienced closure due to a break in service, a 30-day start-up period will be added to their first budget period, making it a 13-month award. Competition is open to individuals, non-profit and for-profit organizations, state and local governments, American Indian tribes and educational institutions.

Applications will be evaluated on the following criteria: the knowledge, background and/or capabilities of the firm and its staff in addressing the needs of the business community in general and, specifically, the special needs of minority businesses, individuals and organizations (45 points), the resources available to the firm in providing business development services (10 points); the firm's approach (techniques and methodologies) to performing the work requirements included in the application (25 points); and the firm's estimated cost for providing such assistance (20 points). An application must receive at least 70% of the points assigned to each evaluation criteria category to be considered programmatically acceptable and responsive. Those applications determined to be acceptable and

responsive will then be evaluated by the Director of MBDA. Final award selections shall be based on the number of points received, the demonstrated responsibility of the applicant, and the determination of those most likely to further the purpose of the MBDA program. Negative audit findings and recommendations and unsatisfactory performance under prior Federal awards may result in an application not being considered for award. The applicant with the highest point score will not necessarily receive the award. Periodic reviews culminating in year-to-date evaluations will be conducted to determine if funding for the project should continue. Continued funding will be at the total discretion of MBDA based on such factors as the MBDC's performance, the availability of funds and Agency priorities.

The MBDC shall be required to contribute at least 15% of the total project cost through non-federal contributions. To assist in this effort, the MBDC may charge client fees for services rendered. Fees may range from \$10 to \$60 per hour based on the gross receipts of the client's business.

Anticipated processing time of this award is 120 days. Executive order 12372, "Intergovernmental Review of Federal Programs," is not applicable to this program. Federal funds for this project include audit funds for non-CPA recipients. In event that a CPA firm wins the competition, the funds allocated for audits are not applicable. Questions concerning the preceding information can be answered by the contact person indicated above, and copies of application kits and applicable regulations can be obtained at the above address. The collection of information requirements for this project have been approved by the Office of Management and Budget (OMB) and assigned OMB control number 0640-0006.

Awards under this program shall be subject to all Federal laws, and Federal and Departmental regulations, policies, and procedures applicable to Federal financial assistance awards.

**Pre-Award Costs**—Applicants are hereby notified that if they incur any costs prior to an award being made, they do so solely at their own risk of not being reimbursed by the Government. Notwithstanding any verbal assurance that an applicant may have received, there is no obligation on the part of the Department of Commerce to cover pre-award costs.

**Outstanding Account Receivable**—No award of Federal funds shall be made to an applicant who has an outstanding delinquent Federal debt until either the delinquent account is paid in full,

repayment schedule is established and at least one payment is received, or other arrangements satisfactory to the Department of Commerce are made.

**Name Check Policy**—All non-profit and for-profit applicants are subject to a name check review process. Name checks are intended to reveal if any key individuals associated with the applicant have been convicted of or are presently facing criminal charges such as fraud, theft, perjury or other matters which significantly reflect on the applicant's management honesty or financial integrity.

**Award Termination**—The Departmental Grants Officer may terminate any grant/cooperative agreement in whole or in part at any time before the date of completion whenever it is determined that the award recipient has failed to comply with the conditions of the grant/cooperative agreement. Examples of some of the conditions which can cause termination are failure to meet cost-sharing requirements; unsatisfactory performance of the MBDC work requirements; and reporting inaccurate or inflated claims of client assistance. Such inaccurate or inflated claims may be deemed illegal and punishable by law.

**False Statements**—A false statement on an application for Federal financial assistance is grounds for denial or termination of funds, and grounds for possible punishment by a fine or imprisonment as provided in 18 U.S.C. 1001.

**Primary Applicant Certifications**—All primary applicants must submit a completed Form CD-511, "Certifications Regarding Debarment, Suspension and Other Responsibility Matters; Drug-Free Workplace Requirements and Lobbying."

**Nonprocurement Debarment and Suspension**—Prospective participants (as defined at 15 CFR Part 26, Section 26.105) are subject to 15 CFR Part 26, "Nonprocurement Debarment and Suspension" and the related section of the certification form prescribed above applies.

**Drug Free Workplace**—Grantees (as defined at 15 CFR Part 26, Section 26.605) are subject to 15 CFR Part 26, Subpart F, "Governmentwide Requirements for Drug-Free Workplace (Grants)" and the related section of the certification form prescribed above applies.

**Anti-Lobbying**—Persons (as defined at 15 CFR Part 28, Section 28.105) are subject to the lobbying provisions of 31 U.S.C. 1352, "Limitation on use of appropriated funds to influence certain Federal contracting and financial

transactions," and the lobbying section of the certification form prescribed above applies to applications/bids for grants, cooperative agreements, and contracts for more than \$100,000, and loans and loan guarantees for more than \$150,000 or the single family maximum mortgage limit for affected programs, whichever is greater.

**Anti-Lobbying Disclosures**—Any applicant that has paid or will pay for lobbying using any funds must submit an SF-LLL, "Disclosure of Lobbying Activities," as required under 15 CFR Part 28, Appendix B.

**Lower Tier Certifications**—Recipients shall require applications/bidders for subgrants, contracts, subcontracts, or other lower tier covered transactions at any tier under the award to submit, if applicable, a completed Form CD-512, "Certifications Regarding Debarment, Suspension, Ineligibility and Voluntary Exclusion-Lower Tier Covered Transactions and Lobbying" and disclosure form, SF-LLL, "Disclosure of Lobbying Activities." Form CD-512 is intended for the use of recipients and should not be transmitted to DOC. SF-LLL submitted by any tier recipient or subrecipient should be submitted to DOC in accordance with the instructions contained in the award document.

**Buy American-made Equipment or Products**—Applicants are hereby notified that they are encouraged, to the extent feasible, to purchase American-made equipment and products with funding provided under this program in accordance with Congressional intent as set forth in the resolution contained in Public Law 103-121, Sections 606 (a) and (b).

11.800 Minority Business Development Center

(Catalog of Federal Domestic Assistance)

Dated: June 6, 1996.

Donald L. Powers

Federal Register Liaison Officer, Minority Business Development Agency.

[FR Doc. 96-14777 Filed 6-11-96; 8:45 am]

BILLING CODE 3510-21-P

### Solicitation of Business Development Center Applications for Brownsville, Corpus Christi, and Oklahoma City

**AGENCY:** Minority Business Development Agency, Commerce.

**ACTION:** Notice.

**SUMMARY:** In accordance with Executive Order 11625 and 15 U.S.C. 1512, the Minority Business Development Agency (MBDA) is soliciting competitive applications from organizations to operate the Minority Business

Development Centers (MBDC) listed in this document.

The purpose of the MBDC Program is to provide business development assistance to persons who are members of groups determined by MBDA to be socially or economically disadvantaged, and to business concerns owned and controlled by such individuals. To this end, MBDA funds organizations to identify and coordinate public and private sector resources on behalf of minority individuals and firms; to offer a full range of client services to minority entrepreneurs; and to serve as a conduit of information and assistance regarding minority business.

In accordance with the Interim Final Policy published in the Federal Register on May 31, 1996, the cost-share requirement for the MBDCs listed in this notice has been increased to 40%. The Department of Commerce will fund up to 60% of the total cost of operating an MBDC on an annual basis. The MBDC operator is required to contribute at least 40% of the total project cost (the "cost-share requirement").

Cost-sharing contributions may be in the form of cash, client fees, third party in-kind contributions, non-cash applicant contributions or combinations thereof. In addition to the traditional sources of an MBDC's cost-share contribution, the 40% may be contributed by local, state and private sector organizations. It is anticipated that some organizations may apply jointly for an award to operate the center. For administrative purposes, one organization must be designated as the recipient organization.

**DATES:** The closing date for applications for each MBDC is July 15, 1996.

**Pre-Application Conference:** Proper identification is required for entrance into any Federal building.

**ADDRESSES:** Completed application packages should be submitted to the U.S. Department of Commerce, Minority Business Development Agency, MBDA Executive Secretariat, 14th and Constitution Avenue, N.W., Room 5073, Washington, D.C. 20230.

**SUPPLEMENTARY INFORMATION:** The following are MBDCs for which applications are solicited:

1. MBDC Application: Brownsville Metropolitan Area Served:  
Brownsville, Texas

Award Number: 06-10-96003-01

**Pre-Application Conference:** A pre-application conference will be held on Tuesday, June 25, 1996, from 9:00 a.m. to 12:00 noon, at the International Plaza, 3505 Boca Chica Boulevard, Suite 200, Brownsville, Texas 78521.

For Further Information and an Application Package, Contact: Bobby Jefferson at (214) 767-8001. Contingent upon the availability of Federal funds, the cost of performance for the first budget period (13 months) from October 1, 1996 to October 31, 1997, is estimated at \$281,875. The total Federal amount is \$169,125 and is composed of \$165,000 plus the Audit Fee amount of \$4,125. The application must include a minimum cost share of 40%, \$112,750 in non-federal (cost-sharing) contributions for a total project cost of \$281,875.

2. MBDC Application: Corpus Christi Metropolitan Area Served: Corpus Christi, Texas

Award Number: 06-10-96004-01

**Pre-Application Conference:** A pre-application conference will be held on Wednesday, June 26, 1996, from 9:00 a.m. to 12:00 noon, at City Hall, 1201 Leopard Avenue, First Floor Meeting Room, Corpus Christi, Texas 78401.

For Further Information and an Application Package, Contact: Bobby Jefferson at (214) 767-8001. Contingent upon the availability of Federal funds, the cost of performance for the first budget period (13 months) from October 1, 1996 to October 31, 1997, is estimated at \$281,875. The total Federal amount is \$169,125 and is composed of \$165,000 plus the Audit Fee amount of \$4,125. The application must include a minimum cost share of 40%, \$112,750 in non-federal (cost-sharing) contributions for a total project cost of \$281,875.

3. MBDC Application: Oklahoma City Metropolitan Area Served:  
Oklahoma City, Oklahoma

Award Number: 06-10-96005-01

**Pre-Application Conference:** A pre-application conference will be held on Thursday, June 27, 1996, from 11:00 a.m. to 1:00 p.m., at the Oklahoma City Chamber of Commerce, 2nd Floor Conference Room, 123 Park Avenue, Oklahoma City, Oklahoma 73102.

For Further Information and an Application Package, Contact: Bobby Jefferson at (214) 767-8001. Contingent upon the availability of Federal funds, the cost of performance for the first budget period (13 months) from October 1, 1996 to October 31, 1997, is estimated at \$281,875. The total Federal amount is \$169,125 and is composed of \$165,000 plus the Audit Fee amount of \$4,125. The application must include a minimum cost share of 40%, \$112,750 in non-federal (cost-sharing) contributions for a total project cost of \$281,875.

#### Standard Paragraphs

The following information and requirements are applicable to the listed MBDCs: Brownsville, Corpus Christi, and Oklahoma City.

The funding instrument for this project will be a cooperative agreement. If the recommended applicant is the current incumbent organization, the award will be for 12 months. For those applicants who are not incumbent organizations or who are incumbents that have experienced closure due to a break in service, a 30-day start-up period will be added to their first budget period, making it a 13-month award. Competition is open to individuals, non-profit and for-profit organizations, state and local governments, American Indian tribes and educational institutions.

Applications will be evaluated on the following criteria: the knowledge, background and/or capabilities of the firm and its staff in addressing the needs of the business community in general and, specifically, the special needs of minority businesses, individuals and organizations (45 points), the resources available to the firm in providing business development services (10 points); the firm's approach (techniques and methodologies) to performing the work requirements included in the application (25 points); and the firm's estimated cost for providing such assistance (20 points). In accordance with Interim Final Policy published in the Federal Register on May 31, 1996, the scoring system will be revised to add ten (10) bonus points to the application of community-based organizations. Each qualifying application will receive the full ten points. Community-based applicant organizations are those organizations whose headquarters and/or principal place of business within the last five years have been located within the geographic service area designated in the solicitation for the award. Where an applicant organization has been in existence for fewer than five years or has been present in the geographic service area for fewer than five years, the individual years of experience of the applicant organization's principals may be applied toward the requirement of five years of organization experience. The individual years of experience must have been acquired in the geographic service area which is the subject of the solicitation. An application must receive at least 70% of the points assigned to each evaluation criteria category to be considered programmatically acceptable and responsive. Those applications

determined to be acceptable and responsive will then be evaluated by the Director of MBDA. Final award selections shall be based on the number of points received, the demonstrated responsibility of the applicant, and the determination of those most likely to further the purpose of the MBDA program. Negative audit findings and recommendations and unsatisfactory performance under prior Federal awards may result in an application not being considered for award. The applicant with the highest point score will not necessarily receive the award. Periodic reviews culminating in year-to-date evaluations will be conducted to determine if funding for the project should continue. Continued funding will be at the total discretion of MBDA based on such factors as the MBDC's performance, the availability of funds and Agency priorities.

The MBDC shall be required to contribute at least 40% of the total project cost through non-federal contributions. To assist in this effort, the MBDC may charge client fees for services rendered. Fees may range from \$10 to \$60 per hour based on the gross receipts of the client's business.

Anticipated processing time of this award is 120 days. Executive order 12372, "Intergovernmental Review of Federal Programs," is not applicable to this program. Federal funds for this project include audit funds for non-CPA recipients. In event that a CPA firm wins the competition, the funds allocated for audits are not applicable. Questions concerning the preceding information can be answered by the contact person indicated above, and copies of application kits and applicable regulations can be obtained at the above address. Notwithstanding any other provision of the law, no person is required to respond to, nor shall any person be subject to a penalty for failure to comply with a collection of information, subject to the requirements of the PRA, unless that collection of information displays a currently valid OMB Control Number. The collection of information requirements for this project have been approved by the Office of Management and Budget (OMB) and assigned OMB control number 0640-0006.

Awards under this program shall be subject to all Federal laws, and Federal and Departmental regulations, policies, and procedures applicable to Federal financial assistance awards.

**Pre-Award Costs**—Applicants are hereby notified that if they incur any costs prior to an award being made, they

do so solely at their own risk of not being reimbursed by the Government. Notwithstanding any verbal assurance that an applicant may have received, there is no obligation on the part of the Department of Commerce to cover pre-award costs.

**Outstanding Account Receivable**—No award of Federal funds shall be made to an applicant who has an outstanding delinquent Federal debt until either the delinquent account is paid in full, repayment schedule is established and at least one payment is received, or other arrangements satisfactory to the Department of Commerce are made.

**Name Check Policy**—All non-profit and for-profit applicants are subject to a name check review process. Name checks are intended to reveal if any key individuals associated with the applicant have been convicted of or are presently facing criminal charges such as fraud, theft, perjury or other matters which significantly reflect on the applicant's management honesty or financial integrity.

**Award Termination**—The Departmental Grants Officer may terminate any grant/cooperative agreement in whole or in part at any time before the date of completion whenever it is determined that the award recipient has failed to comply with the conditions of the grant/cooperative agreement. Examples of some of the conditions which can cause termination are failure to meet cost-sharing requirements; unsatisfactory performance of the MBDC work requirements; and reporting inaccurate or inflated claims of client assistance. Such inaccurate or inflated claims may be deemed illegal and punishable by law.

**False Statements**—A false statement on an application for Federal financial assistance is grounds for denial or termination of funds, and grounds for possible punishment by a fine or imprisonment as provided in 18 U.S.C. 1001.

**Primary Applicant Certifications**—All primary applicants must submit a completed Form CD-511, "Certifications Regarding Debarment, Suspension and Other Responsibility Matters; Drug-Free Workplace Requirements and Lobbying."

**Nonprocurement Debarment and Suspension**—Prospective participants (as defined at 15 CFR Part 26, Section 26.105) are subject to 15 CFR Part 26, "Nonprocurement Debarment and Suspension" and the related section of the certification form prescribed above applies.

**Drug Free Workplace**—Grantees (as defined at 15 CFR Part 26, Section 26.605) are subject to 15 CFR Part 26, Subpart F, "Governmentwide Requirements for Drug-Free Workplace (Grants)" and the related section of the certification form prescribed above applies.

**Anti-Lobbying**—Persons (as defined at 15 CFR Part 28, Section 28.105) are subject to the lobbying provisions of 31 U.S.C. 1352, "Limitation on use of appropriated funds to influence certain Federal contracting and financial transactions," and the lobbying section of the certification form prescribed above applies to applications/bids for grants, cooperative agreements, and contracts for more than \$100,000, and loans and loan guarantees for more than \$150,000 or the single family maximum mortgage limit for affected programs, whichever is greater.

**Anti-Lobbying Disclosures**—Any applicant that has paid or will pay for lobbying using any funds must submit an SF-LLL, "Disclosure of Lobbying Activities," as required under 15 CFR Part 28, Appendix B.

**Lower Tier Certifications**—Recipients shall require applications/bidders for subgrants, contracts, subcontracts, or other lower tier covered transactions at any tier under the award to submit, if applicable, a completed Form CD-512, "Certifications Regarding Debarment, Suspension, Ineligibility and Voluntary Exclusion-Lower Tier Covered Transactions and Lobbying" and disclosure form, SF-LLL, "Disclosure of Lobbying Activities." Form CD-512 is intended for the use of recipients and should not be transmitted to DOC. SF-LLL submitted by any tier recipient or subrecipient should be submitted to DOC in accordance with the instructions contained in the award document.

**Buy American-made Equipment or Products**—Applicants are hereby notified that they are encouraged, to the extent feasible, to purchase American-made equipment and products with funding provided under this program.

11.800 Minority Business Development Center

(Catalog of Federal Domestic Assistance)

Dated: June 7, 1996.

Donald L. Powers,

Federal Register Liaison Officer, Minority Business Development Agency.

[FR Doc. 96-14886 Filed 6-11-96; 8:45 am]

BILLING CODE 3510-21-P

**National Oceanic and Atmospheric Administration**

[I.D. 060696D]

**Mid-Atlantic Fishery Management Council; Public Meetings**

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

**ACTION:** Notice of public meetings.

**SUMMARY:** The Mid-Atlantic Fishery Management Council (Council) and its Law Enforcement Committee, Monkfish Committee (with Advisors), and Atlantic Mackerel, Squid, and Butterfish Committee will hold public meetings.

**DATES:** The meetings will be held on June 25–27, 1996. See **SUPPLEMENTARY INFORMATION** for specific dates and times.

**ADDRESSES:** The meetings will be held at the Doubletree Inn (at airport), 4101 Island Avenue, Philadelphia, PA; telephone: 1–800–222–TREE.

*Council address:* Mid-Atlantic Fishery Management Council, 300 S. New Street, Dover, DE 19901; telephone: 302–674–2331.

**FOR FURTHER INFORMATION CONTACT:** David R. Keifer, Executive Director; telephone: 302–674–2331, extension 18.

**SUPPLEMENTARY INFORMATION:** On June 25, the Law Enforcement Committee will meet from 10:00 a.m. until noon. The Monkfish Committee will meet from 1:00–5:00 p.m. On June 26, the Council will meet from 8:00 a.m. until noon, and the Atlantic Mackerel, Squid, and Butterfish Committee will meet as a Council Committee of the Whole from 1:00–4:00 p.m. On June 27, the Council will meet from 8:00 a.m. until approximately noon.

The purpose of the meetings is to review NMFS Strategic Plan and enforcement issues on fishery management plans (FMP), review possible management measures for monkfish, review hearing comments for Amendment 5 to Atlantic Mackerel, Squid, and Butterfish FMP and adopt for Secretarial approval, and adopt Amendment 6 to Atlantic Mackerel, Squid, and Butterfish FMP for public hearings. We will also have a presentation on the HACCP (Hazard Analysis Critical Control Point) Program.

**Special Accommodations**

These meetings are physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Joanna Davis (see

**ADDRESSES**) at least 5 days prior to the meeting dates.

Dated: June 7, 1996.

Richard H. Schaefer,

*Director, Office of Fisheries Conservation and Management, National Marine Fisheries Service.*

[FR Doc. 96–14934 Filed 6–11–96; 8:45 am]

**BILLING CODE 3510–22–F**

[I.D. 053096D]

**Marine Mammals; Scientific Research Permit (P613)**

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

**ACTION:** Receipt of application.

**SUMMARY:** Notice is hereby given that Dr. Glenn Cota, Center for Coastal Physical Oceanography, Old Dominion University, 768 W. 52nd Street, Norfolk, VA 23529, has applied in due form for a permit to import marine mammal specimen materials for purposes of scientific research.

**DATES:** Written comments must be received on or before July 12, 1996.

**ADDRESSES:** The application and related documents are available for review upon written request or by appointment in the following office(s):

Permits Division, Office of Protected Resources, NMFS, 1315 East-West Highway, Room 13130, Silver Spring, MD 20910 (301/713–2289); and

Northeast Region, NMFS, One Blackburn Drive, Gloucester, MA 01930–2289 (508/281–9250).

Written data or views, or requests for a public hearing on this request, should be submitted to the Director, Office of Protected Resources, NMFS, 1315 East-West Highway, Room 13130, Silver Spring, MD 20910. Those individuals requesting a hearing should set forth the specific reasons why a hearing on this particular request would be appropriate.

Concurrent with the publication of this notice in the Federal Register, NMFS is forwarding copies of this application to the Marine Mammal Commission and its Committee of Scientific Advisors.

**SUPPLEMENTARY INFORMATION:** The subject permit is requested under the authority of the Marine Mammal Protection Act of 1972, as amended (16 U.S.C. 1361 *et seq.*) and the Regulations Governing the Taking and Importing of Marine Mammals (50 CFR part 216).

The applicant requests authority to import from Canada muscle and/or adipose tissue taken from Narwhal (*Monodon monoceros*), Beluga whale

(*Delphinapterus leucas*), Bearded seal (*Erignathus barbatus*), and Ringed seal (*Phoca sibirica*). Samples will weigh approximately 100–300g each. The objective of the study is to determine the abundance, distribution, and identity of select radionuclides in biogenic particulate matter, zooplankton, and a variety of invertebrates, fishes, and mammals from arctic marine planktonic food webs, and provide data from key regions not currently sampled which presumably represent high and low levels of contamination.

Dated: May 31, 1996.

Ann D. Terbush,

*Chief, Permits and Documentation Division, Office of Protected Resources, National Marine Fisheries Service.*

[FR Doc. 96–14932 Filed 6–11–96; 8:45 am]

**BILLING CODE 3510–22–F**

[I.D. 052896B]

**Marine Mammals; Permit No. 838 (P535)**

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

**ACTION:** Scientific research permit modification.

**SUMMARY:** Notice is hereby given that a request for modification of scientific research permit no. 838 submitted by Stephen Insley, Smithsonian Institution, National Zoological Park, Dept. Zoological Research, Washington, DC 20008, has been granted.

**ADDRESSES:** The modification and related documents are available for review upon written request or by appointment in the following office(s):

Permits Division, Office of Protected Resources, NMFS, 1315 East-West Highway, Suite 13130, Silver Spring, MD 20910 (301/713–2289); and

Director, Alaska Region, NMFS, P.O. Box 21668, Juneau, AK 99802–1668 (907/568–7221).

**SUPPLEMENTARY INFORMATION:** On May 3, 1996, notice was published in the Federal Register (61 FR 19907) that a modification of permit no. 838, issued March 23, 1995 (60 FR 16116), had been requested by the above-named individual. The requested modification has been granted under the authority of the Marine Mammal Protection Act of 1972, as amended (16 U.S.C. 1361 *et seq.*), the provisions of paragraphs (d) and (e) of § 216.33 of the Regulations Governing the Taking and Importing of Marine Mammals (50 CFR part 216), the Fur Seal Act of 1966, as amended (16

U.S.C. 1151 *et seq.*), and the fur seal regulations at 50 CFR part 215.

Under this modification, the genetic relatedness of males holding viable territories with those holding non-viable peripheral territories will be investigated through collecting tissue samples from 60 adult male seals, and 20 mother-offspring pairs. This information, combined with behavioral data, may indicate if kin recognition and kin selection play significant roles in determining the breeding social structure in northern fur seals.

Dated: June 3, 1996.

Ann Terbush,

Chief, Permits & Documentation Division,  
National Marine Fisheries Service.

[FR Doc. 96-14933 Filed 6-11-96; 8:45 am]

BILLING CODE 3510-22-F

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## DEPARTMENT OF EDUCATION

### Notice of Proposed Information Collection Requests

**AGENCY:** Department of Education.

**ACTION:** Notice of proposed information collection requests.

**SUMMARY:** The Director, Information Resources Group, invites comments on the proposed information collection requests as required by the Paperwork Reduction Act of 1995.

**DATES:** An emergency review has been requested in accordance with the Act (44 U.S.C. Chapter 3507(j)), since public harm is reasonably likely to result if normal clearance procedures are followed. Approval by the Office of Management and Budget (OMB) has been requested by June 24, 1996. A regular clearance process is also beginning. Interested persons are invited to submit comments on or before August 12, 1996.

**ADDRESSES:** Written comments regarding the emergency review should be addressed to the Office of Information and Regulatory Affairs, Attention: Wendy Taylor, Desk Officer: Department of Education, Office of Management and Budget, 725 17th Street, NW., Room 10235, New Executive Office Building, Washington, D.C. 20503. Requests for copies of the proposed information collection request should be addressed to Patrick J. Sherrill, Department of Education, 7th & D Streets, S.W., Room 5624, Regional Office Building 3, Washington, D.C. 20202-4651.

Written comments regarding the regular clearance and requests for copies of the proposed information collection requests should be addressed to Patrick

J. Sherrill, Department of Education, 600 Independence Avenue, S.W., Room 5624, Regional Office Building 3, Washington, DC 20202-4651, or should be electronic mailed to the internet address #FIRB@ed.gov, or should be faxed to 202-708-9346.

**FOR FURTHER INFORMATION CONTACT:**

Patrick J. Sherrill (202) 708-8196. 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:** Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 3506(c)(2)(A)) requires that the Director of OMB provide interested Federal agencies and the public an early opportunity to comment on information collection requests. The Office of Management and Budget (OMB) may amend or waive the requirement for public consultation to the extent that public participation in the approval process would defeat the purpose of the information collection, violate State or Federal law, or substantially interfere with any agency's ability to perform its statutory obligations. The Director of the Information Resources Group, publishes this notice containing proposed information collection requests at the beginning of the Departmental review of the information collection. Each proposed information collection, grouped by office, contains the following: (1) Type of review requested, e.g., new, revision, extension, existing or reinstatement; (2) Title; (3) Summary of the collection; (4) Description of the need for, and proposed use of, the information; (5) Respondents and frequency of collection; and (6) Reporting and/or Recordkeeping burden. ED invites public comment at the address specified above. Copies of the requests are available from Patrick J. Sherrill at the address specified above.

The Department of Education is especially interested in public comment addressing the following issues: (1) is this collection necessary to the proper functions of the Department, (2) will this information be processed and used in a timely manner, (3) is the estimate of burden accurate, (4) how might the Department enhance the quality, utility, and clarity of the information to be collected, and (5) how might the Department minimize the burden of this collection on the respondents, including through the use of information technology.

Dated: June 6, 1996.

Gloria Parker,

Director, Information Resources Group.

Office of Postsecondary Education

*Type of Review:* New.

*Title:* William D. Ford Federal Direct Loan Program Alternative Documentation of Income Form.

*Abstract:* Borrowers in the William D. Ford Federal Direct Loan Program Income Contingent Repayment Plan will use this form to submit documentation of their current income when Adjusted Gross Income information is unavailable or does not reflect current income.

*Additional Information:* If the Department is unable to efficiently capture this information, borrowers could pay significantly more interest over the life of their loans and become delinquent or default on their loans because the monthly payment amount does not accurately reflect their ability to repay the loans.

*Frequency:* Annually.

*Affected Public:* Individuals or households.

*Annual Reporting and Recordkeeping Hour Burden:*

Responses: 75,000.

Burden Hours: 24,750.

[FR Doc. 96-14827 Filed 6-11-96; 8:45 am]

BILLING CODE 4000-01-P

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### Notice of Proposed Information Collection Requests

**AGENCY:** Department of Education.

**ACTION:** Submission for OMB review; comment request.

**SUMMARY:** The Director, Information Resources Group, invites comments on the proposed information collection requests as required by the Paperwork Reduction Act of 1995.

**DATES:** Interested persons are invited to submit comments on or before July 12, 1996.

**ADDRESSES:** Written comments should be addressed to the Office of Information and Regulatory Affairs, Attention: Wendy Taylor, Desk Officer, Department of Education, Office of Management and Budget, 725 17th Street, NW., Room 10235, New Executive Office Building, Washington, DC 20503. Requests for copies of the proposed information collection requests should be addressed to Patrick J. Sherrill, Department of Education, 600 Independence Avenue, SW, Room 5624, Regional Office Building 3, Washington, DC 20202-4651.

**FOR FURTHER INFORMATION CONTACT:** Patrick J. Sherrill (202) 708-8196.

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:** Section 3506 of the Paperwork Reduction Act of 1995 (44 U. S. C. Chapter 35) requires that the Office of Management and Budget (OMB) provide interested Federal agencies and the public an early opportunity to comment on information collection requests. OMB may amend or waive the requirement for public consultation to the extent that public participation in the approval process would defeat the purpose of the information collection, violate State or Federal law, or substantially interfere with any agency's ability to perform its statutory obligations. The Director of the Information Resources Group publishes this notice containing proposed information collection requests prior to submission of these requests to OMB. Each proposed information collection, grouped by office, contains the following: (1) Type of review requested, e.g., new, revision, extension, existing or reinstatement; (2) Title; (3) Summary of the collection; (4) Description of the need for, and proposed use of, the information; (5) Respondents and frequency of collection; and (6) Reporting and/or Recordkeeping burden. OMB invites public comment at the address specified above. Copies of the requests are available from Patrick J. Sherrill at the address specified above.

Dated: June 6, 1996.

Gloria Parker

Director, Information Resources Group.

Office of the Under Secretary

*Type of Review:* New.

*Title:* Evaluating States' Planning and Implementation of Goals 2000 and the Elementary and Secondary Education Act (ESEA).

*Frequency:* One Time.

*Affected Public:* State, local or Tribal Government, SEAs or LEAs.

*Reporting and Recordkeeping Hour Burden:*

Responses: 500.

Burden Hours: 500.

*Abstract:* The Department of Education is charged with evaluating Title I of ESEA and other elementary and secondary education legislation enacted by the 103rd Congress. These surveys will collect information on the operations and effects at the state level of legislative provisions and federal assistance, in the context of state education reform efforts. Findings will be used in reporting to Congress and

improving information dissemination. Respondents are managers in nine programs in all 50 state education agencies.

Office of Vocational and Adult Education

*Type of Review:* New.

*Title:* Descriptive, Comparative Analysis and Evaluation of the Business and Education Standards Projects.

*Frequency:* End of Program.

*Affected Public:* Business or other for-profit; State, Local or Tribal Government

*Reporting and Recordkeeping Burden:*

Responses: 16.

Burden Hours: 40.

*Abstract:* The purpose of this evaluation is to describe, analyze, compare and evaluate the 16 skill Standards projects funded by the Business and Education Standards projects. The study is intended to inform the National Skill Standards Board, authorized by the Goals 2000: Educate America Act, regarding endorsement criteria for establishment of occupational clusters, establishment of partnerships to create skill standards and identification of areas regarding more research in the skill standard arena. The study will also inform policy makers within the Department of Education about what has been learned from the projects that could assist in the broader education reform agenda being pursued by the Department.

[FR Doc. 96-14828 Filed 6-11-96; 8:45 am]

BILLING CODE 4000-01-P

### Office of Postsecondary Education Federal Work-Study Programs

**AGENCY:** Department of Education.

**ACTION:** Notice of the closing date for institutions that participate in the Federal Work-Study (FWS) Program to submit the Campus-Based Reallocation Form (ED Form E40-4P).

**SUMMARY:** The Secretary gives notice to institutions of higher education of the deadline for an institution that participated in the FWS Program for the 1995-96 award year (July 1, 1995 through June 30, 1996) to submit a Campus-Based Reallocation Form to request supplemental FWS funds for the 1996-97 award year (July 1, 1996 through June 30, 1997). The information collected is used to determine whether an institution is eligible to receive supplemental FWS funds for the 1996-97 award year.

**DATES:** *Closing Date for Submitting a Campus-Based Reallocation Form.* If an institution that participated in the FWS

Program for the 1995-96 award year wants to ensure that it will be considered for supplemental FWS funds for the 1996-97 award year, the institution must submit the Campus-Based Reallocation Form by July 12, 1996. The Department will not accept a form submitted by facsimile transmission.

**ADDRESSES:** *Campus-Based Reallocation Form Delivered by Mail.* The Campus-Based Reallocation Form delivered by mail must be addressed to the U.S. Department of Education, SFAP, AFMS, Institutional Financial Management Division (Room 4714, ROB-3), 600 Independence Avenue, S.W., Washington, D.C. 20202-5458. An applicant must show proof of mailing consisting of one of the following: (1) A legibly dated U.S. Postal Service postmark; (2) a legible mail receipt with the date of the mailing stamped by the U.S. Postal Service; (3) a dated shipping label, invoice, or receipt from a commercial carrier; or (4) any other proof of mailing acceptable to the Secretary of Education.

If a Campus-Based Reallocation Form is sent through the U.S. Postal Service, the Secretary does not accept either of the following as proof of mailing: (1) A private metered postmark, or (2) a mail receipt that is not dated by the U.S. Postal Service. An institution should note that the U.S. Postal Service does not uniformly provide a dated postmark. Before relying on this method, an institution should check with its local post office. An institution is encouraged to use certified or at least first-class mail.

*Campus-Based Reallocation Form Delivered by Hand.* A Campus-Based Reallocation Form delivered by hand must be taken to the Campus-Based Financial Operations Branch, Institutional Financial Management Division, Accounting and Financial Management Service, Student Financial Assistance Programs, U.S. Department of Education, Room 4714, Regional Office Building 3, 7th and D Streets, S.W., Washington, D.C. Hand-delivered reallocation forms will be accepted between 8:00 a.m. and 4:30 p.m. (Eastern time) daily, except Saturdays, Sundays, and Federal holidays. A Campus-Based Reallocation form that is delivered by hand will not be accepted after 4:30 p.m. on the appropriate closing date.

**SUPPLEMENTARY INFORMATION:** The Department will reallocate unexpanded FWS Federal funds from the 1995-96 award year as supplemental allocations for the 1996-97 award year under the FWS Program. Supplemental allocations

will be issued this fall in accordance with the reallocation procedures contained in the Higher Education Act of 1965, as amended (HEA). Under section 442(e) of the HEA, unexpended FWS funds returned to the Secretary must be reallocated to eligible institutions that used at least 10 percent of the total FWS Federal funds granted to the institution to compensate students employed in community services. Because reallocated FWS funds will be distributed on the basis of fair share shortfall criteria, institutions must also have a fair share shortfall to receive these funds. Institutions must use all the reallocated FWS Federal funds to compensate students employed in community services. To ensure consideration for supplemental FWS Federal funds for the 1996-1997 award year, an institution must submit the Campus-Based Reallocation Form by July 12, 1996.

#### Applicable Regulations

The following regulations apply to the Federal Work-Study Program:

- (1) Student Assistance General Provisions, 34 CFR Part 668.
- (2) Federal Work-Study Programs, 34 CFR Part 675.
- (3) Institutional Eligibility Under the Higher Education Act of 1965, as amended, 34 CFR Part 600.
- (4) New Restrictions on Lobbying, 34 CFR Part 82.
- (5) Governmentwide Debarment and Suspension (NonProcurement) and Governmentwide Requirements for Drug-Free Workplace (Grants), 34 CFR Part 85.
- (6) Drug-Free Schools and Campuses, 34 CFR Part 86.

#### FOR FURTHER INFORMATION CONTACT:

For technical assistance concerning the Campus-Based Reallocation Form or other operational procedures of the campus-based programs, contact Ms. Judy Norris, Campus-Based Financial Operations Branch, Institutional Financial Management Division, Accounting and Financial Management Service, Student Financial Assistance Programs, U.S. Department of Education, 600 Independence Avenue, S.W., (Room 4714, ROB-3), Washington, D.C. 20202-5458. Telephone (202) 708-9757. 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.

(Authority: 42 U.S.C. 2752)

(Catalog of Federal Domestic Assistance Number: 84.033 Federal Work-Study Program)

Dated: June 7, 1996.  
David A. Longanecker,  
*Assistant Secretary for Postsecondary Education.*  
[FR Doc. 96-14936 Filed 6-11-96; 8:45 am]  
**BILLING CODE 4000-01-M**

## DEPARTMENT OF ENERGY

### Notice of Intent To Prepare Environmental Impact Statement; Shutdown of the River Water System at the Savannah River Site

**AGENCY:** Department of Energy.

**ACTION:** Notice of intent.

**SUMMARY:** The Department of Energy (DOE) announces its intent to prepare an Environmental Impact Statement (EIS), pursuant to the National Environmental Policy Act (NEPA) of 1969, for the proposed shutdown of the River Water System at the Savannah River Site (SRS). The River Water System was originally constructed to pump large quantities of cooling water from the Savannah River to five nuclear reactors at SRS. Since all of the reactors are shut down, no cooling water is required. DOE invites the public, organizations, and agencies to present oral or written comments concerning (1) the scope of the EIS, (2) the issues the EIS should address, and (3) the alternatives the EIS should analyze.

**DATES:** The public scoping period will continue until July 12, 1996. Written comments submitted by mail should be postmarked by that date to ensure consideration. DOE will consider comments mailed after that date to the extent practicable. On June 27, 1996, DOE will conduct a public scoping meeting to assist in defining the appropriate scope of the EIS and identifying significant environmental issues to be addressed. This meeting will be held at the following times and location: June 27, 1996; 1-4 and 6-9 pm; North Augusta Community Center, 495 Brookside Drive, North Augusta, S.C.

**ADDRESSES:** Please direct comments or suggestions on the scope of the EIS, requests to speak at the public scoping meeting, and questions concerning the project to: Mr. Andrew R. Grainger, U.S. Department of Energy, Savannah River Operations Office, P.O. Box A, Aiken, S.C. 29802, 1-800-242-8269, E-mail: nepa@barms036.br.com

Mark the envelopes: "River Water System EIS Comments".

**FOR FURTHER INFORMATION CONTACT:** For general information on the DOE NEPA process, please contact: Ms. Carol M. Borgstrom, Director, Office of NEPA Policy and Assistance (EH-42), U.S.

Department of Energy, 1000 Independence Avenue, S.W., Washington, D.C. 20585, telephone: 202-586-4600 or leave a message at 1-800-472-2756.

**SUPPLEMENTARY INFORMATION:** SRS is an 800-square-kilometer (300 square mile) controlled area located in southwestern South Carolina. The Site is approximately 25 miles southeast of Augusta, Georgia, and 20 miles south of Aiken, South Carolina. Since its establishment, the mission of SRS has been to produce nuclear materials that support the defense, research, and medical programs of the United States.

Because of the end of the Cold War and the reduction in the size of the U.S. nuclear weapons stockpile, the need for production of new nuclear materials has been reduced dramatically. As a result, activities at SRS have shifted from nuclear material production to cleanup and environmental restoration. DOE developed the Savannah River Operations Office Strategic Plan in order to guide SRS in meeting this changing mission. The Strategic Plan directs SRS to identify excess infrastructure and develop action plans for its disposition. DOE has identified the River Water System as potential surplus infrastructure.

The River Water System was originally constructed to pump large quantities of cooling water from the Savannah River to all five production reactors at SRS. Heated discharge water from the reactors was returned to the Savannah River via several onsite streams and creeks. In 1958, Par Pond was constructed to dissipate the thermal effluent from P- and R-Reactors. In 1984, L-Lake was constructed to dissipate the thermal effluent from L-Reactor. However, all production reactors are now shut down. Operationally, there is no longer a need to provide cooling water, except for some small air conditioning and equipment cooling loads in K-, L-, and P-Reactor Areas.

The River Water System maintains L Lake and Par Pond water levels at their normal operating values. As analyzed in an Environmental Assessment performed in 1995 (Environmental Assessment for the Natural Fluctuation of Water Level in Par Pond and Reduced Water Flow in Steel Creek Below L Lake at the Savannah River Site, DOE/EA-1070), Par Pond water level is currently allowed to fluctuate naturally, but the River Water System is used to prevent the water level from falling below 195 feet above mean sea level.

#### Proposed Action and Alternatives

The Department proposes to shut down the River Water System and to

place all or part of the system in standby condition. Under the proposed "standby" alternative, portions of the River Water System could be placed in a variety of conditions. For example, surplus portions of the River Water System could be shut down and deactivated. Those portions of the River Water System that are deactivated would not be capable of being restarted. However, other portions of the River Water System could be placed in a "layup" condition in order to support potential future missions. In the layup condition, equipment would be shut down, but preserved so that restart would be possible.

Alternatively, some portions of the River Water System could be placed in a higher state of readiness than in "layup" condition; such portions of the River Water System could be restarted in a relatively short period of time. Short term cost savings would be minimal, but this condition would allow DOE to maintain a great degree of flexibility. Unlike the "shutdown and deactivate" alternative described below, the River Water System could be available to mitigate or even reverse the impacts of the proposed action, if deemed necessary.

Two alternatives to the proposed action are under consideration. The first alternative is to continue current River Water System operation (this is the no-action alternative). Under this alternative, the River Water System would continue to provide water to maintain L Lake and Par Pond water levels. The second alternative is to shut down and deactivate the entire River Water System. Under this alternative, alternative water sources (such as from ground water) would be needed to provide for minor non-reactor cooling requirements (air conditioning, small equipment cooling, etc.). The cessation of river water input to L Lake would result in the gradual disappearance of the lake and its return to original creek conditions over the next several years.

#### Preliminary Identification of Environmental and Other Issues

The Department has identified the following issues for analysis for proposed and alternative actions in the EIS. Additional issues may be identified as a result of the scoping process.

(1) Public and Worker Safety and Health Risk Assessment: radiological and nonradiological impacts of the proposed action and alternatives, including projected effects on workers and the public from expected and potential conditions.

(2) Impacts from releases to air, water, and soil.

(3) Impacts to plants, animals, and habitat, including impacts to wetlands, and threatened or endangered species and their habitat.

(4) The consumption of natural resources and energy including water, natural gas, and electricity.

(5) Socioeconomic impacts to affected communities from operation labor forces and support services in the SRS area.

(6) Environmental justice: disproportionately high and adverse human health or environmental effects on minority and low-income populations.

(7) Impacts to cultural resources such as historic, archaeological, scientific, or culturally important sites.

(8) Status of compliance with all applicable Federal, state, and local statutes and regulations; required Federal and state environmental consultations and notifications; and DOE Orders on waste management, waste minimization initiatives, and environmental protection.

(9) Cumulative impacts from the proposed action and other past, present, and reasonably foreseeable actions at the Savannah River Site.

(10) Potential irreversible and irretrievable commitments of resources.

#### Related NEPA Documentation

Completed and ongoing environmental reviews may affect the scope of this EIS. Background information and documents, listed below, on past, present, and future activities at the Savannah River Site are available in DOE public reading rooms.

*Continued Operation of K-, L-, and P-Reactors* (DOE/EIS-0147, 1990).

*Interim Management of Nuclear Materials* (DOE/EIS-0220, 1995).

*L-Reactor Operation* (DOE/EIS-0108, 1984).

*Environmental Assessment for the Natural Fluctuation of Water Level in Par Pond and Reduced Water Flow in Steel Creek Below L-Lake at the Savannah River Site* (DOE/EA-1070, 1995).

*Programmatic Spent Nuclear Fuel Management* (DOE/EIS-0203, 1995).

*Proposed Nuclear Weapons Nonproliferation Policy Concerning Foreign Research Reactor Spent Nuclear Fuel* (DOE/EIS-0218, 1996).

*Savannah River Site Waste Management* (DOE/EIS-0217, 1995).

Please direct written comments assisting DOE in identifying significant environmental issues and defining the appropriate scope of the EIS to Mr. Andrew R. Grainger at the address indicated above. DOE also invites

agencies, organizations, and the general public to present oral comments pertinent to the preparation of this EIS at the public scoping meeting on the date indicated above. Organizations and individuals wishing to participate in the public meeting can call 1-800-242-8269 between 8:30 AM and 5:00 PM (Eastern time zone) Monday through Friday, or submit their requests to Mr. Grainger at the address indicated above. DOE requests that anyone who wishes to speak at the scoping meeting preregister by contacting Mr. Grainger, either by phone or in writing. Preregistration should occur at least two days before the designated meeting. Persons who have not preregistered to speak may register at the meeting and will be called on to speak as time permits. In addition, DOE will accept comments electronically via voice mail or facsimile transmission by calling 1-800-242-8269. DOE is committed to providing opportunities for the involvement of interested individuals and groups in this and other DOE planning activities; consequently, DOE will give equal consideration to all comments.

Issued in Washington, D.C., this 5th day of June, 1996.

Peter N. Brush,

*Principal Deputy Assistant Secretary  
Environment, Safety and Health.*

[FR Doc. 96-14896 Filed 6-11-96; 8:45 am]

BILLING CODE 6450-01-P

#### Federal Energy Regulatory Commission

[Docket No. CP96-539-000]

#### Columbia Gulf Transmission Company; Notice of Request Under Blanket Authorization

June 6, 1996.

Take notice that on May 23, 1996, Columbia Gulf Transmission Company (Columbia Gulf), 2603 Augusta STE 125, Houston, Texas 77057-5637, filed in Docket No. CP96-539-000 a request pursuant to Sections 157.205 and 157.211 of the Commission's Regulations under the Natural Gas Act (18 CFR 157.205, 157.211) for authorization to establish a new interconnection in Louisiana, under Columbia Gulf's blanket certification issued in Docket No. CP83-496-000 pursuant to Section 7 of the Natural Gas Act, all as more fully set forth in the request that is on file with the Commission and open to public inspection.

Columbia Gulf proposes to construct and operate a new interconnection point

with Central Louisiana Electric Company, Inc. (CLECO) for providing transportation services. The new point will be located in St. Mary Parish, Louisiana and was requested by CLECO to serve the Teche Power Plant. The estimated quantities of natural gas to be delivered will be 85,000 Dth/day-12.6 Bcf/annually. The cost is approximately \$186,000 with CLECO reimbursing Columbia Gulf 100% of the total actual construction cost. The services provided through the interconnection will be on an interruptible basis and will not affect Columbia Gulf's peak day and annual deliveries and the total volumes delivered will not exceed total volumes authorized prior to this request. Columbia Gulf states that this new interconnection is not prohibited by its existing tariff and that it has sufficient capacity to accomplish deliveries without detriment or disadvantage to other customers.

Any person or the Commission's staff may, within 45 days after issuance of the instant notice by the Commission, file pursuant to Rule 214 of the Commission's Procedural Rules (18 CFR 385.214) a motion to intervene or notice of intervention and pursuant to Section 157.205 of the Regulations under the Natural Gas Act (18 CFR 157.205) a protest to the request. If no protest is filed within the time allowed therefor, the proposed activity shall be deemed to be authorized effective the day after the time allowed for filing a protest. If a protest is filed and not withdrawn within 30 days after the time allowed for filing a protest, the instant request shall be treated as an application for authorization pursuant to Section 7 of the Natural Gas Act.

Lindwood A. Watson, Jr.,  
*Acting Secretary.*

[FR Doc. 96-14837 Filed 6-11-96; 8:45 am]  
BILLING CODE 6717-01-M

[Docket No. RP96-267-000]

### Gas Research Institute; Notice of Annual Application

June 6, 1996.

Take notice that on June 5, 1996, Gas Research Institute (GRI) filed an application requesting advance approval of its 1997-2001 Five-Year Research, Development and Demonstration (RD&D) Plan and 1997 RD&D Program, and the funding of its RD&D activities for 1997, pursuant to the Natural Gas Act and the Commission's Regulations, particularly 18 CFR 154.401.

In its application, GRI requests approval of a total obligations budget of

\$170.4 million in 1997, a decrease of \$4.4 million from the \$174.8 million approved for GRI's amended 1996 obligations budget. During the twelve months ending December 31, 1997, GRI intends to collect \$179.9 million through jurisdictional rates and charges, and disburse \$176.2 million.

GRI also proposes to modify its current funding mechanism by: (i) Not following the 50/50 demand/commodity balancing provisions so that current surcharges may be used in 1997; and (ii) limiting refunds to amounts collected in excess of the annualized funding requirement for its 1997 RD&D program.

GRI proposes to fund its 1997 RD&D Program through the following surcharges: (1) A demand/reservation surcharge on two-part rates of 26.0 cents per Dth per Month for "high load-factor customers"; (2) a demand/reservation surcharge on two-part rates of 16.0 cents per Dth per month for "low load-factor customers"; (3) a volumetric commodity/usage surcharge of 0.88 cents for firm services involving two-part rates and for one-part interruptible rates; (4) a special "small customer" surcharge of 2.0 cents per Dth; and (5) a surcharge of 1.74 cents per Dth per month for one-part, firm service outside the "small customer" class.

GRI has not filed detailed information on its 1998 RD&D Program. According to GRI, downsizing of its 1996 RD&D Program is yet to be fully implemented and issues pertaining to funding stability are still outstanding; for this reason GRI requests that its 1997 proposal be approved on its own merit, rather than as part of a two-year program.

The Commission Staff will analyze GRI's application and prepare a Commission Staff Report. This Staff Report will be served on all parties and filed with the Commission as a public document by July 31, 1996. Comments on the Staff Report by all parties, except GRI, must be filed with the Commission on or before August 14, 1996. GRI's reply comments must be filed on or before August 28, 1996.

Any person desiring to be heard or to protest GRI's application, except for GRI members and state regulatory commissions, who are automatically permitted to participate in the instant proceedings as intervenors, should file a motion to intervene or protest with Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426, in accordance with Rules 214 and 211 of the Commission's Rules of Practice and Procedure, 18 CFR 385.214 and 385.11. All protests, motions to intervene and comments should be filed

on or before June 20, 1996. All comments and protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to this proceeding. Any person wishing to become a party, other than a GRI member or a state regulatory commission, must file with the Commission and are available for public inspection.

Linwood A. Watson, Jr.,

*Acting Secretary.*

[FR Doc. 96-14829 Filed 6-11-95; 8:45 am]

BILLING CODE 6717-01-M

[Docket No. RP96-264-000]

### K N Interstate Gas Transmission Co.; Notice of Account No. 858 Filing

June 6, 1996.

Take notice that on June 3, 1996, K N Interstate Gas Transmission Co. (KNI) made its annual Account No. 858 tracker filing in the above captioned docket.

KNI states that the filing revises KNI's Account No. 858 rate component and details, for the months April 1, 1995 through March 1996, its actual Account No. 858 cost recovery and incurrence.

KNI states that copies of the filing were served upon KNI's jurisdictional customers, interested public bodies, and all parties to the proceedings.

Any person desiring to be heard or to make any protest with reference to this filing should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211, 385.214). All such motions or protests must be filed as provided in Section 154.210 of the Commission's Regulations. All protests filed with the Commission will be considered by it in determining the appropriate action to be taken, but will not serve to make the protestants parties to the proceeding. Any person wishing to become a party to a proceeding or to participate as a party in any hearing therein must file a petition to intervene in accordance with the Commission's Rules. Copies of this filing are on file with the Commission and are available for public inspection.

Linwood A. Watson, Jr.,

*Acting Secretary.*

[FR Doc. 96-14831 Filed 6-11-96; 8:45 am]

BILLING CODE 6717-01-M

**[Docket No. MG96-13-000]****K N Interstate Gas Transmission Co.;  
Notice of Filing**

June 6, 1996.

Take notice that on May 31, 1995, K N Interstate Gas Transmission Co. (K N Interstate) submitted revised standards of conduct under Order Nos. 497 *et seq.*<sup>1</sup> and Order No. 566-A.<sup>2</sup> K N Interstate states that it is revising its standards of conduct in compliance with Order No. 566-A.

K N Interstate states that copies of this filing have been mailed to all parties on the official service list compiled by the Secretary in this proceeding.

Any person desiring to be heard or to protest said filing should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426, in accordance with Rules 211 or 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 or 385.214). All such motions to intervene or protest should be filed on or before June 21, 1996. Protests will be considered by the Commission in determining the appropriate action to be taken but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the

<sup>1</sup> Order No. 497, 53 FR 22139 (June 14, 1988), FERC Stats. & Regs. ¶ 30,820 (1988) (Regulations Preambles 1986-1990); Order No. 497-A, *order on rehearing*, 54 FR 52781 (December 22, 1989), FERC Stats. & Regs. 30,868 (1989) (Regulations Preambles 1986-1990); Order No. 497-B, *order extending sunset date*, 55 FR 53291 (December 28, 1990), FERC Stats. & Regs. ¶ 30,908 (1990) (Regulations Preambles 1986-1990); Order No. 497-C, *order extending sunset date*, 57 FR 9 (January 2, 1992), III FERC Stats. & Regs. ¶ 30,934 (1991), rehearing denied, 57 FR 5815 (February 18, 1992), 58 FERC ¶ 61,139 (1992); Tenneco Gas v. FERC (affirmed in part and remanded in part), 969 F.2d 1187 (D.C. Cir. 1992); Order No. 497-D, *order on remand and extending sunset date*, III FERC Stats. & Regs. ¶ 30,958 (December 4, 1992), 57 FR 58978 (December 14, 1992); Order No. 497-E, *order on rehearing and extending sunset date*, 59 FR 243 (January 4, 1994), 65 FERC ¶ 61,381 (December 23, 1993); Order No. 497-F, *order denying rehearing and granting clarification*, 59 FR 15336 (April 1, 1994), 66 FERC ¶ 61,347 (March 24, 1994); and Order No. 497-G, *order extending sunset date*, 59 FR 32884 (June 27, 1994), III FERC Stats. & Regs. ¶ 30,996 (June 17, 1994).

<sup>2</sup> Standards of Conduct and Reporting Requirements for Transportation and Affiliate Transactions, Order No. 566, 59 FR 32885 (June 27, 1994), III FERC Stats. & Regs. ¶ 30,997 (June 17, 1994); Order No. 566-A, *order on rehearing*, 59 FR 52896 (October 20, 1994), 69 FERC ¶ 61,044 (October 14, 1994); Order No. 566-B, *order on rehearing*, 59 FR 65707 (December 21, 1994); 69 FERC ¶ 61,334 (December 14, 1994); *appeal docketed, Conoco, Inc. v. FERC*, D.C. Cir. Docket No. 94-1745 (December 14, 1994).

Commission and are available for public inspection.

Linwood A. Watson, Jr.,  
*Acting Secretary.*

[FR Doc. 96-14835 Filed 6-11-96; 8:45 am]  
BILLING CODE 6717-01-M

**[Docket No. MG96-14-000]****K N Wattenberg Transmission, L.L.C.;  
Notice of Filing**

Take notice that on May 31, 1995, K N Wattenberg Transmission, L.L.C. (K N Wattenberg) submitted initial standards of conduct under Order Nos. 497 *et seq.*<sup>1</sup> and Order No. 566-A.<sup>2</sup>

K N Wattenberg states that copies of this filing have been mailed to all parties on the official service list compiled by the Secretary in this proceeding.

Any person desiring to be heard or to protest said filing should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C., 20426, in accordance with Rules 211 or 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 or 385.214). All such motions to intervene or protest should be filed on or before June 21, 1996. Protests will be considered by the Commission in determining the appropriate action to be taken but will not serve to make

<sup>1</sup> Order No. 497, 53 FR 22139 (June 14, 1988), FERC Stats. & Regs. ¶ 30,820 (1988) (Regulations Preambles 1986-1990); Order No. 497-A, *order on rehearing*, 54 FR 52781 (December 22, 1989), FERC Stats. & Regs. 30,868 (1989) (Regulations Preambles 1986-1990); Order No. 497-B, *order extending sunset date*, 55 FR 53291 (December 28, 1990), FERC Stats. & Regs. ¶ 30,908 (1990) (Regulations Preambles 1986-1990); Order No. 497-C, *order extending sunset date*, 57 FR 9 (January 2, 1992), III FERC Stats. & Regs. ¶ 30,934 (1991), rehearing denied, 57 FR 5815 (February 18, 1992), 58 FERC ¶ 61,139 (1992); Tenneco Gas v. FERC (affirmed in part and remanded in part), 969 F.2d 1187 (D.C. Cir. 1992); Order No. 497-D, *order on remand and extending sunset date*, III FERC Stats. & Regs. ¶ 30,958 (December 4, 1992), 57 FR 59878 (December 14, 1992); Order No. 497-E, *order on rehearing and extending sunset date*, 59 FR 243 (January 4, 1994), 65 FERC ¶ 61,381 (December 23, 1993); Order No. 497-F, *order denying rehearing and granting clarification*, 59 FR 15336 (April 1, 1994), 66 FERC ¶ 61,347 (March 24, 1994); and Order No. 497-G, *order extending sunset date*, 59 FR 32884 (June 27, 1994), III FERC Stats. & Regs. ¶ 30,996 (June 17, 1994).

<sup>2</sup> Standards of Conduct and Reporting Requirements for Transportation and Affiliate Transactions, Order No. 566, 59 FR 32885 (June 27, 1994), III FERC Stats. & Regs. ¶ 30,997 (June 17, 1994); Order No. 566-A, *order on rehearing*, 59 FR 52896 (October 20, 1994), 69 FERC ¶ 61,044 (October 14, 1994); Order No. 566-B, *order on rehearing*, 59 FR 65707 (December 21, 1994); 69 FERC ¶ 61,334 (December 14, 1994); *appeal docketed, Conoco, Inc. v. FERC*, D.C. Cir. Docket No. 94-1745 (December 14, 1994).

protestants parties to the proceeding. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection.

Linwood A. Watson, Jr.,  
*Acting Secretary.*

[FR Doc. 96-14834 Filed 6-11-96; 8:45 am]  
BILLING CODE 6717-01-M

**[Docket No. RP94-120-014]****Koch Gateway Pipeline Company;  
Notice of Proposed Changes in FERC  
Gas Tariff**

June 6, 1996.

Take notice that on May 31, 1996, Koch Gateway Pipeline Company (Koch) tendered for filing as part of its FERC Gas Tariff, Fifth Revised Volume No. 1, the following tariff sheets to be effective June 1, 1996:

Substitute Eleventh Revised Sheet No. 20  
Substitute Tenth Revised Sheet No. 21  
Substitute Eleventh Revised Sheet No. 22  
Substitute Seventh Revised Sheet No. 23  
Substitute Eleventh Revised Sheet No. 24  
First Revised Sheet No. 4000  
Second Revised Sheet No. 5200

Koch states that the purpose of this filing is to accept the February 10, 1995 Settlement as modified by the Commission's January 31, 1996 and May 1, 1996 orders and move the relevant tariff sheets into effect.

Koch states that copies of the filing will be served upon all parties on the official service list created by the Secretary in this proceeding.

Any person desiring to protest this filing should file a protest with the Federal Energy Regulatory Commission, 888 First Street, NE, Washington, D.C. 20426, in accordance with 18 CFR 385.211 of the Commission's Rules and Regulations. All such protests must be filed as provided in Section 154.210 of the Commission's Regulations. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Copies of this filing are on file with the Commission and are available for public inspection in the Public Reference Room.

Linwood A. Watson, Jr.,  
*Acting Secretary.*

[FR Doc. 96-14833 Filed 6-11-96; 8:45 am]  
BILLING CODE 6717-01-M

**[Docket No. RP96-237-001]****Northern Border Pipeline Company; Notice of Proposed Changes in FERC Gas Tariff**

June 6, 1996.

Take notice that on June 3, 1996, Northern Border Pipeline Company (Northern Border) tendered for filing to become part of Northern Border Pipeline Company's FERC Gas Tariff, First Revised Volume No. 1, the following tariff sheets to become effective July 1, 1996:

Sub Seventh Revised Sheet Number 156  
Sub Eighth Revised Sheet Number 157

Northern Border states that the purpose of this filing is to revise the Maximum Rate and Minimum Revenue credit under Rate Schedule IT-1, currently pending in this proceeding, for the period July 1, 1996 through December 31, 1996. Northern Border proposes to decrease the Maximum Rate from 4.221 cents per 100 Dekatherm-Miles and to increase the Minimum Revenue Credit from 2.198 cents per 100 Dekatherm-Miles to 2.213 cents per 100 Dekatherm-Miles.

In accordance with the letter order of the Director, Division of Audits, issued May 17, 1996 at Docket No. FA93-45-000, Northern Border is required to make certain accounting and billing adjustments and refunds. The herein proposed change to the Maximum Rate reflect such adjustments to the Rate to be charged for volumes transported pursuant to Rate Schedules IT-1 or OT-1. The herein proposed changes do not result in a change in Northern Border's total revenue requirement.

Northern Border states that copies of this filing have been sent to all of Northern Border's contract shippers.

Any person desiring to protest this filing should file a protest with the Federal Energy Regulatory Commission, 888 First Street, N.E. Washington, DC 20426, in accordance with Section 385.211 of the Commission's Rules and Regulations. All such protests must be filed as provided in Section 154.210 of the Commission's Regulations. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Copies of this filing are on file with the Commission and are available for public inspection in the Public Reference Room.

Linwood A. Watson, Jr.,  
*Acting Secretary.*

[FR Doc. 96-14832 Filed 6-11-96; 8:45 am]

BILLING CODE 6717-01-M

**[Docket No. RP96-266-000]****Overthrust Pipeline Company; Notice of Tariff Filing**

June 6, 1996.

Take notice that on June 4, 1996, Overthrust Pipeline Company (Overthrust) tendered for filing to become part of its FERC Gas Tariff, Original Volume No. 1 and First Revised Volume No. 1-A, the below-listed tariff sheets, to be effective July 5, 1996:

*Original Volume No. 1*

Third Revised Sheet No. 1

*First Revised Volume No. 1-A*

Revised Title Page

First Revised Sheet Nos. 1 and 68

Second Revised Sheet Nos. 43 and 69

Third Revised Sheet Nos. 30 and 70

Overthrust states that the proposed tariff sheets revise its tariff to reflect changes required by Commission Order Nos. 581, 581-A, and 582 and 582-A.

Over thrust states that a copy of this filing has been served upon its customers and the Wyoming Public Service Commission.

Any person desiring to be heard or to protest said filing should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, DC 20426, in accordance with Rules 385.211 and 385.214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). All such motions or protests must be as provided in Section 154.210 of the Commission's Regulations. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Copies of this filing are on file with the Commission and are available for public inspection.

Linwood A. Watson, Jr.,

*Acting Secretary.*

[FR Doc. 96-14830 Filed 6-11-96; 8:45 am]

BILLING CODE 6717-01-M

**[Docket No. GT96-66-000]****Williston Basin Interstate Pipeline Company; Notice of Filing**

June 6, 1996.

Take notice that on June 4, 1996, Williston Basin Interstate Pipeline Company (Williston Basin), tendered for filing as part of its FERC Gas Tariff, Second Revised Volume No. 1, the following revised tariff sheets to become effective June 4, 1996:

Second Revised Volume No. 1

Second Revised Sheet Nos. 5-6

Original Sheet No. 6A  
First Revised Sheet No. 8  
Second Revised Sheet No. 9  
Fourth Revised Sheet Nos. 775-776  
Sixth Revised Sheet No. 777  
Ninth Revised Sheet No. 778  
Eleventh Revised Sheet No. 779  
Tenth Revised Sheet No. 780  
Ninth Revised Sheet No. 781  
Eleventh Revised Sheet Nos. 782-784  
Thirteenth Revised Sheet No. 785  
Fourteenth Revised Sheet Nos. 786-788  
Fifteenth Revised Sheet Nos. 789-790  
Fourteenth Revised Sheet No. 791  
Fifteenth Revised Sheet Nos. 792-794  
Sheet Nos. 795-824 (Reserved)  
Sixth Revised Sheet No. 825  
Ninth Revised Sheet No. 826  
Tenth Revised Sheet No. 827  
Ninth Revised Sheet No. 828  
Twelfth Revised Sheet Nos. 829-830  
Eleventh Revised Sheet No. 831  
Thirteenth Revised Sheet No. 832  
Fourteenth Revised Sheet No. 833

Williston Basin states that the revised tariff sheets are being filed simply to update its system maps and Master Receipt/Delivery Point List.

Any person desiring to be heard or to protest this filing should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with Sections 385.214 and 385.211 of the Commission's Rules and Regulations. All such motions or protests must be filed as provided in Section 154.210 of the Commission's Regulations. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection in the Public Reference Room.

Linwood A. Watson, Jr.,

*Acting Secretary.*

[FR Doc. 96-14836 Filed 6-11-96; 8:45 am]

BILLING CODE 6717-01-M

**ENVIRONMENTAL PROTECTION AGENCY**

**[FRL-5518-4]**

**Public Water System Supervision Program Revisions for the State of Nevada; Lead and Copper Rule**

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Notice of decision and opportunity for hearing.

**SUMMARY:** Notice is hereby given that the State of Nevada is revising its approved State Public Water System

Supervision Program. Nevada has adopted regulations for controlling lead and copper in drinking water. The Nevada State regulations correspond to the National Primary Drinking Water Regulations promulgated by EPA on June 7, 1991 (56 FR 26460), also known as the Lead and Copper Rule; and correcting amendments appearing on July 15, 1991 (56 FR 32112); June 29, 1992 (57 FR 28785); and June 30, 1994 (59 FR 33860). EPA has determined that the State program revisions are no less stringent than the corresponding federal regulations. Therefore, EPA has tentatively decided to approve the State program revision.

All interested parties are invited to request a public hearing on EPA's decision to approve the State program revisions. A request for a public hearing must be submitted by July 12, 1996 to the Regional Administrator at the address shown below. Insubstantial requests for a hearing may be denied by the Regional Administrator. If no timely and appropriate request for a hearing is received and the Regional Administrator does not elect to hold a hearing on his/her own motion, this determination shall become effective July 12, 1996.

Any request for a public hearing shall include the following: (1) the name, address, and telephone number of the individual, organization, or other entity requesting a hearing; (2) a brief statement of the requesting person's interest in the Regional Administrator's determination and of information that the requesting person intends to submit at such hearing; and (3) the signature of the individual making the request, or, if the request is made on behalf of an organization or other entity, the signature of a responsible official of the organization or other entity.

**ADDRESSES:** All documents relating to this determination are available for inspection between the hours of 8:30 a.m. and 4:00 p.m., Monday through Friday, at the following offices: Nevada Bureau of Health Protection Services, 505 East King Street, Room 103, Carson City, Nevada, 89710; and EPA, Region IX, Water Management Division, Drinking Water Section (W-6-1), 75 Hawthorne Street, San Francisco, California 94105.

**FOR FURTHER INFORMATION CONTACT:** Michelle Moustakas, EPA, Region IX, at the San Francisco address given above or by telephone at (415) 744-1859.

**SUPPLEMENTARY INFORMATION:** [Sec. 1413 of the Safe Drinking Water Act as amended [1986]; and 40 CFR 142.10 of the National Primary Drinking Water Regulations.]

Dated: May 23, 1996.  
Alexis Strauss,  
*Acting Regional Administrator.*  
[FR Doc. 96-14768 Filed 6-11-96; 8:45 am]  
BILLING CODE 6560-50-P

**[OPP-00439; FRL-5377-3]**

**Pesticide Program Dialogue Committee; Open Meeting**

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Notice.

**SUMMARY:** As required by section 10(a)(2) of the Federal Advisory Committee Act [Public Law 92-463], EPA's Office of Pesticide Programs (OPP) is giving notice of the establishment of the Pesticide Program Dialogue Committee (PPDC), and to announce that a meeting will be held on July 9 and 10, 1996.

**DATES:** The meeting will be held on July 9, 1996, from 9:30 a.m. to 6 p.m., and on July 10, 1996, from 9:00 a.m. to 12 p.m.

**ADDRESSES:** The meeting will be held at the Hyatt Regency Crystal City, 2799 Jefferson Davis Highway, Arlington, VA 22202, in Potomac Rooms 3 and 4.

**FOR FURTHER INFORMATION CONTACT:** By mail: Margie Fehrenbach or Theresa Thomas, Office of Pesticide Programs (7501C), Environmental Protection Agency, 401 M St., SW., Washington, DC 20460. Office location and telephone number: USEPA, Rm. 1119, Crystal Mall #2, 1921 Jefferson Davis Highway, Arlington, VA 22202, (703) 305-7090; e-mail: Fehrenbach.Margie@epamail.epa.gov.

**SUPPLEMENTARY INFORMATION:** As required by section 10(a)(2) of the Federal Advisory Committee Act (Public Law 92-463), EPA's OPP is giving notice of the establishment of the PPDC and to announce that a meeting of the PPDC will be held on July 9 and 10, 1996. The topics to be discussed are: 1) Resistance Management; 2) Endocrine Disruptors; 3) Fees for Service; and 4) Public Education/Communications Needs. The Committee was established to provide a forum for a diverse group of individuals to provide advice and assistance to EPA's Office of Pesticide Programs (OPP) regarding pesticide regulatory development and reform initiatives, evolving public policy and program implementation issues, and science issues associated with evaluating and reducing risks from use of pesticides.

The PPDC will be composed of a balanced group of participants from the

following sectors: industry and trade associations; pesticide user and commodity groups; Federal and State governments; consumer and environmental/public interest groups, including representatives from the general public; academia; public health community; and, congressional staff offices. The Committee's function will be to foster communication and understanding among the parties represented on the Committee and with the OPP. The Committee will also provide advice and guidance to OPP regarding pesticide regulatory, policy and implementation issues.

These meetings are open to the public. Outside statements by observers are welcome and one hour will be allocated on July 10, 1996, for this purpose. Oral statements will be limited to five minutes, and it is preferred that only one person present the statement.

Any person who wishes to file a written statement can do so before or after a Committee meeting. These statements will become part of the permanent file and will be provided to the Committee members for their information.

A final agenda and background papers regarding the four topics to be discussed will be available to the public after June 25. These can be obtained by writing or calling the contacts listed above under FOR FURTHER INFORMATION CONTACT. In conjunction with the formation of this Advisory Committee, OPP is setting up an open docket which will include all supporting material for the PPDC. This material will be available for public review at the following address: U.S. Environmental Protection Agency, Rm. 1128, Crystal Mall #2, 1921 Jefferson Davis Highway, Arlington, VA 22202 (703) 305-5805.

Members of the public who would like to attend the meeting, present an oral statement, or submit a written statement, should contact Margie Fehrenbach, Designated Federal Officer, or Theresa Thomas, listed above under FOR FURTHER INFORMATION CONTACT, before July 2, 1996.

**List of Subjects**

Environmental protection.

Dated: June 5, 1996.

Daniel M. Barolo,  
*Director, Office of Pesticide Programs.*  
[FR Doc. 96-14916 Filed 6-10-96; 10:16 am]  
BILLING CODE 6560-50-F

[OPP-00438; FRL-5376-6]

**Worker Protection Standard; Notice of Public Meetings****AGENCY:** Environmental Protection Agency (EPA).**ACTION:** Notice of meetings.

**SUMMARY:** EPA is holding a series of public meetings to solicit information from workers, growers and others regarding regulations designed to protect agricultural workers and pesticide handlers. The first meeting was held in Winter Haven, Florida on February 22, 1996. The meetings are a part of EPA's commitment to monitor and evaluate the impact and performance of the Worker Protection regulations. The public meetings are designed to provide an opportunity for those directly affected by the regulations to relay their experiences after the regulations' first full year of implementation. By reaching out to those on the frontlines and for whom these regulations are intended to provide public health protection, EPA will better understand how the program is working and where meaningful improvements should be made. The meetings are open to the public.

**DATES:** The following is the schedule for the remaining public meetings:

June 19, 1996, Pasco, Washington  
 June 26, 1996, Biglerville, Pennsylvania  
 July 23, 1996, Fresno, California  
 July 25, 1996, Salinas, California  
 August 7, 1996, Portageville, Missouri  
 August 21, 1996, Tipton, Indiana  
 The date and location for a public meeting in Puerto Rico will be announced at a later date. There will not be a public meeting scheduled in Washington, DC as was previously noted.

**ADDRESSES:** The June 19, 1996 meeting will be held at the Red Lion Inn, 2525 North 20th Street, Pasco, Washington.

The June 26, 1996 meeting will be held at the Biglerville High School, North Main Street, Biglerville, Pennsylvania.

The July 23, 1996 meeting will be held at the C.P.D.E.S. Hall, 172 West Jefferson Avenue, Fresno, California.

The July 25, 1996 meeting will be held at the Salinas Community Center, 940 North Main Street, Salinas, California.

The August 7, 1996 meeting will be held at the University of Missouri Delta Research Center, Highway T, Portageville, Missouri.

The August 21, 1996 meeting will be held at the Tipton County Fair Grounds, 1200 South Main Street, Tipton, Indiana.

In general, registration begins at 5 p.m., and the public meetings begin at 7 p.m. Please call the contacts listed below to verify the schedule for each meeting.

**FOR FURTHER INFORMATION CONTACT:** By mail: Jeanne Heying (7506C), Office of Pesticide Programs, Field Operations Division, Environmental Protection Agency, 401 M St., SW., Washington, DC 20460, Telephone number: (703) 305-7164, Fax: (703) 308-2962, e-mail: heying.jeanne@epamail.epa.gov., or EPA WPS representatives in regions hosting public meetings.

California meetings: Kay Rudolph, (415) 744-1065 or Mary Grisier, (415) 744-1095.

Indiana meeting: Don Baumgartner, (312) 886-7835.

Missouri meeting: Glen Yager, (913) 551-7296 or Kathleen Fenton, (913) 551-7874.

Pennsylvania meeting: Magda Rodriguez-Hunt, (215) 566-2128.

Puerto Rico meeting: Fred Kozak, (908) 321-6769.

Washington meeting: Allan Welch, (206) 553-1980.

**SUPPLEMENTARY INFORMATION:****I. Background**

In 1992, EPA issued final regulations governing the protection of employees on farms, forests and nurseries, and greenhouses from occupational exposures to agricultural pesticides. The WPS covers both workers in areas treated with pesticides and employees who handle (mix, load, apply, etc.) pesticides. More specifically, the provisions of the Standard are intended to:

*Inform employees about the hazards of pesticides:*

- By requiring provisions for basic safety training, posting and distribution of information about the pesticides.

*Eliminate exposure to pesticides:*

- By prohibiting against the application of pesticides in a way that would cause exposure to people.

- By requiring time-limited restrictions for workers to return to areas following the application of pesticides.

- By requiring provisions for workers and handlers to wear proper protective clothing/equipment.

*Mitigate exposures that occur:*

- By requiring arrangements for the supply of soap, water, and towels in the case of pesticide exposure.

- By requiring provisions for emergency assistance.

**II. Information Sought by EPA**

EPA believes that agricultural workers, handlers, and growers are best

able to provide unique insights on the effects of the WPS requirements. Their input will be supplemented by data generated from other sources during the course of EPA's longer-term evaluation effort. As a follow-up to the public meetings, EPA will develop a summary of information gained. These tools will be used to develop strategies for improving the administration of the WPS. The Agency is specifically interested in hearing public comment, or receiving written comment, on the following topics.

1. Assistance from regulatory partners and others involved with the WPS.
2. Usefulness of available assistance.
3. Understanding the WPS requirements.
4. Success in implementing the requirements.
5. Difficulties in implementing the requirements.
6. Suggestions to improve implementation.

**III. Registration to Make Comments**

Persons who wish to speak at the public meeting are encouraged to register at the meeting location. The Agency encourages parties to submit data to substantiate comments whenever possible. All comments, as well as information gathered at the public meetings will be available for public inspection from 8 a.m. to 4:30 p.m., Monday through Friday (except legal holidays) at the Public Response and Program Resource Branch, Field Operations Division, Room 1132, Crystal Mall #2, 1921 Jefferson Davis Highway, Arlington, VA.

Information submitted as part of any comment may be claimed as confidential by marking any or all of that information as Confidential Business Information (CBI). Information so marked will not be disclosed except in accordance with the procedures set forth in 40 CFR part 2. A copy of the comment that does not contain CBI must be submitted for inclusion in the public record. Information not marked confidential may be disclosed publicly by the Agency without prior notice to the submitter. The Agency anticipates that most of the comments will not be classified as CBI, and prefers that all information submitted be publicly available. Any records or transcripts of the open meetings will be considered public information and cannot be declared CBI.

**IV. Structure of the Meeting**

EPA will open the meeting with brief introductory comments. EPA will then invite those parties who have registered to present their comments. EPA

anticipates that each speaker will be permitted 5 minutes to make comments. After each speaker, Agency and state representatives may ask the presenter questions of clarification. The Agency reserves the right to adjust the time for presenters depending on the number of speakers.

Members of the public are encouraged to submit written documentation to EPA at the meeting to ensure that their entire position goes on record in the event that time does not permit a complete oral presentation. Any information may be mailed to Jeanne Heying at the address stated earlier in this Notice.

Dated: June 4, 1996.

William L. Jordan,

*Director, Field Operations Division, Office of Pesticide Programs.*

[FR Doc. 96-14915 Filed 6-11-96; 8:45 am]

BILLING CODE 6560-50-F

[OPP-30387A; FRL-5375-2]

### **Rhone-Poulenc AG Co.; Approval of Pesticide Product Registrations**

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Notice.

**SUMMARY:** This notice announces Agency approval of applications to register the pesticide products Chipco Choice and Fipronil Technical, containing an active ingredient not included in any previously registered products pursuant to the provisions of section 3(c)(5) of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), as amended.

**FOR FURTHER INFORMATION CONTACT:** By mail: Richard Keigwin, PM 10, Registration Division (750C), Office of Pesticide Programs, Environmental Protection Agency, 401 M St., SW., Washington, DC 20460. Office location and telephone number: Rm. 713, CM #2, 1925 Jefferson Davis Highway, Arlington, VA 22202, (703) 305-7618; e-mail: keigwin.richard@epamail.epa.gov.

**SUPPLEMENTARY INFORMATION:** EPA issued a notice, published in the Federal Register of May 31, 1995 (60 FR 28407; FRL-4956-1), which announced that Rhone-Poulenc AG Company, P.O. Box 12014, 2 T.W. Alexander Drive, Research Triangle Park, NC 27709, had submitted applications to register the products Chipco Gauntlet 0.1G (now known as Chipco Choice) and Fipronil Technical (File Symbols 264-LLN and 264-LLU), containing the active ingredient fipronil 5-amino-1-(2,6-dichloro-4-(trifluoromethyl)phenyl)-4-((1,R,S)-(trifluoromethyl)sulfinyl)-1-H-

pyrazole-3-carbonitrile at 0.1 and 96.5 percent.

The applications were approved on May 1, 1996, as Chipco Choice (formerly Chipco Gauntlet 0.1G) for use on golf and commercial turf to control mole crickets (EPA Reg. No. 264-550) and Fipronil Technical for formulation into insecticide products (EPA Reg. No. 264-554).

The Agency has considered all required data on risks associated with the proposed use of fipronil 5-amino-1-(2,6-dichloro-4-(trifluoromethyl)phenyl)-4-((1,R,S)-(trifluoromethyl)sulfinyl)-1-H-pyrazole-3-carbonitrile, and information on social, economic, and environmental benefits to be derived from use. Specifically, the Agency has considered the nature of the chemical and its pattern of use, application methods and rates, and level and extent of potential exposure. Based on these reviews, the Agency was able to make basic health safety determinations which show that use of fipronil 5-amino-1-(2,6-dichloro-4-(trifluoromethyl)phenyl)-4-((1,R,S)-(trifluoromethyl)sulfinyl)-1-H-pyrazole-3-carbonitrile when used in accordance with widespread and commonly recognized practice, will not generally cause unreasonable adverse effects to the environment.

More detailed information on these registrations is contained in an EPA Pesticide Fact Sheet on fipronil 5-amino-1-(2,6-dichloro-4-(trifluoromethyl)phenyl)-4-((1,R,S)-(trifluoromethyl)sulfinyl)-1-H-pyrazole-3-carbonitrile.

A copy of this fact sheet, which provides a summary description of the chemical, use patterns and formulations, science findings, and the Agency's regulatory position and rationale, may be obtained from the National Technical Information Service (NTIS), 5285 Port Royal Road, Springfield, VA 22161.

In accordance with section 3(c)(2) of FIFRA, a copy of the approved label and the list of data references used to support registration are available for public inspection in the office of the Product Manager. The data and other scientific information used to support registration, except for material specifically protected by section 10 of FIFRA, are available for public inspection in the Public Response and Program Resources Branch, Field Operations Division (7506C), Office of Pesticide Programs, Environmental Protection Agency, Rm. 1132, CM #2, Arlington, VA 22202 (703-305-5805). Requests for data must be made in accordance with the provisions of the Freedom of Information Act and must

be addressed to the Freedom of Information Office (A-101), 401 M St., SW., Washington, D.C. 20460. Such requests should: (1) Identify the product name and registration number and (2) specify the data or information desired.

Authority: 7 U.S.C. 136.

### **List of Subjects**

Environmental protection, Pesticides and pests, Product registration.

Dated: May 29, 1996.

Stephen L. Johnson,

*Director, Registration Division, Office of Pesticide Programs.*

[FR Doc. 96-14451 Filed 6-11-96; 8:45 am]

BILLING CODE 6560-50-F

[PP 4G4414/T690; FRL 5373-3]

### **Cyclanilide; Renewal of a Temporary Tolerance**

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Notice.

**SUMMARY:** EPA has renewed a temporary tolerance for residues of the plant growth regulator, cyclanilide in or on the raw agricultural commodity cottonseed at 0.75 parts per million (ppm).

**DATES:** This temporary tolerance expires January 1, 1997.

**FOR FURTHER INFORMATION CONTACT:** By mail: Cynthia Giles-Parker, Product Manager (PM) 22, Registration Division (7505C), Office of Pesticide Programs, Environmental Protection Agency, 401 M St., SW., Washington, DC 20460. Office location and telephone number: Rm. 229, CM#2, 1921 Jefferson Davis Highway, Arlington, VA, (703) 305-5540; e-mail: parker.cynthia@epamail.epa.gov.

**SUPPLEMENTARY INFORMATION:** EPA issued a notice published in the Federal Register of September 27, 1995 (60 FR 49837), stating that a temporary tolerance had been established for residues of the plant growth regulator, cyclanilide, 1-(2,4-dichlorophenylaminocarbonyl)-cyclopropane carboxylic acid in or on the raw agricultural commodity cottonseed at 0.5 parts per million (ppm). This tolerance is renewed at 0.75 ppm in response to Pesticide Petition (PP) 4G4414, submitted by Rhone-Poulenc AG Company, P.O. Box 12014, 2 T.W. Alexander Drive, Research Triangle Park, NC 27709-2014.

The company has requested a 1-year renewal of a temporary tolerance for residues of the insecticide to permit the

continued marketing of the above raw agricultural commodity when treated in accordance with the provisions of the experimental use permit 264-EUP-97, which is being renewed under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) as amended (Pub. L. 95-396, 92 Stat. 819; 7 U.S.C. 136).

The scientific data reported and other relevant material were evaluated, and it was determined that a renewal of the temporary tolerance will protect the public health. Therefore, the temporary tolerance has been renewed on the condition that the pesticide be used in accordance with the experimental use permit and with the following provisions:

1. The total amount of the active ingredient to be used must not exceed the quantity authorized by the experimental use permit.

2. Rhone-Poulenc AG Company must immediately notify the EPA of any findings from the experimental use that have a bearing on safety. The company must also keep records of production, distribution, and performance and on request make the records available to any authorized officer or employee of the EPA or the Food and Drug Administration.

This tolerance expires January 1, 1997. Residues not in excess of this amount remaining in or on the above raw agricultural commodity after this expiration date will not be considered actionable if the pesticide is legally applied during the term of, and in accordance with, the provisions of the experimental use permit and temporary tolerance.

This tolerance may be revoked if the experimental use permit is revoked or if any experience with or scientific data on this pesticide indicate that such revocation is necessary to protect the public health.

The Office of Management and Budget has exempted this notice from the

requirements of section 3 of Executive Order 12866.

Pursuant to the requirements of the Regulatory Flexibility Act (Pub. L. 96-354, 94 Stat. 1164, 5 U.S.C. 601-612), the Administrator has determined that regulations establishing new tolerances or raising tolerance levels or establishing exemptions from tolerance requirements do not have a significant economic impact on a substantial number of small entities. A certification statement to this effect was published in the Federal Register of May 4, 1981 (46 FR 24950).

Authority: 21 U.S.C. 346a(j).

List of Subjects

Environmental protection, Administrative practice and procedure, Agricultural commodities, Pesticides and pests, Reporting and recordkeeping requirements.

Dated: May 28, 1996.

Stephen L. Johnson,  
Director, Registration Division, Office of Pesticide Programs.

[FR Doc. 96-14628 Filed 6-11-96; 8:45 am]  
BILLING CODE 6560-50-F

[PF-646; FRL-5354-7]

**Pesticide Tolerance Petitions; Notice of Filings and Amendment**

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Notice of filing.

**SUMMARY:** This notice announces the initial filings and amendment of pesticide petitions (PP) proposing the establishment of regulations for residues of certain pesticide chemicals in or on various agricultural commodities.

**DATES:** Comments, identified by the docket number [PF-646], must be received on or before July 12, 1996.

**ADDRESSES:** By mail, submit written comments to: Public Response and Program Resources Branch, Field Operations Division (7506C), Office of Pesticide Programs, Environmental Protection Agency, 401 M St., SW., Washington, DC 20460. In person, bring comments to: Rm. 1132, CM #2, 1921 Jefferson Davis Highway, Arlington, VA 22202. Comments and data may also be submitted electronically by sending electronic mail (e-mail) to: opp-docket@epamail.epa.gov. Electronic comments must be submitted as an ASCII file avoiding the use of special characters and any form of encryption. Comments and data will also be accepted on disks in WordPerfect 5.1 file format or ASCII file format. All comments and data in electronic form must be identified by the docket number [PF-646]. Electronic comments on this notice may be filed online at many Federal Depository Libraries. Additional information on electronic submissions can be found below in this document.

Information submitted as a comment concerning this document may be claimed confidential by marking any part or all of that information as "Confidential Business Information" (CBI). CBI should not be submitted through e-mail. Information marked as CBI will not be disclosed except in accordance with procedures set forth in 40 CFR part 2. A copy of the comment that does not contain CBI must be submitted for inclusion in the public record. Information not marked confidential may be disclosed publicly by EPA without prior notice. All written comments will be available for public inspection in Rm. 1132 at the address given above, from 8 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays.

**FOR FURTHER INFORMATION CONTACT:** The product manager listed in the table below:

Product Manager	Office location/telephone number	Address
Rick Keigwin (PM 10) ....	Rm. 210, CM #2, 703-305-6788, e-mail: keigwin.richard@epamail.epa.gov.	1921 Jefferson Davis Hwy, Arlington, VA
George LaRocca (PM 13).	Rm. 204, CM #2, 703-305-6100, e-mail: larocca.george@epamail.epa.gov.	Do.
Dennis Edwards (PM 19)	Rm. 207, CM #2, 703-305-6386, e-mail: edwards.dennis@epamail.epa.gov.	Do.
Connie Welch (PM 21)	Rm. 227, CM #2, 703-305-6226, e-mail: welch.connie@epamail.epa.gov.	Do.
Cynthia Giles-Parker (PM 22).	Rm. 229, CM #2, 703-305-5540, e-mail: giles-parker.cynthia@epamail.epa.gov.	Do.
Joanne I. Miller (PM 23)	Rm. 237, CM #2, 703-305-7830, e-mail: miller.joanne@epamail.epa.gov.	Do.
Robert J. Taylor (PM 25)	Rm. 245, CM #2, 703-305-6027, e-mail: taylor.robert@epamail.epa.gov.	Do.

**SUPPLEMENTARY INFORMATION:** EPA has received pesticide petitions as follows proposing the establishment and/or amendment of regulations for residues

of certain pesticide chemicals in or on various raw agricultural commodities.

Initial Filings

1. *PP OF3848*. Rhone-Poulenc Ag Company, P.O. Box 12014, 2 T.W.

Alexander Drive, Research Triangle Park, NC 27709, proposes to amend 40 CFR 180.324 by establishing tolerances for residues of the herbicide bromoxynil (3,5-dibromo-4-hydroxybenzotrile) in or on the raw agricultural commodities rice, grain at 0.10 ppm and rice, straw at 0.10 ppm. The proposed analytical method for determining residues is gas chromatography. (PM 25)

2. *PP 5F4560*. DowElanco, 9330 Zionville Road, Indianapolis, IN 46268-1054, proposes to amend 40 CFR part 180 by establishing a regulation to permit residues of the herbicide cloransulam-methyl, in or on soybeans, soybean forage, and soybean hay at 0.02, 0.1 and 0.2 ppm, respectively. (PM 25).

3. *PP 5H5716*. ZENECA Ag Products, P.O. Box 15458, Wilmington, DE 19850-5458, proposes to amend 40 CFR 185.2500 by changing the regulations permitting residues of the plant growth regulator diquat [6,7-dihydrodipyrido (1,2-a:2',1'-c) pyrazinediium] derived from application of the dibromide salt and calculated as the cation in or on the raw agricultural commodity potatoes, processed (including potato chips) at 1.0 ppm. The proposed analytical method for determining residues is extraction with sulfuric acid with spectrometric detection. (PM 23)

4. *PP 6F4648*. Valent U.S.A. Corporation, P.O. Box 1333 N. California Blvd., Walnut Creek, CA 94596 proposes to amend 40 CFR part 180 by establishing a tolerance for fenpropathrin, *alpha*-cyano-3-phenoxbenzyl 2,2,3,3-tetramethylcyclopropanecarboxylate, in or on the crop groupings 5A head and stem brassica (including cabbage, broccoli, cauliflower, brussels sprouts, and related non-leafy brassica crops) at 1.5 ppm and 9A melons (including watermelon, honeydew, cantaloupe, and other musk melons) at 0.5 ppm. The proposed analytical method for determining residues is GC method with an electron capture detector for nitrogen and phosphorus. (PM 13)

5. *PP 6E4683*. American Cyanamid Company, Agricultural Research Division, P.O. Box 400, Princeton, N.J. 08543-0400, proposes to amend 40 CFR 180 by establishing a regulation to add an import tolerance of 0.5 ppm for residues of the insecticide chemical AC 303,630, 4-bromo-2-(4-bromo-2-(4-chlorophenyl)-1-(ethoxymethyl)-5-(trifluoromethyl)-1H-pyrrole-3-carbonitrile in or on imported citrus. (PM 19)

6. *PP 6F4614*. Ciba Crop Protection, Ciba-Geigy Corporation, P.O. Box 18300, Greensboro, NC 27419-8300 proposes to amend 40 CFR part 180 by establishing a tolerance for residues of the herbicide

Acetic Acid [[2-chloro-4-fluoro-5-[(tetrahydro-3-oxo-1H,3H-[1,3,4]thiadiazolo[3,4- $\alpha$ ]pyridazin-1-ylidene)amino]phenyl]thio]-methyl ester in or on the raw agricultural commodity soybeans at 0.02 ppm. The proposed analytic method for determining residues is gas chromatographic. (PM 23)

7. *PP 6F4617*. Ciba-Geigy Corporation, P.O. Box 18300, Greensboro, NC 27419-8300 proposes to amend 40 CFR part 180 by establishing tolerances for the residues/combined residues of the insecticide Fenoxycarb: (ethyl[2-(4-phenoxyphenoxy)ethyl] carbamate in or on citrus fruit at .05 ppm. The proposed analytical method for determining residues is column switching high performance liquid chromatography. (PM 10)

8. *PP 6F4618*. Ciba-Geigy Corporation, P.O. Box 18300, Greensboro, NC 27419-8300 proposes to amend 40 CFR part 180 by establishing tolerances for the combined residues of the insecticide Fenoxycarb: (ethyl[2-(4-phenoxyphenoxy)ethyl] carbamate in or on pome fruit at 0.02 ppm. The proposed analytical method for determining residues is column switching high performance liquid chromatography. (PM 10)

9. *PP 6F4631*. Bayer Corporation, P.O. Box 4913, 8400 Hawthorne Road, Kansas City, MO 64120-0013 proposes amending 40 CFR 180 by establishing tolerances for the residues of the herbicide *N*-(4-fluorophenyl)-*N*-(1-methylethyl)-2-[[5-(trifluoromethyl)-1,3,4-thiazol-2-yl]oxy]acetamide in or on the raw agricultural commodities field corn grain at 0.05 ppm, field corn forage at 0.4 ppm, field corn stover (fodder) at 0.4 ppm, soybeans at 0.1 ppm, milk at 0.01 ppm, meat at 0.05 ppm, and meat by products at 0.05 ppm. The proposed method for determining residues is nuclear magnetic resonance. (PM 22)

10. *PP 6F4633*. Ciba-Geigy Corporation, P.O. Box 18300, Greensboro, NC 27419-8300 proposes to amend 40 CFR part 180 by establishing tolerances for the combined residues of the insecticide Fenoxycarb: (ethyl[2-(4-phenoxyphenoxy)ethyl] carbamate in or on nutmeat at 0.05 ppm and almond hulls at 4.0 ppm. The proposed analytical method for determining residues is column switching high performance liquid chromatography and UV detection. (PM 10)

11. *PP 6F4640*. BASF Corporation, Agricultural Products, P.O. Box 13528, Research Triangle Park, NC 27709-3528 proposes to amend 40 CFR 180.355 by establishing tolerances for the combined residues of the herbicide bentazon (3-

isopropyl-1*H*-2,1,3-benzothiadiazin-4(3*H*-one 2,2-dioxide) and its 6- and 8-hydroxy metabolites in or on peas, succulent at 3.0 ppm. The proposed analytical method for determining residues is gas chromatography with a thermionic specific detector (TSD). (PM 25)

12. *PP 6F4641*. Zeneca Ag Products, 1800 Concord Pike, P.O. Box 15458, Wilmington, DE 19850-5458 proposes to amend 40 CFR parts 185 and 186 by establishing regulations permitting residues of the fungicide Azoxystrobin (methyl (*E*)-2-[2-[6-(2-cyanophenoxy)pyrimidin-4-yl]oxy]phenyl]-3-methoxyacrylate) in or on the raw agricultural commodities grapes at 1.0 ppm, grape pomace at 2.0 ppm and raisin waste at 9.0 ppm. (PM 22)

13. *PP 6F4642*. Zeneca Ag Products, 1800 Concord Pike, P.O. Box 15458, Wilmington, DE 19850-5458 proposes to amend 40 CFR parts 185 and 186 by establishing regulations permitting residues of the fungicide Azoxystrobin (methyl (*E*)-2-2-[6-(2-cyanophenoxy)pyrimidin-4-yl]oxy]phenyl]-3-methoxyacrylate) in or on the raw agricultural commodities pecans at 0.01 ppm. (PM 22)

14. *PP 6F4654*. Bayer Corporation, Agriculture Division, Animal Health, P.O. Box 390, Shawnee Mission, KS 66201-0390 proposes to amend 40 CFR 180.436 by increasing the established tolerance for residues of the insecticide cyfluthrin, cyano(4-fluoro-3-phenoxyphenyl)methyl-3-(2,2-dichloroethenyl)-2,2-dimethyl cyclopropane carboxylate, in or on eggs at 0.02 ppm; poultry fat at 0.05 ppm; poultry meat at 0.05 ppm; and poultry meat by-products at 0.05 ppm. (PM 13)

15. *PP 6F4661*. Monsanto Company, 700 14th Street, NW., Suite 1100, Washington, DC 20005, proposes to amend 40 CFR 180.479 by establishing tolerances for residues of the herbicide halosulfuron, methyl 5-[[4,6-dimethoxy-2-pyrimidinyl]amino]carbonylamino-sulfonyl]-3-chloro-1-methyl-1-*H*-pyrazole-4-carboxylate, and its metabolites determined as 3-chloro-1-methyl-5-sulfamoylpyrazole-4-carboxylic acid and expressed as parent equivalents in or on the raw agricultural commodities sweet corn, kernal plus cob with husks removed at 0.1 ppm; sweet corn, forage at 0.5 ppm; sweet corn, fodder/stover at 1.5 ppm; pop corn, grain at 0.1 ppm; pop corn, fodder/stover at 1.5 ppm; and sugarcane, cane at 0.05 ppm. The proposed analytical method for determining residues is gas chromatography with an electron capture detector. (PM 23)

16. *PP 6F4664*. Rhone-Poulenc Ag Company, P.O. Box 12014, 2 T.W. Alexander Drive, Research Triangle Park, NC 27709, proposes to amend 40 CFR part 180 by establishing tolerances for residues of the herbicide isoxaflutole, 5-cyclopropyl-4-(2-methylsulfonyl-4-trifluoromethylbenzoyl)isoxazole and its metabolites, 1-(2-methylsulphonyl-4-trifluoromethylphenyl)-2-cyano-3-cyclopropyl propane-1,3-dione and 2-methylsulphonyl-4-trifluoromethyl benzoic acid in or on the raw agricultural commodities field corn, grain at 0.10 ppm; field corn, fodder at 0.40 ppm; and field corn, forage at 0.40 ppm. In addition, Rhone-Poulenc proposes to establish tolerances in cattle, liver at 0.20 ppm; cattle, kidney at 0.03 ppm; goat, liver at 0.20 ppm; goat, kidney at 0.03 ppm; hog, liver at 0.04 ppm; hog, kidney at 0.01 ppm; poultry, fat at 0.05 ppm; poultry, liver at 0.20 ppm; poultry, meat at 0.05 ppm; eggs at 0.05 ppm; sheep, liver at 0.20 ppm; and sheep, kidney at 0.03 ppm. (PM 23)

17. *PP 6F4669*. Bayer Corporation, P.O. Box 4913, 8400 Hawthorne Road, Kansas City, MO 64120-0013 proposes amending 40 CFR 180 by establishing tolerances for the residues of the fungicide tebuconazole (alpha-(2-(4-(chlorophenyl)ethyl)-alpha-(1,1-dimethylethyl)-1H-1,2,4-triazole-1-ethanol) in or on the raw agricultural commodities commodity grapes at 5.0 ppm. (PM 21)

18. *PP 9F3727*. Uniroyal Chemical Co., Inc., 74 Amity Road, Bethany, CT, proposes to amend 40 CFR 180.301 by establishing a tolerance for the residues of the herbicide carboxin (5,6-dihydro-2-methyl-1,4-oxathiin-3-carboxanilide) and its metabolite 5,6-dihydro-3-carboxanilide-2-methyl-1,4-oxathiin-4-oxide (calculated as carboxin) (from treatment of seed prior to planting) in or on the raw agricultural commodity onion (dry bulb) at 0.2 ppm. (PM 21)

#### Amended Filings

*PP 9F3740*. Ciba-Geigy Corporation, Ciba Crop Protection, P.O. Box 18300, Greensboro, NC 27419-8300 proposes to amend 40 CFR 180.434 by establishing tolerances for the combined residues of the fungicide (1-((2-(2,4-dichlorophenyl)-4-propyl-1,3-dioxolan-2-yl)methyl)-1H-1,2,4-triazole)), and its metabolites determined as 2,4-dichlorobenzoic acid and expressed as parent compound in or on the raw agricultural commodity tree nuts crop grouping at 0.1 ppm. Notice of this petition originally published in the Federal Register of March 23, 1989 (55 FR 12009) and proposed establishing

tolerances for almonds at 0.10 ppm and almond hulls at 0.10 ppm. The proposes analytical method for determining residue is capillary gas chromatography. (PM 21)

A record has been established for this notice under docket number [PF-646] (including comments and data submitted electronically as described below). A public version of this record, including printed, paper versions of electronic comments, which does not include any information claimed as CBI, is available for inspection from 8 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The public record is located in Room 1132 of the Public Response and Program Resources Branch, Field Operations Division (7506C), Office of Pesticide Programs, Environmental Protection Agency, Crystal Mall #2, 1921 Jefferson Davis Highway, Arlington, VA.

Electronic comments can be sent directly to EPA at:  
opp-Docket@epamail.epa.gov

Electronic comments must be submitted as an ASCII file avoiding the use of special characters and any form of encryption.

The official record for this rulemaking, as well as the public version, as described above will be kept in paper form. Accordingly, EPA will transfer all comments received electronically into printed, paper form as they are received and will place the paper copies in the official rulemaking record which will also include all comments submitted directly in writing. The official rulemaking record is the paper record maintained at the address in "ADDRESSES" at the beginning of this document.

#### List of Subjects

Environmental protection, Administrative practice and procedure, Agricultural commodities, Pesticides and pests, Reporting and recordkeeping requirements.

Dated: May 24, 1996.

Susant Lewis,

Acting Director, Registration Division, Office of Pesticide Programs.

[FR Doc. 96-14450 Filed 6-11-96; 8:45 am]

BILLING CODE 6560-50-F

[FRL-5519-9]

#### De Minimis Settlement Under Section 122(g) of the Comprehensive Environmental Response, Compensation and Liability Act; In the Matter of Conservation Chemical Company of Illinois, Gary, IN

AGENCY: Environmental Protection Agency.

ACTION: *De Minimis* Settlement.

**SUMMARY:** EPA is proposing to settle claims with certain *de minimis* potentially responsible parties (PRPs) regarding past and estimated future response costs at the Conservation Chemical Company of Illinois Site in Gary, Indiana. EPA is authorized under Section 122(i)(1) of the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended ("CERCLA") to enter into this settlement. The U.S. Department of Justice has approved this *de minimis* settlement, consistent with Section 122(g)(4) of CERCLA. Through July 31, 1995, response costs totalling approximately \$5,140,059.38 were incurred by EPA and certain PRPs in connection with the Site. It is estimated that future costs of \$10,806,165 will be required to complete cleanup of the Site. The settling PRPs will pay approximately \$2,800,000 in settlement payments for response costs related to the Conservation Chemical Company of Illinois Site. EPA is proposing to approve this *de minimis* settlement because it reimburses EPA, in part, for costs incurred during EPA's response activities at this Site.

On February 8, 1996, U.S. EPA sent a *de minimis* settlement offer and Administrative Order by Consent to 171 *de minimis* PRPs. Approximately 153 of these PRPs executed binding certifications of their consent to participate in the *de minimis* settlement. The Administrative Order by Consent provides for settlement with certain parties who are, individually, responsible for less than 1% of the total volume of hazardous substances sent to the Site. Settling *de minimis* PRPs will be required to pay their fair share of the past and estimated future response costs at the Site, based on \$1.01 per gallon of hazardous substances that the PRP contributed to the Site; there is a minimum settlement payment amount of \$50.00. The *de minimis* settlement includes a premium of 100% assessed against estimated future response costs to account for potential cost overruns, the potential for failure of the selected response action to clean up the Site, and other risks. The *de minimis* settlement

also provides for the settling *de minimis* PRPs to receive credits against their base *de minimis* settlement amounts, for any properly documented prior payments made by the *de minimis* PRPs to the group of major PRPs who previously did work at the Site. Pursuant to the Agency's *de minimis* settlement offer, numerous settling *de minimis* PRPs have appropriately documented their prior payments and applied for credits. Subsequently, EPA has amended Appendix D to the Consent Order to reflect the amount of all credits approved by EPA, and the final revised individual *de minimis* settlement amounts.

**DATES:** Comments on this *de minimis* settlement must be received within 30 days from publication of this notice.

**ADDRESSES:** Written comments relating to this *de minimis* settlement, Docket Number V-W-96-C-337, should be sent to Cynthia N. Kawakami, Associate Regional Counsel, U.S. Environmental Protection Agency, Region 5, Mail Code: CM-29A, 77 West Jackson Boulevard, Chicago, Illinois 60604-3590.

**ADDITIONAL INFORMATION:** Copies of the Administrative Order by Consent and the Administrative Record for this Site are available at the following address for review. It is strongly recommended that you telephone Ms. Beth Guria at (312) 886-5892 before visiting the Region 5 Office. U.S. Environmental Protection Agency, Region 5, Superfund Division, Emergency Response Branch, 77 West Jackson Boulevard, Chicago, Illinois 60604-3590.

Authority: The Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, 42 U.S.C. Sections 9601 *et seq.*

William E. Muno,

Director, Superfund Division.

[FR Doc. 96-14909 Filed 6-11-96; 8:45 am]

BILLING CODE 6560-50-P

## FEDERAL MARITIME COMMISSION

[Docket No. 96-12]

### Compania Sud Americana de Vapores S.A. v. Inter-American Freight Conference; Notice of Filing of Complaint and Assignment

Notice is given that a complaint filed by Compania Sud Americana de Vapores S.A. ("Complainant") against Inter-American Freight Conference ("Respondent") was served June 5, 1996. Complainant alleges that Respondent has violated sections 10(a)(2) and (3) of the Shipping Act of 1984, 46 U.S.C. app. §§ 1709(a)(2) and (3) by

using funds from complainant's Irrevocable Standby Letter of Credit for costs in winding up a Brazil corporation, contrary to the provisions of the Inter-American Freight Conference Agreement.

This proceeding has been assigned to the office of Administrative Law Judges. Hearing in this matter, if any is held, shall commence within the time limitations prescribed in 46 CFR 502.61, and only after consideration has been given by the parties and the presiding officer to the use of alternative forms of dispute resolution. The hearing shall include oral testimony and cross-examination in the discretion of the presiding officer only upon proper showing that there are genuine issues of material fact that cannot be resolved on the basis of sworn statements, affidavits, depositions, or other documents or that the nature of the matter in issue is such that an oral hearing and cross-examination are necessary for the development of an adequate record. Pursuant to the further terms of 46 CFR 502.61, the initial decision of the presiding officer in this proceeding shall be issued by June 5, 1997, and the final decision of the Commission shall be issued by October 3, 1997.

Joseph C. Polking,

Secretary.

[FR Doc. 96-14782 Filed 6-11-96; 8:45 am]

BILLING CODE 6730-01-M

[Docket No. 96-13]

### Holt Cargo Systems, Inc. and Astro Holdings, Inc.; Holt Hauling and Warehousing Systems, Inc. v. Delaware River Port Authority; Port of Philadelphia and Camden; Philadelphia Regional Port Authority, and Pasha Auto Warehousing, Inc.; Notice of Filing of Complaint and Assignment

Notice is given that a complaint filed by Holt Cargo Systems, Inc. and Astro Holdings, Inc.; Holt Hauling and Warehousing Systems, Inc. ("Complainants") against Delaware River Port Authority; Port of Philadelphia and Camden; Philadelphia Regional Port Authority, and Pasha Auto Warehousing, Inc. ("Respondents") was served June 5, 1996. Complainants allege that Respondents have violated, and continue to violate, sections 10(a)(3)(b)(11), (b)(12) and (d)(1) of the Shipping Act of 1984, 46 U.S.C. app. §§ 1709(a)(3), (b)(11), (b)(12) and (d)(1), by failing to operate under an agreement according to its terms, and engaging in voluminous unreasonable and discriminatory practices to reduce

Complainants' competitiveness, to exclude Complainants from the port, and to take over and operate Complainants' business enterprises at the Ports of Philadelphia and Camden.

This proceeding has been assigned to the office of Administrative Law Judges. Hearing in this matter, if any is held, shall commence within the time limitations prescribed in 46 CFR 502.61, and only after consideration has been given by the parties and the presiding officer to the use of alternative forms of dispute resolution. The hearing shall include oral testimony and cross-examination in the discretion of the presiding officer only upon proper showing that there are genuine issues of material fact that cannot be resolved on the basis of sworn statements, affidavits, depositions, or other documents or that the nature of the matter in issue is such that an oral hearing and cross-examination are necessary for the development of an adequate record. Pursuant to the further terms of 46 CFR 502.61, the initial decision of the presiding officer in this proceeding shall be issued by June 5, 1997, and the final decision of the Commission shall be issued by October 3, 1997.

Joseph C. Polking,

Secretary.

[FR Doc. 96-14783 Filed 6-11-96; 8:45 am]

BILLING CODE 6730-01-M

## FEDERAL RESERVE SYSTEM

### Change in Bank Control Notices; Acquisitions of Shares of Banks or Bank Holding Companies

The notificants listed below have applied under the Change in Bank Control Act (12 U.S.C. 1817(j)) and § 225.41 of the Board's Regulation Y (12 CFR 225.41) to acquire a bank or bank holding company. The factors that are considered in acting on the notices are set forth in paragraph 7 of the Act (12 U.S.C. 1817(j)(7)).

The notices are available for immediate inspection at the Federal Reserve Bank indicated. Once the notices have been accepted for processing, they will also be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing to the Reserve Bank indicated for that notice or to the offices of the Board of Governors. Comments must be received not later than June 26, 1996.

A. Federal Reserve Bank of Atlanta (Zane R. Kelley, Vice President) 104 Marietta Street, N.W., Atlanta, Georgia 30303:

1. *Edward F. Butler*, New Orleans, Louisiana, Houston Fast Foods, Inc., Metairie, Louisiana, Isabella L. Delahoussaye, Crowley, Louisiana, Henry A. Smith, Jr., Norco, Louisiana, Magnolia Holdings, Inc., River Ridge, Louisiana, Valliere J. Dauterive, Meraux, Louisiana, Raymond G. Willhoft, Sr., Chalmette, Louisiana, and Sidney D. Torres, III, St. Bernard, Louisiana; to retain a total of 16.3 percent of the voting shares of St. James Bancorporation, Litcher, Louisiana, and thereby indirectly retain St. James Bank & Trust Company, Litcher, Louisiana.

2. *Claude Williams, Jr.*, Athens, Georgia; to retain a total of 10.92 percent of the voting shares of Georgia National Bancorp, Inc., Athens, Georgia, and thereby indirectly retain The Georgia National Bank, Athens, Georgia.

Board of Governors of the Federal Reserve System, June 6, 1996.

Jennifer J. Johnson,

*Deputy Secretary of the Board.*

[FR Doc. 96-14847 Filed 6-11-96; 8:45 am]

BILLING CODE 6210-01-F

### Formations of, Acquisitions by, and Mergers of Bank Holding Companies

The companies listed in this notice have applied to the Board for approval, pursuant to the Bank Holding Company Act of 1956 (12 U.S.C. 1841 *et seq.*) (BHC Act), Regulation Y (12 CFR part 225), and all other applicable statutes and regulations to become a bank holding company and/or to acquire the assets or the ownership of, control of, or the power to vote shares of a bank or bank holding company and all of the banks and nonbanking companies owned by the bank holding company, including the companies listed below.

The applications listed below, as well as other related filings required by the Board, are available for immediate inspection at the Federal Reserve Bank indicated. Once the application has been accepted for processing, it will also be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the standards enumerated in the BHC Act (12 U.S.C. 1842(c)). If the proposal also involves the acquisition of a nonbanking company, the review also includes whether the acquisition of the nonbanking company complies with the standards in section 4 of the BHC Act, including whether the acquisition of the nonbanking company can "reasonably be expected to produce benefits to the public, such as greater convenience, increased competition, or gains in efficiency, that outweigh possible adverse effects, such as undue

concentration of resources, decreased or unfair competition, conflicts of interests, or unsound banking practices" (12 U.S.C. 1843). Any request for a hearing must be accompanied by a statement of the reasons a written presentation would not suffice in lieu of a hearing, identifying specifically any questions of fact that are in dispute, summarizing the evidence that would be presented at a hearing, and indicating how the party commenting would be aggrieved by approval of the proposal. Unless otherwise noted, nonbanking activities will be conducted throughout the United States.

Unless otherwise noted, comments regarding each of these applications must be received at the Reserve Bank indicated or the offices of the Board of Governors not later than July 8, 1996.

A. Federal Reserve Bank of Chicago (James A. Bluemle, Vice President) 230 South LaSalle Street, Chicago, Illinois 60690:

1. *Hills Bancorporation*, Hills, Iowa; to acquire 100 percent of the voting shares of Hills Bank Kalona, Kalona, Iowa, a *de novo* bank.

2. *Landmark Financial Group, Inc.*, Belvidere, Illinois; to acquire 100 percent of the voting shares of Alpine Bancorporation, Inc., Rockford, Illinois, and thereby indirectly acquire Alpine Bank Illinois, Rockford, Illinois.

3. *North Shore Community Bancorp, Inc.*, Wilmette, Illinois (which will be renamed Wintrust Financial Corporation); to acquire 100 percent of the voting shares of Lake Forest Bancorp, Inc., Lake Forest, Illinois, Hinsdale Bancorp, Inc., Hinsdale, Illinois, and Libertyville Bancorp, Inc., Libertyville, Illinois, and thereby indirectly acquire Lake Forest Bank & Trust Company, Lake Forest, Illinois, Hinsdale Bank & Trust Company, Hinsdale, Illinois, and Libertyville Bank & Trust Company, Libertyville, Illinois.

In connection with this application, Applicant also has applied to acquire Crabtree Capital Corporation, Schaumburg, Illinois, and thereby engage through its wholly-owned subsidiary, First Premium Services, Inc., Deerfield, Illinois, in making and servicing loans for the financing of commercial insurance premiums, pursuant to § 225.25(b)(1) of the Board's Regulation Y.

B. Federal Reserve Bank of Kansas City (John E. Yorke, Senior Vice President) 925 Grand Avenue, Kansas City, Missouri 64198:

1. *First Fidelity Bancorp, Inc.*, Oklahoma City, Oklahoma; to acquire 100 percent of the voting shares of Comban Shares, Inc., Oklahoma City, Oklahoma, and thereby indirectly

acquire Community Bank & Trust Company, Oklahoma City, Oklahoma.

C. Federal Reserve Bank of San Francisco (Kenneth R. Binning, Director, Bank Holding Company) 101 Market Street, San Francisco, California 94105:

1. *CU Bancorp*, Encino, California; to merge with Home Interstate Bancorp, Signal Hill, California, and thereby indirectly acquire Home Bank, Signal Hill, California.

Board of Governors of the Federal Reserve System, June 6, 1996.

Jennifer J. Johnson,

*Deputy Secretary of the Board.*

[FR Doc. 96-14848 Filed 6-11-96; 8:45 am]

BILLING CODE 6210-01-F

### Notice of Proposals to Engage in Permissible Nonbanking Activities or to Acquire Companies that are Engaged in Permissible Nonbanking Activities

The companies listed in this notice have given notice under section 4 of the Bank Holding Company Act (12 U.S.C. 1843) (BHC Act) and Regulation Y, (12 CFR part 225) to engage *de novo*, or to acquire or control voting securities or assets of a company that engages either directly or through a subsidiary or other company, in a nonbanking activity that is listed in § 225.25 of Regulation Y (12 CFR 225.25) or that the Board has determined by Order to be closely related to banking and permissible for bank holding companies. Unless otherwise noted, these activities will be conducted throughout the United States.

Each notice is available for inspection at the Federal Reserve Bank indicated. Once the notice has been accepted for processing, it will also be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the question whether the proposal complies with the standards of section 4 of the BHC Act, including whether consummation of the proposal can "reasonably be expected to produce benefits to the public, such as greater convenience, increased competition, or gains in efficiency, that outweigh possible adverse effects, such as undue concentration of resources, decreased or unfair competition, conflicts of interests, or unsound banking practices" (12 U.S.C. 1843). Any request for a hearing on this question must be accompanied by a statement of the reasons a written presentation would not suffice in lieu of a hearing, identifying specifically any questions of fact that are in dispute, summarizing the evidence that would be presented at a

hearing, and indicating how the party commenting would be aggrieved by approval of the proposal.

Unless otherwise noted, comments regarding the applications must be received at the Reserve Bank indicated or the offices of the Board of Governors not later than June 26, 1996.

A. Federal Reserve Bank of New York (Christopher J. McCurdy, Senior Vice President) 33 Liberty Street, New York, New York 10045:

1. *Canadian Imperial Bank of Commerce*, New York, New York; to engage *de novo* through its subsidiary, Canadian Imperial Holdings Inc., New York, New York, in certain higher residual value leasing activities, pursuant to § 225.25 (b)(5)(ii) of the Board's Regulation Y.

2. *Dresdner Bank AG*, Frankfurt, Germany; to engage *de novo* through its subsidiary, Dresdner Bridge Investors Inc. New York, New York, in making, acquiring and servicing loans or other extensions of credit, pursuant to § 225.25 (b)(1) of the Board's Regulation Y.

B. Federal Reserve Bank of Kansas City (John E. Yorke, Senior Vice President) 925 Grand Avenue, Kansas City, Missouri 64198:

1. *Community First Bancorp, Inc.*, Cheyenne, Wyoming; to engage *de novo* in lending activities, pursuant to § 225.25(b)(1) of the Board's Regulation Y.

Board of Governors of the Federal Reserve System, June 6, 1996.

Jennifer J. Johnson,

*Deputy Secretary of the Board.*

[FR Doc. 96-14849 Filed 6-11-96; 8:45 am]

BILLING CODE 6210-01-F

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Food and Drug Administration

[Docket No. 96F-0062]

#### Cytec Industries Inc.; Withdrawal of Food Additive Petition

**AGENCY:** Food and Drug Administration, HHS.

**ACTION:** Notice.

**SUMMARY:** The Food and Drug Administration (FDA) is announcing the withdrawal, without prejudice to a future filing, of a food additive petition (FAP 6B4485), filed by Cytec Industries, Inc., proposing that the food additive regulations be amended to correct nomenclature by changing the two listings for sulfosuccinic acid 4-ester with polyethylene glycol dodecyl ether, disodium salt (CAS Reg. No. 39354-45-

5) to polyethyleneglycol alkyl (C<sub>10</sub>-C<sub>12</sub>) ether sulfosuccinate, disodium salt (CAS Reg. No. 68954-91-6).

**FOR FURTHER INFORMATION CONTACT:** Vir D. Anand, Center for Food Safety and Applied Nutrition (HFS-216), Food and Drug Administration, 200 C St. SW., Washington, DC 20204, 202-418-3081.

**SUPPLEMENTARY INFORMATION:** In a notice published in the Federal Register of March 4, 1996 (61 FR 8290), FDA announced that a food additive petition (FAP 6B4485) had been filed by Cytec Industries Inc., c/o Keller and Heckman, 1001 G St. NW., suite 500 West, Washington, DC 20001. The petition proposed that the food additive regulations in §§ 175.105 *Adhesives* (21 CFR 175.105) and 178.3400 *Emulsifiers and/or surface active agents* (21 CFR 178.3400) be amended to correct nomenclature by changing the two listings for sulfosuccinic acid 4-ester with polyethylene glycol dodecyl ether, disodium salt (CAS Reg. No. 39354-45-5) to use the nomenclature polyethyleneglycol alkyl (C<sub>10</sub>-C<sub>12</sub>) ether sulfosuccinate, disodium salt (CAS Reg. No. 68954-91-6). Cytec Industries Inc., has now withdrawn the petition without prejudice to a future filing (21 CFR 171.7).

Dated: June 3, 1996.

Alan M. Rulis,

*Director, Office of Premarket Approval, Center for Food Safety and Applied Nutrition.*

[FR Doc. 96-14892 Filed 6-11-96; 8:45 am]

BILLING CODE 4160-01-F

## DEPARTMENT OF THE INTERIOR

### Geological Survey

#### Information Collection Submitted to the Office of Management and Budget for Review Under the Paperwork Reduction Act

The proposal for the collection of information described below has been submitted to the Office of Management and Budget for approval under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35). Copies of the proposed collection of information and related forms may be obtained by contacting the Bureau's clearance officer at the phone number listed below. Comments and suggestions on the proposal should be made directly to the bureau clearance officer and to the Office of Management and Budget, Paperwork Reduction Project (1028-0048), Washington, DC 20503.

*Title:* Earthquake Report.

*OMB approval number:* 1928-0048.

*Abstract:* Respondents supply information on the effects of the shaking

from an earthquake—on themselves personally, buildings and their effects, other man-made structures, and ground effects such as faulting or landslides. This information will be used in the study of the hazards from earthquakes and used to compile and publish the annual USGS publication "United States Earthquakes".

*Bureau form number:* 9-3013.

*Frequency:* After each earthquake.

*Description of respondents:* State and local employees; and, the general public.

*Estimated completion time:* 0.1 hours.

*Annual responses:* 1,500.

*Annual burden hours:* 150 hours.

*Bureau clearance officer:* John Cordyack, 703-648-7313.

Dated: May 3, 1996.

P. Patrick Leahy,

*Chief Geologist.*

[FR Doc. 96-14800 Filed 6-11-96; 8:45 am]

BILLING CODE 4310-31-M

## Bureau of Indian Affairs

### Indian Gaming

**AGENCY:** Bureau of Indian Affairs, Interior.

**ACTION:** Notice of Final Agency Determination to take land into trust under 25 CFR Part 151, Land Acquisitions.

**SUMMARY:** The Assistant Secretary—Indian Affairs made a final agency determination to acquire approximately .52 acres, more or less, of land into trust for the Wyandotte Tribe of Oklahoma on June 6, 1996. This notice is published in the exercise of authority delegated by the Secretary of the Interior to the Assistant Secretary—Indian Affairs by 209 DM 8.

**FOR FURTHER INFORMATION CONTACT:** George T. Skibine, Director, Indian Gaming Management Staff Office, Bureau of Indian Affairs, MS-2070/MIB, 1849 C Street, N.W., Washington, D.C. 20240, telephone (202) 219-4066.

**SUPPLEMENTARY INFORMATION:** This notice is published to comply with the requirement of 25 CFR § 151.12(b) that notice be given to the public of the Secretary's decision to acquire land into trust at least 30 days prior to signatory acceptance of the land into trust. The purpose of the 30-day waiting period in 25 CFR § 151.12(b) is to afford interested parties the opportunity to seek judicial review of final administrative decisions to take land into trust for Indian tribes and individual Indians before transfer of title to the property occurs. On June 6, 1996, the Assistant Secretary—Indian

Affairs decided to accept approximately .52 acres, more or less, of land into trust for the Wyandotte Tribe of Oklahoma pursuant to § 105(b)(1) of Pub. L. 98-602, 98 Stat. 3149. The Secretary shall acquire title in the name of the United States in trust for the Wyandotte Tribe of Oklahoma for one tract of land described below no sooner than 30 days after the date of this notice.

Wyandotte County, Kansas

A tract of land in the NW Quarter of Section 10, Township 11, Range 25, Wyandotte County, Kansas situated in Kansas City, Kansas and more particularly described as: Beginning at the SW corner of Huron Place, as shown on the recorded Plat of Wyandotte City, in Kansas City, Kansas, thence North 150 feet; thence East 150 feet; thence South 150 feet; thence West 150 feet to the point of beginning, meaning and intending to describe a tract of land 150 feet square in the Southwest corner of Huron Place as shown on the recorded Plat of Wyandotte City, which is marked "Church Lot" thereon.

Title to the land described above will be conveyed subject to any valid existing easements for public roads, highways, public utilities, pipelines, and any other valid easements or rights-of-way now on record.

Dated: June 6, 1996.

Ada E. Deer,

*Assistant Secretary—Indian Affairs.*

[FR Doc. 96-14907 Filed 6-11-96; 8:45 am]

BILLING CODE 4310-02-M

## Bureau of Land Management

[WY-921-41-5700; WYW104460]

### Notice of Proposed Reinstatement of Terminated Oil and Gas Lease

Pursuant to the provisions of 30 U.S.C. 188 (d) and (e), and 43 CFR 3108.2-3 (a) and (b)(1), a petition for reinstatement of oil and gas lease WYW104460 for lands in Niobrara County, Wyoming, was timely filed and was accompanied by all the required rentals accruing from the date of termination.

The lessee has agreed to the amended lease terms for rentals and royalties at rates of \$5.00 per acre, or fraction thereof, per year and 16<sup>2</sup>/<sub>3</sub> percent, respectively.

The lessee has paid the required \$500 administrative fee and \$125 to reimburse the Department for the cost of this Federal Register notice. The lessee has met all the requirements for reinstatement of the lease as set out in Section 31 (d) and (e) of the Mineral Lands Leasing Act of 1920 (30 U.S.C. 188), and the Bureau of Land

Management is proposing to reinstate lease WYW104460 effective June 1, 1995, subject to the original terms and conditions of the lease and the increased rental and royalty rates cited above.

Pamela J. Lewis,

*Chief, Leasable Minerals Section.*

[FR Doc. 96-14803 Filed 6-11-96; 8:45 am]

BILLING CODE 4310-22-P

[CA-010-1430-01; CACA 7912]

### Public Land Order No. 7200; Revocation of Executive Order Dated April 13, 1912; California

**AGENCY:** Bureau of Land Management, Interior.

**ACTION:** Public land order.

**SUMMARY:** This order revokes an Executive Order in its entirety as to the remaining 729.22 acres of lands withdrawn for Power Site Reserve No. 263. The lands are no longer needed for this purpose, and the revocation is necessary to permit completion of a land exchange under Section 206 of the Federal Land Policy and Management Act of 1976. Of the 729.22 acres being revoked, 40 acres are temporarily segregated by a pending land exchange. The remaining 689.22 acres will be opened to surface entry. All 729.22 acres have been open to mining under the provisions of the Mining Claims Rights Restoration Act of 1955, and these provisions are no longer applicable. The 729.22 acres will remain open to mining and to mineral leasing. The Federal Energy Regulatory Commission has concurred with this revocation.

**EFFECTIVE DATE:** July 12, 1996.

**FOR FURTHER INFORMATION CONTACT:** Duane Marti, BLM California State Office (CA-931.4), 2800 Cottage Way, Sacramento, CA 95825, 916-979-2858.

By virtue of the authority vested in the Secretary of the Interior by Section 204 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. 1714 (1988), it is ordered as follows:

1. The Executive Order dated April 13, 1912, which withdrew public lands for Power Site Reserve No. 263, is hereby revoked in its entirety as to the following described lands:

Mount Diablo Meridian

(a) T. 45 N., R. 7 W.,  
Sec. 12, NE<sup>1</sup>/<sub>4</sub>NE<sup>1</sup>/<sub>4</sub>.

The area described contains 40 acres in Siskiyou County.

(b) T. 46 N., R. 6 W.,  
Sec. 30, lots 1 to 4, inclusive.  
T. 45 N., R. 7 W.,

Sec. 1, lot 14.  
T. 46 N., R. 7 W.,

Sec. 24, SE<sup>1</sup>/<sub>4</sub>;

Sec. 25, lots 1 and 2, NE<sup>1</sup>/<sub>4</sub>, W<sup>1</sup>/<sub>2</sub>SE<sup>1</sup>/<sub>4</sub>, and SE<sup>1</sup>/<sub>4</sub>SE<sup>1</sup>/<sub>4</sub> (originally described as E<sup>1</sup>/<sub>2</sub>);

Sec. 30, E<sup>1</sup>/<sub>2</sub>E<sup>1</sup>/<sub>2</sub>SE<sup>1</sup>/<sub>4</sub> and NW<sup>1</sup>/<sub>4</sub>NE<sup>1</sup>/<sub>4</sub>SE<sup>1</sup>/<sub>4</sub>.

The areas described aggregate 689.22 acres in Siskiyou County.

2. The land described above in paragraph 1(a) is temporarily segregated by a pending land exchange and will not be opened by this order.

3. At 10 a.m. on September 11, 1996 the lands described above in paragraph 1(b) will be opened to the operation of the public land laws generally, subject to valid existing rights, the provisions of existing withdrawals, other segregations of record, and the requirements of applicable law. All valid applications received at or prior to 10 a.m. on September 11, 1996 shall be considered as simultaneously filed at that time. Those received thereafter shall be considered in the order of filing.

4. The lands described in paragraphs 1(a) and 1(b) have been open to mining under the provisions of the Mining Claims Rights Restoration Act of 1955, 30 U.S.C. 621 (1988) and these provisions are no longer required.

5. In regards to the land described above in paragraph 1(a), the State of California has waived its right of selection in accordance with the provisions of the Act of June 10, 1920, Section 24, as amended, 16 U.S.C. 818 (1988).

6. In regards to the lands described above in paragraph 1(b), the State of California has a preference right for public highway rights-of-way or material sites for a period of 90 days from the date of publication of this order, and any location, entry, selection, or subsequent patent shall be subject to any rights granted the State as provided by the Act of June 10, 1920, Section 24, as amended, 16 U.S.C. 818 (1988).

Dated: May 29, 1996.

Bob Armstrong,

*Assistant Secretary of the Interior.*

[FR Doc. 96-14802 Filed 6-11-96; 8:45 am]

BILLING CODE 4310-40-P

[ES-931-1430-01; FLES-041063]

### Public Land Order No. 7202; Partial Revocation of Executive Order Dated October 22, 1854, and Executive Order No. 4254 of June 12, 1925; Florida

**AGENCY:** Bureau of Land Management, Interior.

**ACTION:** Public Land Order.

**SUMMARY:** This order revokes two Executive Orders insofar as they affect

80.68 acres of land withdrawn for the U.S. Coast Guard's lighthouse site. The land is no longer needed for lighthouse purposes. This action will open the land to surface entry and mining. The land is within an incorporated city and will remain closed to mineral leasing.

**EFFECTIVE DATE:** July 12, 1996.

**FOR FURTHER INFORMATION CONTACT:**

Mary A. Weaver, Withdrawal Coordinator, BLM Jackson District Office, 411 Briarwood Drive, Suite 404, Jackson, Mississippi 39206-3039, 601-977-5400.

By virtue of the authority vested in the Secretary of the Interior by Section 204 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. 1714 (1988), it is ordered as follows:

1. The Executive Order dated October 22, 1854, and Executive Order No. 4254, dated June 12, 1925, which withdrew public lands for use as lighthouse purposes are hereby revoked insofar as they affect the following described land:

Tallahassee Meridian

T. 40 S., R. 43 E.,

Sec. 31, lots 13 and 15 (formerly lots 1 and 8, and part of lot 11).

The area described contains 80.68 acres in Palm Beach County.

2. At 10:00 on July 12, 1996, the land will be opened to the operation of the public land laws generally, subject to valid existing rights, the provisions of existing withdrawals, other segregations of record, and the requirements of applicable law. All valid applications received at or prior to 10:00 a.m. on July 12, 1996, shall be considered as simultaneously filed at that time. Those received thereafter shall be considered in the order of filing.

3. At 10:00 a.m. on July 12, 1996 the land will be opened to location and entry under the United States mining laws subject to valid existing rights, the provisions of existing withdrawals, other segregations of record, and the requirements of applicable law. Appropriation of any of the land described in this order under the general mining laws prior to the date and time of restoration is unauthorized. Any such attempted appropriation, including attempted adverse possession under 30 U.S.C. 38 (1988), shall vest no rights against the United States. Acts required to establish a location and to initiate a right of possession are governed by State law where not in conflict with Federal law. The Bureau of Land Management will not intervene in disputes between rival locators over possessory rights since Congress has provided for such determinations in local courts.

Dated: May 29, 1996.

Bob Armstrong,

*Assistant Secretary of the Interior.*

[FR Doc. 96-14798 Filed 6-11-96; 8:45 am]

**BILLING CODE 4310-GJ-M**

**[NM-1430-01; NMNM 95060]**

**Public Land Order No. 7201; Transfer of Jurisdiction; New Mexico**

**AGENCY:** Bureau of Land Management, Interior.

**ACTION:** Public Land Order.

**SUMMARY:** This order transfers jurisdiction of 1,262 acres of public land from the Bureau of Land Management to the Department of the Air Force for use by Holloman Air Force Base. This transfer of jurisdiction is directed by the National Defense Authorization Act for Fiscal Year 1995 (Public Law 103-337).

**EFFECTIVE DATE:** June 12, 1996.

**FOR FURTHER INFORMATION CONTACT:**

Bernie Creager, BLM Las Cruces District Office, 1800 Marquess, Las Cruces, New Mexico 88005, (505) 525-4325.

By virtue of the authority vested in the Secretary of the Interior by Section 2845 of Public Law 103-337, it is ordered as follows:

1. Subject to valid existing rights, jurisdiction of the following described public land is hereby transferred to the Department of the Air Force for use by Holloman Air Force Base:

New Mexico Principal Meridian

T. 17 S., R. 8 E.,

Sec. 21, S $\frac{1}{2}$ N $\frac{1}{2}$ , E $\frac{1}{2}$ NW $\frac{1}{4}$ NE $\frac{1}{4}$ , and NE $\frac{1}{4}$ NE $\frac{1}{4}$ ;

Sec. 22, W $\frac{1}{2}$ , and W $\frac{1}{2}$ E $\frac{1}{2}$ ;

Sec. 27, All that part lying north of Mexico Highway 70 except for the E $\frac{1}{2}$ E $\frac{1}{2}$ ;

Sec. 28, NE $\frac{1}{4}$ , N $\frac{1}{2}$ SE $\frac{1}{4}$ , SW $\frac{1}{4}$ SE $\frac{1}{4}$ , and W $\frac{1}{2}$ SE $\frac{1}{4}$ SE $\frac{1}{4}$ ;

Sec. 33, NW $\frac{1}{4}$ NE $\frac{1}{4}$ , NW $\frac{1}{4}$ NE $\frac{1}{4}$ NE $\frac{1}{4}$ , and W $\frac{1}{2}$ SW $\frac{1}{4}$ NE $\frac{1}{4}$ .

The area described contains 1,262 acres in Otero County.

2. Future use of the land shall be in accordance with and subject to the provisions of Section 2845 of Public Law 103-337.

Dated: May 29, 1996.

Bob Armstrong,

*Assistant Secretary of the Interior.*

[FR Doc. 96-14801 Filed 6-11-96; 8:45 am]

**BILLING CODE 4310-FB-P**

**[OR-958-1430-01; GP6-0044; OR-50892-WA]**

**Public Land Order No. 7198; Withdrawal of National Forest System Lands To Protect the White Pass Ski Area; Washington**

**AGENCY:** Bureau of Land Management, Interior.

**ACTION:** Public Land Order.

**SUMMARY:** This order withdraws 1,712.50 acres of National Forests System lands in the Snoqualmie and Gifford Pinchot National Forests from mining for a period of 20 years to protect the recreational and visual resources of the White Pass Ski Area. The lands have been and remain open to such forms of disposition as may by law be made of National Forest System lands and to mineral leasing.

**EFFECTIVE DATE:** June 12, 1996.

**FOR FURTHER INFORMATION CONTACT:**

Betty McCarthy, BLM, Oregon/Washington State Office, P.O. Box 2965, Portland, Oregon 97208-2965, 503-952-6155.

By virtue of the authority vested in the Secretary of the Interior by Section 204 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. 1714 (1988), it is ordered as follows:

1. Subject to valid existing rights, the following described National Forest System lands are hereby withdrawn from location and entry under the United States mining laws (30 U.S.C. Ch. 2 (1988)), but not from leasing under the mineral leasing laws, to protect the significant recreational and visual resources in the White Pass Ski Area:

Willamette Meridian

*Snoqualmie and Gifford Pinchot National Forests*

T. 13 N., R. 11 E., unsurveyed,

Sec. 1, that portion of the N $\frac{1}{2}$  lying northerly of the withdrawal for State Highway 12;

Sec. 2, that portion of the N $\frac{1}{2}$  lying outside the William O. Douglas Wilderness Area;

Sec. 10, that portion of the E $\frac{1}{2}$  lying southerly of the withdrawal for State Highway 12;

Sec. 11, S $\frac{1}{2}$ S $\frac{1}{2}$ ;

Sec. 12, that portion of the S $\frac{1}{2}$ SW $\frac{1}{4}$  lying outside the Goat Rocks Wilderness Area; Secs. 14, 15, 22, and 23, those portions lying outside the Goat Rocks Wilderness Area;

T. 14 N., R. 11 E., unsurveyed,

Sec. 35, that portion lying outside the William O. Douglas Wilderness Area;

Sec. 36, those portions of the S $\frac{1}{2}$ SW $\frac{1}{4}$  and SW $\frac{1}{4}$ SE $\frac{1}{4}$  lying outside the William O. Douglas Wilderness Area and outside the three unpatented mining claims known as Cover All Bets, Up The Creek, and Spiral View.

The areas described aggregate approximately 1,712.50 acres in Lewis and Yakima Counties.

2. The withdrawal made by this order does not alter the applicability of those public land laws governing the use of the National Forest System lands under lease, license, or permit, or governing the disposal of their mineral or vegetative resources other than under the mining laws.

3. This withdrawal will expire 20 years from the effective date of this order unless, as a result of a review conducted before the expiration date pursuant to Section 204(f) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. 1714(f) (1988), the Secretary determines that the withdrawal shall be extended.

Dated: May 29, 1996.

Bob Armstrong,

*Assistant Secretary of the Interior.*

[FR Doc. 96-14797 Filed 6-11-96; 8:45 am]

BILLING CODE 4310-33-M

[NV-930-1430-01; N-59444]

### Notice of Realty Action: Non-Competitive Sale of Public Lands

**AGENCY:** Bureau of Land Management, Interior.

**ACTION:** Non-Competitive Sale of Public Lands in Clark County, Nevada.

**SUMMARY:** The following described public land in Clark County, Nevada has been examined and found suitable for sale utilizing non-competitive procedures, at not less than the fair market value. Authority for the sale is Section 203 and Section 209 of the Federal Land Policy and Management Act of 1976 (FLPMA).

Mount Diablo Meridian, Nevada

T. 19 S., R. 59 E.,

Sec. 1: Lots 30, 35 and 36.

Containing 15.00 acres, more or less.

This parcel of land, situated in Clark County is being offered as a direct sale to Nevada Power Company.

This land is not required for any federal purposes. The sale is consistent with current Bureau planning for this area and would be in the public interest.

In the event of a sale, conveyance of the available mineral interests will occur simultaneously with the sale of the land. The mineral interests being offered for conveyance have no known mineral value. Acceptance of a direct sale offer will constitute an application for conveyance of those mineral interests. The applicant will be required to pay a \$50.00 nonreturnable filing fee

for conveyance of the available mineral interests.

The patent, when issued, will contain the following reservations to the United States:

1. A right-of-way thereon for ditches and canals constructed by the authority of the United States, Act of August 30, 1890 (43 U.S.C. 945).

2. Oil, gas, sodium, potassium and saleable minerals, and will be subject to an easement for roads, public utilities and flood control purposes in accordance with the transportation plan for Clark County.

1. Those rights for an electrical substation purposes which have been granted to Nevada Power Company by Permit No. N-52806 under the Act of October 21, 1976 (43USC1761).

2. Those rights for aerial distribution line purposes which have been granted to Nevada Power Company by Permit No. NEV-043546 under the Act of October 21, 1976 (43USC1761).

3. Those rights for communication line purposes which have been granted to Sprint Central Telephone Company of Nevada by Permit No. N-50243 under the Act of October 21, 1976 (43USC1761).

Upon publication of this notice in the Federal Register, the above described land will be segregated from all other forms of appropriation under the public land laws, including the general mining laws, except for sales and disposals under the mineral disposal laws. This segregation will terminate upon issuance of a patent or 270 days from the date of this publication, whichever occurs first.

For a period of 45 days from the date of publication of this notice in the Federal Register, interested parties may submit comments to the District Manager, Las Vegas District, 4765 W. Vegas Drive, Las Vegas, Nevada 89108. Any adverse comments will be reviewed by the State Director who may sustain, vacate, or modify this realty action. In the absence of any adverse comments, this realty action will become the final determination of the Department of the Interior. The Bureau of Land Management may accept or reject any or all offers, or withdraw any land or interest in the land from sale, if, in the opinion of the authorized officer, consummation of the sale would not be fully consistent with FLPMA, or other applicable laws. The lands will not be offered for sale until at least 60 days after the date of publication of this notice in the Federal Register.

Dated: May 31, 1996.

Michael F. Dwyer,

*District Manager, Las Vegas, NV.*

[FR Doc. 96-14788 Filed 6-11-96; 8:45 am]

BILLING CODE 4310-HC-P

[ID-957-1420-00]

### Idaho: Filing of Plats of Survey; Idaho

The plat of the following described land was officially filed in the Idaho State Office, Bureau of Land Management, Boise, Idaho, effective 9:00 a.m., May 30, 1996.

The plat representing the dependent resurvey of portions of the Tenth Standard Parallel North (south boundary, T. 49 N., R. 3 W.), and of the subdivisional lines, and of the subdivision of sections 3, 4, and 8, T 48 N., R. 3 W., Boise Meridian, Idaho, Group No. 886, was accepted, May 30, 1996.

This survey was executed to meet certain administrative needs of the USDA Forest Service, Region 1. All inquiries concerning the survey of the above described land must be sent to the Chief, Cadastral Survey, Idaho State Office, Bureau of Land Management, 3380 American Terrace, Boise, Idaho 83706-2500.

Dated: May 30, 1996.

Duane E. Olsen,

*Chief Cadastral Surveyor for Idaho.*

[FR Doc. 96-14913 Filed 6-11-96; 8:45 am]

BILLING CODE 4310-GG-M

### National Park Service

#### River Management Plan, Environmental Assessment, Canyonlands National Park

**AGENCY:** National Park Service, Department of the Interior.

**ACTION:** Notice of intent to prepare an environmental assessment for the River Management Plan, Canyonlands National Park.

**SUMMARY:** Under the provisions of the National Environmental Policy Act, the National Park Service is preparing an environmental assessment for the River Management Plan for the Green and Colorado Rivers, including Cataract Canyon, in Canyonlands National Park.

The effort will result in a comprehensive management plan that encompasses preservation of natural and cultural resources, visitor use and interpretation. In cooperation with the Bureau of Land Management and the State of Utah, attention will also be given to resources outside the boundaries that affect the Green and Colorado Rivers in Canyonlands

National Park. Alternatives to be considered include no action, a preferred alternative, and other alternatives.

Canyonlands National Park has begun the scoping phase of the planning process, and is soliciting comments on issues and concerns that should be addressed by the River Management Plan. Issues identified to date include the type of recreational experience desired by visitors, the limited number of river corridor campsites during high water periods, the availability of permits for commercial and non-commercial river runners, and impacts from river users on natural and cultural resources.

To make comments or to obtain information on issues identified to date, contact David Wood, Canyonlands National Park, 2282 South West Resource Boulevard, Moab, Utah 84532, telephone 801-259-3911 ext. 2133, electronic mail Dave—Wood@nps.gov. Scoping comments will be accepted at the above address for 30 days following publication of this notice.

**FOR FURTHER INFORMATION:** Contact Superintendent Walter D. Dabney, Canyonlands National Park, 801-259-3911.

Dated: May 24, 1996.

Walter D. Dabney,

*Superintendent, Southeast Utah Group,  
National Park Service.*

[FR Doc. 96-14809 Filed 6-11-96; 8:45 am]

**BILLING CODE 4310-70-P**

### **Maine Acadian Culture Preservation Commission; Notice of Meeting**

Notice is hereby given in accordance with the Federal Advisory Committee Act (PL 92-463) that the Maine Acadian Culture Preservation Commission will meet on Friday, June 28, 1996. The meeting will convene at 2:00PM in the conference room, Madawaska High School, 80 7th Avenue, Madawaska, Aroostook County, Maine.

The Maine Acadian Culture Preservation Commission was appointed by the Secretary of the Interior pursuant to the Maine Acadian Culture Preservation Act (PL 101-543). The purpose of the Commission is to advise the National Park Service with respect to:

- The development and implementation of an interpretive program of Acadian culture in the state of Maine; and
- The selection of sites for interpretation and preservation by means of cooperative agreements.

The Agenda for this meeting is as follows:

1. Review and approval of the summary reports of the meetings held August 17, 1995, and October 19, 1995.

2. Reports of Maine Acadian Culture Preservation Commission working groups.

3. Report of the National Park Service project staff.

4. Revision of Article VIII, Maine Acadian Culture Preservation Commission Bylaws, to eliminate the requirement of a court reporter at Commission meetings; and revision of Article XI, to change the quorum for Commission meetings.

5. Opportunity for public comment.

6. Proposed agenda, place, and date of the next Commission meeting.

The meeting is open to the public. Further information concerning Commission meetings may be obtained from the Superintendent, Acadia National Park. Interested persons may make oral/written presentations to the Commission or file written statements. Such requests should be made at least seven days prior to the meeting to: Superintendent, Acadia National Park, P.O. Box 177, Bar Harbor, ME 04609-0177; telephone (207) 288-5472.

Dated: May 20, 1996.

Paul F. Haertel,

*Superintendent, Acadia National Park.*

[FR Doc. 96-14929 Filed 6-11-96; 8:45 am]

**BILLING CODE 4310-10-P**

### **National Register of Historic Places; Notification of Pending Nominations**

Nominations for the following properties being considered for listing in the National Register were received by the National Park Service before June 1, 1995. Pursuant to section 60.13 of 36 CFR Part 60 written comments concerning the significance of these properties under the National Register criteria for evaluation may be forwarded to the National Register, National Park Service, P.O. Box 37127, Washington, DC 20013-7127. Written comments should be submitted by June 27, 1996. Carol D. Shull,

*Keeper of the National Register.*

#### **ALASKA**

Anchorage Borough-Census Area

Site Summit, Off Arctic Valley Rd., 12.5 mi. E of Anchorage, Anchorage vicinity, 96000691

#### **ARKANSAS**

Benton County

Garfield Elementary School (Public Schools in the Ozarks MPS) US 62, near jct. with AR 127, Benton, 96000693

Pike County

Glenwood Iron Mountain Railroad Depot (Historic Railroad Depots of Arkansas MPS) W of jct. of Union Pacific RR and US 70, Glenwood, 96000692

#### **CALIFORNIA**

Los Angeles County

North Harper Avenue Historic District, Roughly, N. Harper Ave. between Fountain and De Longpre Aves., West Hollywood, 96000694

#### **FLORIDA**

Leon County

Miccosukee Methodist Church, Co. Rd. 59, S of jct. with FL 151, Miccosukee, 96000695

#### **GEORGIA**

Fulton County

63 Magnum Street Industrial Building, 63-69 Mangum St.—398-400 Markham St., Atlanta, 96000696

#### **IOWA**

Cedar County

Lincoln Hotel, 408 Main St., Lowden, 96000699

Hardin County

New Providence School Gymnasium, 106 N. Main St., New Providence, 96000698

Iowa County

Hughes, David and M. Maria, House, 101 W. Penn St., Williamsburg, 96000697

Story County

Morrill Hall, Morrill Rd., facing E toward central campus, Iowa St. University, Ames, 96000700

#### **KANSAS**

Doniphan County

White Cloud Historic District, Roughly bounded by Poplar, 6th, Chesnut Sts. and KS7, White Cloud, 96000701

#### **MISSISSIPPI**

Copiah County

Carpenter United Methodist Church (Copiah County MPS) Carpenter Rd., 1.1 mi. N of MS 18, Utica vicinity, 96000705  
Pleasant Valley Methodist Church (Copiah County MPS) Pleasant Valley Rd., .8 mi. E of MS 28, Hazlehurst vicinity, 96000703  
Tabernacle Methodist Church (Copiah County MPS) Dentville Rd., 4.6 mi. N of MS 28, Hazlehurst vicinity, 96000704

Lowndes County

St. Paul's Episcopal Church Rectory, Old, 300 Main St., Columbus, 96000702

#### **PENNSYLVANIA**

Beaver County

Bridgewater Historic District, Roughly bounded by Bridge St., Mulberry St., Fulton St., Cherry Alley, Elm St., and Beaver River, Bridgewater, 96000713

Berks County

Merit Underwear Company, 43 E. Noble Ave., Shoemakersville, 96000711

## Blair County

Noble, J. L. School, 209 12th Ave., Juniata, Altoona, 96000712

## Cambria County

Patton Historic District, Roughly bounded by 5th, Beech, 6th, Palmer Aves. and Terra Cotta St., Patton, 96000714

## Franklin County

Oller, Joseph J., House, 138 W. Main St., Waynesboro, 96000707

## Lancaster County

Nissly Swiss Chocolate Company, 951 Wood St., Mount Joy, 96000709

## Montgomery County

Kastner, Jacob, Loghouse, 416 Norristown Rd., Lower Gwynedd Township, Spring House, 96000708

Rittenhouse, David, Junior High School, 1705 Locust St., Norristown, 96000717

## Philadelphia County

The Elverson Building, 400-440 N. Broad St., Philadelphia, 96000716

## Sullivan County

Eagles Mere Historic District, Roughly bounded by PA 42, Lakewood, LaPorte, and Forest Aves., Shrewsbury Township, Eagles Mere, 96000718

## Susquehanna County

Susquehanna County Courthouse Complex, Town Green, jct. of Public Ave. and Maple St., Montrose, 96000706

## Warren County

Woman's Club of Warren, 310 Market St., Warren, 96000715

## Washington County

Munce, Thomas, House, Rt. 136, 3 mi. E of Washington, S. Strabane Township, Washington vicinity, 96000710

## TENNESSEE

## Cumberland County

Wilson, Greenberry, House (Historic Family Farms in Middle Tennessee MPS) E. G. Wilson Rd., 7 mi. SE of Crossville, Burke vicinity, 96000719

## Rhea County

Broyles—Darwin House, 108 Idaho, Dayton, 96000720

## UTAH

## Davis County

Stewart, LeConte, House, 172 W. 100 South, Kaysville, 96000721

## WASHINGTON

## Klickitat County

Rowland Basin Site, Address Restricted, Lyle vicinity, 96000724

## WISCONSIN

## Calumet County

Timm, Herman C., House, 1600 Main St., New Holstein, 96000727

## Kewaunee County

Kewaunee County Sheriff's House and Jail, Court House Sq., jct. of Dodge and Vliet Sts., Kewaunee, 96000728

## Outagamie County

Schuetter, Henry, House, 330 W. 6th St., Appleton, 96000725

## Richland County

Bowen, Julia B. and Fred P., House, 220 E. Union St., Richland Center, 96000729  
Cunningham Lane Bridge, Hansberry Lane, near Fancy Cr., Rockbridge, 96000731

## Waukesha County

Castleman, Dr. Alfred L., House, 975 S. Waterville Rd., Summit, 96000730  
Moreland Boulevard Pump House and Reservoir, 413 Moreland Blvd., Waukesha, 96000726

## Waupaca County

Waupaca Free Public Library (Public Library Facilities in Wisconsin MPS) 321 S. Main St., Waupaca, 96000732

[FR Doc. 96-14808 Filed 6-11-96; 8:45 am]

BILLING CODE 4310-70-P

## DEPARTMENT OF JUSTICE

**International Criminal Investigative Training Assistance Program; Notice of Information Collection Under Review**

Office of Management and Budget (OMB) approval is being sought for the information collection listed below. This proposed information collection was previously published in the Federal Register and allowed 60 days for public comments.

The purpose of this notice is to allow an additional 30 days for public comments from the data listed at the top of this page in the Federal Register. This process is conducted in accordance with 5 Code of Federal Regulation, Part 1320.10.

Written comments and/or suggestions regarding the item(s) contained in this notice, especially regarding the estimated public burden and associated response time, should be directed to the Office of Management and Budget, Office of Regulatory Affairs, Attention: Department of Justice Desk Officer, Washington, DC, 20530. Additionally, comments may be submitted to OMB via facsimile to 202-395-7285. Comments may also be submitted to the Department of Justice (DOJ), Justice Management Division, Information Management and Security Staff, Attention: Department Clearance Officer, Suite 850, 1001 G Street, NW., Washington, DC., 20530. Additionally, comments may be submitted to DOJ via facsimile to 202-514-1534. Written

comments and suggestions from the public and affected agencies should address one or more of the following points:

(1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency/component, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agencies/components estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other information technology, e.g. permitting electronic submission of responses.

The proposed collection is listed below:

(1) Type of information collection. New Collection.

(2) The title of the form/collection. Organizational Study, Evaluation of the ICITAP Qualification Statement.

(3) The agency form number, if any, and the applicable component of the Department sponsoring the collection. Form: None. International Criminal Investigative Training Assistance Program, Criminal Division, United States Department of Justice.

(4) Affected public who will be asked or required to respond, as well as a brief abstract. Primary: Consists of individuals associated with the law enforcement community. Other: None.

The information collection form will be used in a dual capacity as a consultant application as well as a device for data entry.

(5) An estimate of the total annual number of respondents and the amounts of time estimated for an average respondent respond. Six hundred responses at one hour or sixty minutes per response.

(6) An estimate of the total public burden (in hours) associated with the collection. Six hundred annual burden hours.

Public comment on this proposed information collection is strongly encouraged.

Dated: June 7, 1996.

Robert B. Briggs,

*Department Clearance Officer, United States Department of Justice.*

[FR Doc. 96-14873 Filed 6-11-96; 8:45 am]

BILLING CODE 4410-20-M

**Notice of Lodging of Consent Decree Pursuant to the Comprehensive Environmental Response Compensation and Recovery Liability Act**

In accordance with Departmental policy, 28 CFR 50.7, notice is hereby given that a proposed partial consent decree in *United States v. The Glidden Company, et al.*, Civil Action No. 5:95 CV 1009, was lodged on May 31, 1996 with the United States District Court for the Northern District of Ohio. This proposed consent decree would resolve the United States' claims against The Glidden Company, one of two defendants in this case, for unreimbursed past costs incurred at the Bohaty Drum Site in Medina County, Ohio, pursuant Section 107 of the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. 9607, in return for a payment of \$60,000.

The Department of Justice will receive, for a period of thirty (30) days from the date of this publication, comments relating to the proposed consent decree. Comments should be addressed to the Assistant Attorney General for the Environment and Natural Resources Division, Department of Justice, Washington, D.C. 20530, and should refer to *United States v. The Glidden Company, et al.*, Civil Action No. 5:95 CV 1009, and the Department of Justice Reference No. 90-11-2-1108.

The proposed consent decree may be examined at the Office of the United States Attorney, Northern District of Ohio, 1800 Bank One Center, 600 Superior Avenue, East, Cleveland, Ohio, 44114-2600; the Region 5 Office of the Environmental Protection Agency, 77 West Jackson Boulevard, Chicago, Illinois, 60604-3590; and at the Consent Decree Library, 1120 G Street, N.W., 4th Floor, Washington, D.C. 20005, 202-624-0892. A copy of the proposed consent decree may be obtained in person or by mail from the Consent Decree Library, 1120 G Street, N.W., 4th Floor, Washington, D.C. 20005. In requesting a copy, please refer to the referenced case and enclose a check in the amount of \$4.25 (25 cents per page reproduction costs), payable to the Consent Decree Library.

Bruce S. Gelber,

*Deputy Chief, Environmental Enforcement Section, Environment and Natural Resources Division.*

[FR Doc. 96-14789 Filed 6-11-96; 8:45 am]

BILLING CODE 4410-01-M

**Notice of Lodging of Consent Decree Pursuant to the Clean Water Act**

In accordance with Departmental Policy, 28 CFR 50.7, notice is hereby given that a consent decree in *United States of America v. Rueth Builders, Inc.*, Civ. No. 2:96-CV-66 (N.D. Ind.), was lodged with the United States District Court for the Northern District of Indiana on March 8, 1996. The proposed decree concerns alleged violations of the Clean Water Act, 33 U.S.C. 1311, as a result of the discharge of dredged and fill materials onto approximately 0.40 acres of wetlands by Rueth Buildings, Inc., in Dyer, Lake County, Indiana.

The Consent Decree provides for the payment of a \$10,000.00 civil penalty to the United States and permanently enjoins Rueth Builders, Inc. from taking any actions, or causing others to take any actions, which result in the discharge of dredged or fill material into waters of the United States, as defined by the Clean Water Act and regulations promulgated thereunder, except as in compliance with an individual permit issued pursuant to 33 U.S.C. 1344(a), or with any applicable general permit issued by the United States Army Corps of Engineers.

The Department of Justice will receive written comments relating to the consent decree for a period of thirty (30) days from the date of this notice. Comments should be addressed to the Assistant Attorney General, Environment and Natural Resources Division, United States Department of Justice, Attention: Steven E. Rusak, Trial Attorney, Environmental Defense Section, P.O. Box 23986, Washington, D.C. 20026-3986, and should refer to *United States of America v. Rueth Builders, Inc.*, DJ Reference No. 90-5-1-6-556.

The proposed consent decree may be examined at the Offices of the United States Attorney for the Northern District of Indiana, 507 State Street, Fourth Floor, Hammond, Indiana 46320; the office of Greg Carlson, Wetlands Enforcement Officer, Wetlands Division, Wetlands and Watershed Section, Wetlands Regulatory Unit, Region V of the United States Environmental Protection Agency, 77 W. Jackson Boulevard, 16th Floor, Chicago, Illinois, 60604, (312) 886-0124, and at the Consent Decree Library, 1120 G Street, N.W., 4th Floor, Washington, D.C. 20005. In requesting a copy, please enclose a check in the amount of \$2.75

for a copy of the consent decree with attachments.

Letitia J. Grishaw,

*Chief, Environmental Defense Section, Environment and Natural Resources Division, United States Department of Justice.*

[FR Doc. 96-14796 Filed 6-11-96; 8:45 am]

BILLING CODE 4410-01-M

**Antitrust Division**

**United States v. A&L Mayer Associates, Inc., et al. No. 96-CV-40-44 (E.D. Pa., Filed May 30, 1996); Proposed Final Judgment and Competitive Impact Statement**

Notice is hereby given pursuant to the Antitrust Procedures and Penalties Act, 15 U.S.C. 16 (b)-(h), that a proposed Final Consent Judgment, Stipulation and Competitive Impact Statement have been filed with the United States District Court for the Eastern District of Pennsylvania in the above-captioned case.

On May 30, 1996, the United States filed a civil antitrust Complaint to prevent and restrain A&L Mayer Associates, Inc., A&L Mayer, Inc. and Fibras Saltillo, S.A. de C.V., from conspiring to fix prices and allocate the sales volume of tampico fiber imported and sold in the United States in violation of Section 1 of the Sherman Act (15 U.S.C. 1). Tampico fiber is a vegetable fiber grown in Mexico and used as a filler in industrial and consumer brushes.

The complaint alleges that the defendants agreed with unnamed co-conspirators to: (1) Fix the prices of tampico fiber imported into the United States; (2) fix the resale prices charged by their United States distributors; and (3) allocate tampico fiber sales between their distributors.

The proposed Final Judgment would prohibit the defendants from entering into any agreement or understanding with any other processor of tampico fiber or any of such processor's distributors for:

(1) Raising, fixing, or maintaining the price or other terms or conditions for the sale or supply of tampico fiber;

(2) Allocating sales volume, geographic markets or customers for tampico fiber;

(3) Taking concerted action to discourage or eliminate new entrants into the tampico fiber market; and

(4) Taking concerted action to restrict or eliminate the supply of tampico fiber to any customer.

The proposed Final Judgment would also prohibit the defendants from adhering to or adopting any resale

pricing policy and from terminating or threatening to terminate any distributor for that distributor's pricing.

Public comment is invited within the statutory sixty (60) day period. Such comments will be published in the Federal Register and filed with the Court. Comments should be addressed to Robert E. Connolly, Chief, Middle Atlantic Office, U.S. Department of Justice, Antitrust Division, The Curtis Center, 6th and Walnut Streets, Suite 650 West, Philadelphia, PA 19106 (telephone number 215-597-7405).

Rebecca P. Dick,

*Deputy Director of Operations.*

In the United States District Court for the Eastern District of Pennsylvania

United States of America, Plaintiff, v. A&L Mayer Associates, Inc.; A&L Mayer, Inc.; and Fibras Saltillo, S.A. DE C.V.; Defendants. Civil Action No. 96-CV-4044, Judge Jay C. Waldman.

#### Stipulation

It is stipulated by and between the undersigned parties, by their respective attorneys, that:

(1) The parties consent that a final judgment in the form hereto attached may be filed and entered by the Court at any time after the expiration of the sixty (60) day period for public comment provided by the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16 (b)-(h), without further notice to any party or other proceedings, either upon the motion of any party or upon the Court's own motion, provided that plaintiff has not withdrawn its consent as provided herein;

(2) The plaintiff may withdraw its consent hereto at any time within said period of sixty (60) days by serving notice thereof upon the other party hereto and filing said notice with the Court;

(3) In the event the plaintiff withdraws its consent hereto, this stipulation shall be of no effect whatever in this or any other proceeding and the making of this stipulation shall not in any manner prejudice any consenting party to any subsequent proceedings.

Dated: May 31, 1996.

For the Plaintiff:

Anne K. Bingaman,

*Assistant Attorney General.*

Joel I. Klein,

*Deputy Assistant Attorney General.*

Rebecca P. Dick,

*Deputy Director of Operations.*

Robert E. Connolly,

*Chief, Middle Atlantic Office.*

For the Defendants:

A&L Mayer Associates, Inc.

A&L Mayer, Inc.

Fibras Saltillo, S.A. DE C.V.

Respectfully submitted,

Edward S. Panek.

Michelle A. Pionkowski.

Roger L. Currier.

Joseph Muoio,

*Attorneys, Antitrust Division, U.S.*

*Department of Justice, Middle Atlantic Office,*

*The Curtis Center, Suite 650W, 7th & Walnut Streets, Philadelphia, PA 19106, Tel.: (215) 597-7401.*

In the United States District Court for the Eastern District of Pennsylvania

United States of America, Plaintiff, v. A&L Mayer Associates, Inc.; and Fibras Saltillo, S.A. DE C.V., Defendants. Civil Action No. 96-CV-4044, Judge Jay C. Waldman.

#### Final Judgment

Plaintiff, the United States of America, filed its complaint on May 31, 1996. Plaintiff and defendants, by their respective attorneys, have consented to the entry of this final judgment without trial or adjudication of any issue of fact or law. This Final Judgment shall not be evidence against or an admission by any party to any issue of fact or law. Defendants have agreed to be bound by the provisions of this Final Judgment pending its approval by the Court.

THEREFORE, before the taking of any testimony and without trial or adjudication of any such issue of fact or law herein, and upon consent of the parties, it is hereby ORDERED, ADJUDGED, AND DECREED as follows:

#### I

##### *Jurisdiction*

This Court has jurisdiction of the subject matter of this action and of each of the parties consenting hereto. The complaint states a claim upon which relief may be granted against defendants under Section 1, of the Sherman Act, 15 U.S.C. § 1.

#### II

##### *Definitions*

As used in this final judgment:

A. "Agreement" means any contract, agreement or understanding, whether

oral or written, or any term or provision thereof.

B. "Person" means any individual, corporation, partnership, company, sole proprietorship, firm or other legal entity.

C. "Tampico fiber" is a natural vegetable fiber produced by the lechuguilla plant and grown in the deserts of northern Mexico. It is harvested by individual farmers, processed, finished and exported to the United States and worldwide where it is used as brush filling material for industrial and consumer brushes. It is available in natural white, bleached white, black, gray and a wide variety of mixtures.

D. "Resale price" means any price, price floor, price ceiling, price range, or any mark-up, formula or margin of profit relating to tampico fiber sold by distributors.

#### III

##### *Applicability*

A. This final judgment applies to each of the defendants and to their officers, directors, agents, employees, subsidiaries, successors and assigns, and to all other persons in active concert or participation with any of them who shall have received actual notice of this final judgment by personal service or otherwise.

B. Each defendant shall require, as a condition of any sale or other disposition of all, or substantially all, of its stock or assets used in the manufacture and/or sale of tampico fiber, that the acquiring party/parties agree to be bound by the provisions of this final judgment, and that such agreement be filed with the Court.

#### IV

##### *Prohibited Conduct*

As to tampico fiber imported into or sold in the United States, each defendant is enjoined and restrained from:

A. directly or indirectly entering into, adhering to, maintaining, furthering, enforcing or claiming any rights under any contract, agreement, arrangement, understanding, plan, program, combination or conspiracy with any other processor of tampico fiber or any of such processor's distributors for:

(1) raising, fixing, or maintaining the prices or other terms or conditions for the sale or supply of tampico fiber;

(2) allocating sales volumes, geographic markets or customers for tampico fiber;

(3) taking concerted action to discourage or eliminate new entrants into the tampico fiber market; and

(4) taking concerted action to restrict or eliminate the supply of tampico fiber to any customer;

B. directly or indirectly entering into, adhering to, maintaining, furthering, enforcing or claiming any right under any contract, agreement, understanding, plan or program with any distributor to fix or maintain the prices at which tampico fiber sold by defendants may be resold or offered for sale by any distributor;

C. directly or indirectly adopting, promulgating, suggesting, announcing or establishing any resale pricing policy for tampico fiber;

D. threatening any distributor with termination or terminating any distributor on the basis of that distributor's pricing; or discussing with any present or potential distributor any decision regarding termination of any other distributor for any reason directly or indirectly related to the latter distributor's resale pricing; provided, however, that nothing herein shall prohibit any defendant from terminating a distributor for any reason other than the distributor's resale pricing; and

E. participating or engaging directly or indirectly through any trade association, organization or other group in any activity which is prohibited in IV (A)-(D) above.

## V

### *Permitted Communication*

Other than Section IV(A) of this Final Judgment, nothing contained in this final judgment shall prohibit a defendant from negotiating, arranging or communicating with another processor of tampico fiber, or any of such processor's distributors or with any agent, broker or representative of such processor or distributor solely in connection with *bona fide* proposed or actual purchases of tampico fiber from, or sale of tampico fiber to, that processor or distributor.

## VI

### *Compliance Program*

Each defendant shall establish within thirty (30) days of entry of this final judgment and shall thereafter for so long as it or its employees are engaged in the manufacture or sale of tampico fiber, maintain a program to insure compliance with this final judgment, which program shall include at a minimum the following:

A. designating an Antitrust Compliance Officer responsible, on a continuing basis, for achieving compliance with this final judgment and promptly reporting to the

Department of Justice any violation of the final judgment;

B. within sixty (60) days after the date of entry of this final judgment, furnishing a copy thereof to each of its own, its subsidiaries', and its affiliates' (1) officers, (2) directors, and (3) employees or managing agents who are engaged in, or have responsibility for or authority over, the pricing of tampico fiber; and advising and informing each such person that his or her violation of this final judgment could result in a conviction for contempt of court and imprisonment and/or fine;

C. within seventy five (75) days after the date of entry of this final judgment, certifying to the plaintiff whether it has designated an Antitrust Compliance Officer and has distributed the final judgment in accordance with Sections VI (A) and (B) above;

D. within thirty (30) days after each such person becomes an officer, director, employee or agent of the kind described in Section VI (B), furnishing to him or her a copy of this final judgment together with the advice specified in Section VI (B);

E. annually distributing the final judgment to each person described in Sections VI (B) and (D);

F. annually briefing each person described in Sections VI (B) and (D) as to defendant's policy regarding compliance with the Sherman Act and with this final judgment, including the advice that such defendant will make legal advice available to such persons regarding any compliance questions or problems;

G. annually obtaining (and maintaining) from each person described in Sections VI (B) and (D) a certification that he or she:

(1) has read, understands and agrees to abide by the terms of this final judgment;

(2) has been advised of and understands the company's policy with respect to compliance with the Sherman Act and the final judgment;

(3) has been advised and understands that his or her non-compliance with the final judgment may result in conviction for criminal contempt of court and imprisonment and/or fine; and

(4) is not aware of any violation of the final judgment that has not been reported to the Antitrust Compliance Officer; and

H. on or about each anniversary date of the entry of the final judgment, submitting to the plaintiff an annual declaration as to the fact and manner of its compliance with this final judgment.

## VII

### *Inspection and Compliance*

For the purpose of determining or securing compliance with this final judgment and subject to any legally recognized privilege, from time to time:

A. duly authorized representatives of the Department of Justice shall, upon written request of the Attorney General or of the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to a defendant made to its principal office, be permitted:

(1) access, during office hours of such defendant, to inspect and copy all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of such defendant, which may have counsel present, relating to any matters contained in this final judgment; and

(2) subject to the reasonable convenience of such defendant and without restraint or interference from it, to interview officers, employees and agents of such defendant, who may have counsel present, regarding any such matters;

B. upon the written request of the Attorney General or of the Assistant Attorney General in charge of the Antitrust Division made to a defendant's principal office, such defendant shall submit such written reports, under oath if requested, with respect to any of the matters contained in this final judgment, as may be requested;

C. no information or documents obtained by the means provided in this Section VII of the final judgment shall be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of the Executive Branch of the United States, except in the course of legal proceedings to which the United States is a party, or for the purpose of securing compliance with this final judgment, or as otherwise required by law;

D. if at the time information or documents are furnished by a defendant to plaintiff, such defendant represents and identifies in writing the material in any such information or documents to which a claim of protection may be asserted under Rule 26(c)(7) of the Federal Rules of Civil Procedure, and such defendant marks each pertinent page of such material, "Subject to claim of protection under Rule 26(c)(7) of the Federal Rules of Civil Procedure," then ten (10) days notice shall be given by plaintiff to such defendant prior to divulging such material in any legal processing (other than a grand jury

proceeding) to which such defendant is not a party; and

E. nothing set forth in this final judgment shall prevent the Antitrust Division from utilizing other investigative alternatives, such as Civil Investigative Demand process provided by 15 U.S.C. §§ 1311-1314 or a federal grand jury, to determine if the defendant has complied with this final judgment.

#### VIII

##### *Retention of Jurisdiction*

Jurisdiction is retained by this Court for the purpose of enabling any of the parties to this final judgment to apply to this Court at any time for such further orders or directions as may be necessary or appropriate for the construction or carrying out of this final judgment, for the modification of any of the provisions hereof, for the enforcement of compliance herewith, and for the punishment of violations hereof.

#### IX

##### *Ten-Year Expiration*

This final judgment will expire on the tenth anniversary of its date of entry.

#### X

##### *Public Interest*

Entry of this final judgment is in the public interest.

Dated: \_\_\_\_\_

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UNITED STATES DISTRICT JUDGE

In the United States District Court for the Eastern District of Pennsylvania

United States of America, Plaintiff, v. A&L Mayer Associates, Inc.; A&L Mayer, Inc.; and Fibras Saltillo, S.A. DE C.V., Defendants.  
Civil Action No. 96-CV-4044, Judge Jay C. Waldman.

##### *Competitive Impact Statement*

Pursuant to Section 2 of the Antitrust Procedures and Penalties Act ("APPA"), 15 U.S.C. § 16(b), the United States files this Competitive Impact Statement relating to the proposed final judgment as to *United States v. A&L Mayer Associates, Inc., et al.*, submitted for entry in this civil antitrust proceeding.

#### I

##### *Nature and Purpose of the Proceedings*

On \_\_\_\_\_, the United States filed a civil antitrust complaint alleging that under Section 4 of the Sherman Act, as amended, 15 U.S.C. § 4, the above-named defendants combined and conspired with others from at least as early as January 1990 to April 1995, to lessen and eliminate competition in the sale of tampico fiber in the United

States, in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1. A companion criminal information against A&L Mayer Associates, Inc. was filed on \_\_\_\_\_. The civil complaint alleges that as part of the conspiracy, the defendants and co-conspirators among other things:

(a) fixed the prices at which tampico fiber was imported into the United States;

(b) fixed the resale prices for tampico fiber charged by their exclusive United States distributors; and

(c) allocated sales between such distributors.

The complaint seeks a judgment by the Court declaring that the defendants engaged in unlawful combinations and conspiracies in restraint of trade in violation of the Sherman Act. It also seeks an order by the Court to enjoin and restrain the defendants from any such activities or other activities having a similar purpose or effect in the future.

The United States and defendants have stipulated that the proposed final judgment may be entered after compliance with the APPA, unless the United States withdraws its consent.

The Court's entry of the proposed final judgment will terminate this civil action against these defendants, except that the Court will retain jurisdiction over the matter for possible further proceedings to construe, modify or enforce the judgment, or to punish violations of any of its provisions.

#### II

##### *Description of the Practices Giving Rise to the Alleged Violations of the Antitrust Laws*

As defined in the complaint, tampico fiber is a natural vegetable fiber produced by the lechuguilla plant and grown in the deserts of northern Mexico. It is harvested by individual farmers, processed, finished and exported worldwide, where it is used as brush filling material for industrial and consumer brushes. It is available in natural white, bleached white, black, gray and a wide variety of mixtures.

The complaint further alleges that the defendant corporations accounted for aggregate United States sales of tampico of approximately \$10 million during the period January of 1990 through April of 1995. During the period of time covered by the complaint the defendants sold and shipped substantial quantities of tampico fiber in a continuous and uninterrupted flow of interstate commerce from the processing facility of Fibras Saltillo, S.A. de C.V. in Mexico through A&L Mayer Associates, Inc., with offices in New York, to their

exclusive United States distributor and the distributor's customers throughout the United States, including those located in the Eastern District of Pennsylvania. Similarly, the complaint alleges that non-defendant co-conspirators sold and shipped additional substantial quantities of tampico fiber in a continuous and uninterrupted flow of interstate commerce from another processing facility in Mexico through their exclusive United States distributor to customers through the United States, including those located in the Eastern District of Pennsylvania.

The complaint alleges that the defendants engaged in three forms of concerted action and states three causes of action: (1) an agreement to fix import prices, (2) an agreement to fix resale prices, and (3) an agreement to allocate sales. Essentially, the complaint alleges that defendants and their co-conspirators fixed the prices at which tampico fiber was sold to their two exclusive United States distributors, agreed on resale prices with those two distributors and agreed to a percentage allocation of sales volume between those distributors.

The defendants and their co-conspirators went far beyond suggesting resale prices for their distributors. Resale price sheets were provided to the two United States distributors by the defendants and co-conspirators. As a condition of becoming and remaining a United States distributor of tampico, one of these distributors agreed by written contract with one of the defendants to sell at the prices listed on the price sheet. From at least January 1990 on, both of the two exclusive United States' distributors of tampico had identical price sheets supplied by the defendants and co-conspirators, and the majority of sales were made by those distributors at these list prices or other agreed upon prices.

The use of resale price maintenance by the defendants and co-conspirators was designed to and had the effect of monitoring and enforcing the horizontal price-fixing and sales volume allocation agreements between the defendants and co-conspirators. The defendants' conduct had the effect of lessening or eliminating competition between the two United States distributors of tampico in order to maintain prices at artificially high and non-competitive levels.

In furtherance of the conspiracy, the defendants and their co-conspirators, among other things, periodically met, discussed and agreed to new import and resale prices for tampico fiber, and met, discussed and compared the annual

sales volumes of their United States distributors to ensure they were at or about the percentages the defendants and co-conspirators had agreed upon for each.

### III

#### *Explanation of the Proposed Final Judgment*

The United States and the defendants have stipulated that a final judgment, in the form filed with the Court, may be entered by the Court at any time after compliance with the APPA, 15 U.S.C. § 16 (b)–(h). The proposed final judgment provides that the entry of the final judgment does not constitute any evidence against or an admission by any party with respect to any issue of fact or law. Under the provisions of Section 2(e) of the APPA, entry of the proposed final judgment is conditioned upon the Court finding that its entry will be in the public interest.

The United States has filed a criminal information charging A&L Mayer Associates, Inc. and unnamed co-conspirators with a conspiracy to fix the prices and allocate sales of tampico fiber imported into and sold in the United States, in violation of the Sherman Act (15 U.S.C. § 1).

The United States does not routinely file both civil and criminal cases involving the same underlying conduct. It is appropriate to do so in this case, however, because of the extent of the control of the market by a small number of companies conspiring to eliminate price competition in the sale of tampico fiber in the United States through a comprehensive scheme of fixing the price of imported tampico, allocating sales volumes between their exclusive distributors, and dictating the prices at which those distributors resold tampico fiber within the United States.

The proposed final judgment contains two principal forms of relief. First, the defendants are enjoined from repeating the behavior which characterized the tampico fiber conspiracy and from certain other conduct that could have similar anticompetitive effects. Second, the proposed final judgment places affirmative burdens on the defendants to pursue a compliance program directed toward avoiding a repetition of the tampico fiber conspiracy.

#### *A. Prohibited Conduct*

Section IV of the proposed final judgment broadly enjoins each defendant from conspiring to fix prices, allocate sales, discourage new entrants, or otherwise restrict or eliminate the supply of tampico fiber sold to any customer in the United States, (IV (A));

from engaging in any conduct to set or control the resale prices of any distributor to their customers (IV (B), (C) and (D)); and from joining any group whose aims or activities are prohibited by Sections IV (A)–(D) of the final judgment (IV (E)). Specifically, as regards tampico fiber sold in the United States, Sections IV (A)–(E) of the proposed final judgment provide as follows.

Section IV(A) of the proposed final judgment enjoins the defendants from directly or indirectly agreeing with any other processor of tampico fiber or such processor's distributors to (1) Raise, fix, or maintain the prices or other terms or conditions for the sale or supply of tampico fiber; (2) allocate sales volumes, geographic markets or customers for tampico; (3) discourage or eliminate new entrants in the tampico fiber market; and (4) restrict or eliminate the supply of tampico fiber to any customer.

Section IV(B) of the proposed final judgment enjoins the defendants from directly or indirectly entering into, adhering to, maintaining, furthering, enforcing or claiming any right under any contract, agreement, understanding, plan or program with any distributor to fix or maintain the prices at which tampico fiber sold by defendants may be resold or offered for sale by an distributor.

Section IV(C) of the proposed final judgment enjoins the defendants from directly or indirectly adopting, promulgating, suggesting, announcing or establishing any resale pricing policy for tampico fiber.

Section IV(D) of the proposed final judgment enjoins the defendants from threatening any distributor with termination or terminating any distributor for that distributor's pricing; or discussing with any present or potential distributor any decision regarding termination of any other distributor for any reason directly or indirectly related to the latter distributor's resale pricing; provided, however, that nothing herein shall prohibit any defendant from terminating a distributor for any reasons other than the distributor's pricing.

Section IV (E) of the proposed final judgment enjoins the defendants from participating or engaging, directly or indirectly through any trade association, organization or other group, in any activity which is prohibited in Sections IV (A)–(D) of the proposed final judgment.

#### *B. Permitted Communications*

The only exception to the board prohibitions of Section IV of the proposed final judgment is contained in

Section V and concerns any necessary negotiations, arrangements or communications with another processor or such processor's distributors or any agent, broker or representative of such processor or distributor in connection with *bona fide* proposed or actual purchases of tampico fiber from or sales of tampico fiber to that processor or distributor.

#### *C. Defendants' Affirmative Obligations*

Section VI requires that within thirty (30) days of entry of the final judgment, the defendants adopt or pursue an affirmative compliance program directed toward ensuring that their employees comply with the antitrust laws. More specifically, the program must include the designation of an Antitrust Compliance Officer responsible for compliance with the final judgment and reporting any violations of its terms. It further requires that each defendant furnish a copy of the final judgment to each of its officers and directors and each of its employees who is engaged in or has responsibility for or authority over pricing of tampico fiber within sixty (60) days of the date of entry, and to certify that it has distributed those copies and designated an Antitrust Compliance officer within seventy-five (75) days. Copies of the final judgment also must be distributed to anyone who becomes such an officer, director or employee within thirty (30) days of holding that position and to all such individuals annually.

Furthermore, Section VI require each defendant to brief each officer, director and employee engaged in or having responsibility over pricing of tampico fiber as to the defendant's policy regarding compliance with the Sherman Act and with the final judgment, including the advice that his or her violation of the final judgment could result in a conviction for contempt of court and imprisonment and/or fine and that the defendant will make legal advice available to such persons regarding compliance questions or problems. The defendants annually must obtain (and maintain) certifications from each such person that the aforementioned briefing, advice and a copy of the final judgment were received and understood and that he or she is not aware of any violation of the final judgment that has not been reported to the Antitrust Compliance Officer. Finally, each defendant must submit to the plaintiff an annual declaration as to the fact and manner of its compliance with the final judgment.

Under Section VII of the final judgment, the Justice Department will have access, upon reasonable notice, to

the defendants' records and personnel in order to determine defendants' compliance with the judgment.

#### *D. Scope of the Proposed Judgment*

##### (1) Persons Bound by the Decree

The proposed judgment expressly provides in Section III that its provisions apply to each of the defendants and each of their officers, directors, agents and employees, subsidiaries, successors and assigns and to all other persons who receive actual notice of the terms of judgment.

In addition, Section III of the judgment prohibits each of the defendants from selling or transferring all or substantially all of its stock or assets used in its tampico fiber business unless the acquiring party files with the Court its consent to be bound by the provisions of the judgment.

##### (2) Duration of the Judgment

Section IX provides that the judgment will expire on the tenth anniversary of its entry.

#### *Effect of the Proposed Judgment on Competition*

The prohibition terms of Section IV of the judgment are designed to ensure that each defendant will act independently in determining the prices, and terms and conditions at which it will sell or offer to sell tampico fiber, and that there will be no conspiratorial restraints (horizontal or vertical) in the tampico fiber market. The affirmative obligations of Sections VI and VII are designed to insure that each corporate defendant's employees are aware of their obligations under the decree in order to avoid a repetition of behavior that occurred in the tampico fiber industry during the conspiracy period. Compliance with the proposed judgment will prevent price collusion, allocation of sales, markets and customers, concerted activities in restricting new entrants and customers, and resale price restraints by each of the defendants with each other and with other tampico fiber processors and/or distributors.

#### IV

#### *Remedies Available to Potential Private Plaintiffs*

After entry of the proposed final judgment, any potential private plaintiff who might have been damaged by the alleged violation will retain the same right to sue for monetary damages and any other legal and equitable remedies which he/she may have had if the proposed judgment had not been entered. The proposed judgment may not be used, however, as *prima facie*

evidence in private litigation, pursuant to Section 5(a) of the Clayton Act, as amended, 15 U.S.C. § 16(a).

#### V

#### *Procedures Available for Modification of the Proposed Consent Judgment*

The proposed final judgment is subject to a stipulation between the government and the defendants which provides that the government may withdraw its consent to the proposed judgment any time before the Court has found that entry of the proposed judgment is in the public interest. By its terms, the proposed judgment provides for the Court's retention of jurisdiction of this action in order to permit any of the parties to apply to the Court for such orders as may be necessary or appropriate for the modification of the final judgment.

As provided by the APPA (15 U.S.C. § 16), any person wishing to comment upon the proposed judgment may, for a sixty-day (60) period subsequent to the publishing of this document in the Federal Register, submit written comments to the United States Department of Justice, Antitrust Division, Attention: Robert E. Connolly, Chief, Middle Atlantic Office, Suite 650 West, 7th and Walnut Streets, Philadelphia, Pennsylvania 19106. Such comments and the government's response to them will be filed with the Court and published in the Federal Register. The government will evaluate all such comments to determine whether there is any reason for withdrawal of its consent to the proposed judgment.

#### VI

#### *Alternative to the Proposed Final Judgment*

The alternative to the proposed final judgment considered by the Antitrust Division was a full trial of the issues on the merits and relief. The Division considers the substantive language of the proposed judgment to be of sufficient scope and effectiveness to make litigation on the issues unnecessary, as the judgment provides appropriate relief against the violations alleged in the complaint.

#### VII

#### *Determinative Materials and Documents*

No materials or documents were considered determinative by the United States in formulating the proposed Final Judgment. Therefore, none are being filed pursuant to the APPA, 15 U.S.C. § 16(b).

Dated: May 31, 1996.

Anne K. Bingaman,  
*Assistant Attorney General.*  
Joel I. Klein,  
*Deputy Assistant Attorney General.*  
Rebecca P. Dick,  
*Deputy Director of Operations.*  
Robert E. Connolly,  
*Chief, Middle Atlantic Office.*

Respectfully submitted,

Edward S. Panek.  
Michelle A. Pionkowski.  
Roger L. Currier.  
Joseph Muoio,  
*Attorneys, Antitrust Division, U.S. Department of Justice, Middle Atlantic Office, The Curtis Center, Suite 650W, 7th & Walnut Streets, Philadelphia, PA 19106, Tel.: (215) 597-7401.*

[FR Doc. 96-14473 Filed 6-11-96; 8:45 am]

BILLING CODE 4410-01-M

#### **Notice Pursuant to the National Cooperative Research and Production Act of 1993, Center for Emissions Control, Inc.**

Notice is hereby given that, on May 8, 1996, pursuant to Section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. § 4301 *et seq.* ("the Act"), the Center for Emissions Control, Inc. ("CEC") filed written notification simultaneously with the Attorney General and the Federal Trade Commission disclosing changes in its membership. The notification was filed for the purpose of extending the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances. Specifically, CEC advised that Diversey Corporation, Cincinnati, OH; Edjetech Services, Inc., Wellington, OH; Grace Container Products, Lexington, MA; Midbrook Products, Inc., Jackson, MI; Precision Machined Products Association, Brecksville, OH; and REM Sales, Inc., East Granby, CT, have become members. Additionally, Acurex, Inc.; Air Canada; AT&T Corporation; Bethlehem Steel Corporation; Bristol-Meyers Squibb Company; Brulin & Company, Inc.; Camco International, Inc.; Chattanooga Group, Inc.; Connor Formed Metal Products Inc.; Delta Omega Technologies, Inc.; Detrex Corporation; Dunlee, Inc.; Environsolv, Inc.; Exxon Chemical Canada, Inc.; Foamex Products, Inc.; Glidco Organics Corporation; Hahn and Kolb, Inc.; HCC Industries/Hermetic Seal Corporation; Kelsey-Hayes Corporation; Mill Creek Company, Inc.; Oakite Products, Inc.; Occidental Chemical Corporation; Quess Industries, Inc.; Ranco, Inc.; Safety Kleen Equipment System, Inc.; Shell

Chemical Company, Inc.; Swenson Company, Inc.; Syntex Corporation; Teledyne Relays, Inc.; The Upjohn Corporation; Thomson Industries Inc; and UOP, Inc. are no longer members.

On May 13, 1991, the CEC filed its original notification pursuant to Section 6(a) of the Act. The Department published a notice in the Federal Register pursuant to Section 6(b) of the Act on May 13, 1991 (56 FR 24843). The last notification was filed on April 14, 1993. The Department published a notice in the Federal Register on June 22, 1993 (58 FR 33952).

Constance K. Robinson,  
*Director of Operations, Antitrust Division.*  
[FR Doc. 96-14791 Filed 6-11-96; 8:45 am]  
BILLING CODE 4410-01-M

**Notice Pursuant to the National Cooperative Research and Production Act of 1993—Enterprise Computer Telephony Forum**

Notice is hereby given that, on April 17, 1996, pursuant to Section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. § 4301 *et seq.* ("the Act"), the Enterprise Computer Telephony Forum [ECTF] filed written notification simultaneously with the Attorney General and the Federal Trade Commission disclosing changes in its membership. The notification was filed for the purpose of extending the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances. Specifically, Amtelco, McFarland, WI; Sun Microsystems, Mountain View, CA; and Trident Corporation, Fairfax, VA have become Principal Members. Analogic Corporation, Peabody, MA has changed from a Principal Member to an Auditing Member. The following parties have become Auditing Members: Applied Language Technologies, Cambridge, MA; Ascom Telecom, Ltd., Cardiff, UNITED KINGDOM; Bosch Telecom GMBH, Frankfurt, GERMANY; Cognitronics Corporation, Danbury, CT; Industry Technology Research Institute, Hsin-chu, TAIWAN; Itec Telecom, Danbury, CT; Oki Electronic Industry Co., Ltd., Warabi-shi, JAPAN; Pagesmart, Dallas, TX; and Silicon Automation Systems, Ltd., Bangalore, INDIA. Samsung Electronics and Teloquent Communications Corporation are no longer Auditing Members.

No other changes have been made in the membership, nature or objectives of ECTF. Membership remains open, and ECTF intends to file additional written notifications disclosing all changes in membership.

On February 20, 1996, ECTF filed its original notification pursuant to Section 6(a) of the Act. The Department of Justice published a notice in the Federal Register pursuant to Section 6(b) of the Act on May 13, 1996 (61 Fed. Reg. 22074).

Constance K. Robinson,  
*Director of Operations, Antitrust Division.*  
[FR Doc. 96-14792 Filed 6-11-96; 8:45 am]  
BILLING CODE 4410-01-M

**Notice Pursuant to the National Cooperative Research and Production Act of 1993—Hybrid Propulsion System Research Collaboration Agreement**

Notice is hereby given that, on May 13, 1996, pursuant to Section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. § 4301 *et seq.* ("the Act"), Hybrid Propulsion System Research Collaboration Agreement has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing (1) The identities of the parties and (2) the nature and objectives of the venture. The notifications were filed for the purpose of invoking the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances. Pursuant to Section 6(b) of the Act, the identities of the parties are: General Motors Corporation, Detroit, MI; Chrysler Corporation, Highland Park, MI; and Ford Motor Company, Dearborn, MI.

The objective of the venture is to accelerate the development of Hybrid Propulsion System (HPS) research, to minimize inefficient duplication of effort and expense, to maximize leverage of corporate and government resources, and to improve general scientific knowledge. The results will support the Partnership for a New Generation of Vehicles and potentially make the Parties more competitive in world markets. To meet these objectives, the Parties will combine their government-funded HPS research initiatives, collect, exchange and analyze research information, interact with government, auto industry and other entities interested in this area and perform other acts allowed by the National Cooperative Research and Production Act that would advance these goals.

Constance K. Robinson,  
*Director of Operations, Antitrust Division.*  
[FR Doc. 96-14793 Filed 6-11-96; 8:45 am]  
BILLING CODE 4410-01-M

**Notice Pursuant to the National Cooperative Research and Production Act of 1993—Inter Company Collaboration for Aids Drug Development**

Notice is hereby given that, on May 24, 1996, pursuant to Section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. § 4301 *et seq.* ("the Act"), Inter Company Collaboration for Aids Drug Development (The Collaboration) filed written notifications simultaneously with the Attorney General and the Federal Trade Commission reflecting changes in membership. The notifications were filed for the purpose of extending the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances. The changes are that Triangle Pharmaceuticals, Inc., of Durham, North Carolina and Agouron Pharmaceuticals, Inc., of La Jolla, California, have become members of the Collaboration.

No other changes have been made in either the membership or planned activities of the Collaboration. Membership in the Collaboration remains open, and the Collaboration intends to file additional written notifications disclosing all changes in membership.

On My 27, 1993, the Collaboration filed its original notification pursuant to Section 6(a) of the Act. The Department of Justice published a notice in the Federal Register pursuant to Section 6(b) of the Act on July 6, 1993 (58 FR 36223).

The last notification was filed with the Department on May 18, 1995. A notice was published in the Federal Register on February 23, 1996 (61 FR 7019).

Constance K. Robinson,  
*Director of Operations Antitrust Division.*  
[FR Doc. 96-14795 Filed 6-11-96; 8:45 am]  
BILLING CODE 4410-01-M

**Notice Pursuant to the National Cooperative Research and Production Act of 1993 Low Cost Flip Chip Consortium**

Notice is hereby given that, on May 20, 1996, pursuant to § 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. § 4301 *et seq.* ("the Act"), the Low Cost Flip Chip Consortium filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing changes in its membership. The notifications were filed for the purpose of extending the

Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances.

Specifically, the changes are as follows: Motorola Corporation, Schaumburg, IL has been added to the venture.

No changes have been made in the planned activities of the Low Cost Flip Chip Consortium. Membership remains open and the Consortium intends to file additional written notifications disclosing all changes in membership.

On August 30, 1995, the low Cost Flip Chip Consortium filed its original notification pursuant to § 6(a) of the Act. The Department of Justice published a notice in the Federal Register pursuant to § 6(b) of the Act on December 6, 1995 (60 FR 62476).

Constance K. Robinson,

*Director of Operations, Antitrust Division.*

[FR Doc. 96-14790 Filed 6-11-96; 8:45 am]

BILLING CODE 4410-01-M

#### Notice Pursuant to the National Cooperative Research and Production Act of 1993—the TRAAMS Venture Team

Notice is hereby given that, on May 13, 1996, pursuant to Section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. § 4301, *et seq.* ("the Act"), the TRAAMS Venture Team (the "TRAAMS Team") has filed written notifications simultaneously with the Attorney General and with the Federal Trade Commission disclosing (1) the identities of the parties and (2) the nature and objectives of the TRAAMS Venture Team research project. The notifications were filed for the purpose of invoking the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances. Pursuant to Section 6(b) of the Act, the identities of the current participants in the TRAAMS Venture Team are: Terabank Systems, Inc., Santa Clara, CA; Energy Conversion Devices, Inc., Troy, MI; Polaroid Corporation, Cambridge, MA; Science Applications International Corporation, San Diego, CA; Motorola Corporation, Tempe, AZ; Carnegie Mellon University, Pittsburgh, PA; University of Arizona, Tucson, AZ; and NASA/Goddard Space Flight Center, Greenbelt, MD.

The nature and objective of the TRAAMS Team is to perform a research program with the goal of development of a tape-based rapid access affordable mass storage system including a prototype optical tape cartridge and tape drive. The activities of the TRAAMS Team will be partially funded by an award from the Advanced Technology

Program, National Institute of Standards and Technology, Department of Commerce.

Additional information about the TRAAMS Venture Team research project may be obtained by contacting Ms. Janet V. LaFever, Science Applications International Corporation, McLean, VA.

Constance K. Robinson,

*Director of Operations, Antitrust Division.*

[FR Doc. 96-14794 Filed 6-11-96; 8:45 am]

BILLING CODE 4410-01-M

#### Immigration and Naturalization Service

##### Agency Information Collection Activities: Extension of Existing Collection; Comment Request

**ACTION:** Notice of information collection under review; Arrival Departure Record (Transit Without Visa).

The proposed information collection is published to obtain comments from the public and affected agencies. Comments are encouraged and will be accepted for "sixty days" from the date listed at the top of this page in the Federal Register.

Request written comments and suggestions from the public and affected agencies concerning the proposed collection of information. Your comments should address one or more of the following four points:

(1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agencies estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

If you have additional comments, suggestions, or need a copy of the proposed information collection instrument with instructions, or additional information, please contact Richard A. Sloan, 202-616-7600, Director, Policy Directives and Instructions Branch, Immigration and

Naturalization Service, U.S. Department of Justice, Room 5307, 425 I Street, NW., Washington, DC 20536. Additionally, comments and/or suggestions regarding the item(s) contained in this notice, especially regarding the estimated public burden and associated response time may also be directed to Mr. Richard A. Sloan.

Overview of this information collection:

(1) *Type of Information Collection:* Extension of a currently approved collection.

(2) *Title of the Form/Collection:* Arrival Departure Record (Transit Without Visa).

(3) *Agency form number, if any, and the applicable component of the Department of Justice sponsoring the collection:* Form I-94T. Inspection Division, Immigration and Naturalization Service.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:* Primary: Individuals or Households, Business or other for-profit. The information collection is used to track the arrival and departure of aliens under the Transit Without Visa program to ensure compliance with 8 CFR 212.1(f) and 8 CFR 214.2(c).

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* 200,000 responses at 4 minutes (.066) per response.

(6) *An estimate of the total public burden (in hours) associated with the collection:* 13,200 annual burden hours.

If additional information is required contact: Mr. Robert B. Briggs, Clearance Officer, United States Department of Justice, Information Management and Security Staff, Justice Management Division, Suite 850, Washington Center, 1001 G Street, NW., Washington, DC 20530.

Dated: June 7, 1996.

Robert B. Briggs,

*Department Clearance Officer, United States Department of Justice.*

[FR Doc. 96-14872 Filed 6-11-96; 8:45 am]

BILLING CODE 4410-18-M

##### Agency Information Collection Activities: Extension of Existing Collection; Comment Request

**ACTION:** Notice of Information Collection Under Review; Notice of Naturalization Oath Ceremony.

Office of Management and Budget (OMB) approval is being sought for the information collection listed below. This proposed information collection was previously published in the Federal

Register on April 8, 1996, at 61 FR 15516-15517, allowing for a 60-day public comment period. No comments were received by the Immigration and Naturalization Service.

The purpose of this notice is to allow an additional 30 days for public comments from the date listed at the top of this page in the Federal Register. This process is conducted in accordance with 5 Code of Federal Regulations, Part 1320.10.

Written comments and/or suggestions regarding the item(s) contained in this notice, especially regarding the estimated public burden and associated response time, and comments and/or suggestions regarding the seven questions contained on the form, should be directed to the Office of Management and Budget, Office of Regulatory Affairs, Attention: Department of Justice Desk Officer, Washington, DC 20530. Additionally, comments may be submitted to OMB via facsimile to 202-395-7285. Comments may also be submitted to the Department of Justice (DOJ), Justice Management Division, Information Management and Security Staff, Attention: Department Clearance Officer, Suite 850, 1001 G Street, NW, Washington, DC 20530. Additionally, comments may be submitted to DOJ via facsimile to 202-514-1534.

Written comments and suggestions from the public and affected agencies should address one or more of the following points:

(1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency/component, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agencies/components estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(3) Enhanced the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses. The proposed collection is listed below:

(1) *Type of Information Collection:* Extension of a currently approved collection

(2) *Title of the Form/Collection:* Notice of Naturalization Oath Ceremony.

(3) *Agency form number, if any, and the applicable component of the Department of Justice sponsoring the collection:* Form N-445. Office of Examinations, Adjudications, Immigration and Naturalization Service.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:* Primary: Individuals or Households. The information furnished on this form refers to events that may have occurred since the applicant's initial interview and prior to the administration of the oath of allegiance. Several months may elapse between these dates and the information that is provided assists the officer to make and render an appropriate decision on the application.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* 650,000 responses at 5 minutes (.083) per response.

(6) *An estimate of the total public burden (in hours) associated with the collection:* 53,950 annual burden hours.

Public comment on this proposed information collection is strongly encouraged.

Dated: June 7, 1996.

Robert B. Briggs,  
Department Clearance Officer, United States  
Department of Justice.

[FR Doc. 96-14874 Filed 6-11-96; 8:45 am]

BILLING CODE 4410-18-M

## NUCLEAR REGULATORY COMMISSION

[Docket Nos. 50-317 and 50-318]

### Baltimore Gas and Electric Company; Notice of Transfer of Authority To Possess and Operate Calvert Cliffs Nuclear Power Plant, Unit Nos. 1 and 2 From Baltimore Gas and Electric Company to Constellation Energy Corporation

Notice is hereby given that the United States Nuclear Regulatory Commission (Commission) is considering approval under Title 10 of the Code of Federal Regulations (10 CFR), Section 50.80 of the transfer of the licenses to possess and operate Calvert Cliffs Nuclear Power Plant, Unit Nos. 1 and 2 from Baltimore Gas and Electric Company (BGE) to Constellation Energy Corporation. By letter dated April 5, 1996, BGE requested consent to the transfer, pursuant to 10 CFR 50.80, of Operating License Nos. DPR-53 and DPR-69 for Calvert Cliffs Unit Nos. 1 and 2. The approval of the proposed license transfers is requested in connection with the pending merger

between BGE and Potomac Electric Power Company into Constellation Energy Corporation. The proposed license transfers would transfer authority to possess and operate Calvert Cliffs from BGE to Constellation Energy Corporation.

Pursuant to 10 CFR 50.80, the Commission may approve the transfer of a license, after notice to interested persons, upon the Commission's determination that the holder of the license following the transfer is qualified to be a holder of the license and the transfer is otherwise consistent with applicable provisions of law, regulations and orders of the Commission. Additionally, BGE has submitted an application, dated April 5, 1996, to amend the licenses to reflect the transfer of the licenses from BGE to Constellation Energy Corporation.

For further details with respect to this action, see the April 5, 1996, letter, 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 Calvert County Library, Prince Frederick, Maryland 20678.

Dated at Rockville, Maryland, this 6th day of June 1996.

For the Nuclear Regulatory Commission.  
Jocelyn A. Mitchell,  
Acting Director, Project Directorate I-1,  
Division of Reactor Projects—I/II, Office of  
Nuclear Reactor Regulation.

[FR Doc. 96-14898 Filed 6-11-96; 8:45 am]

BILLING CODE 7590-01-P

[Docket No. 50-336]

### Northeast Utilities Service Company; Notice of Consideration of Issuance of Amendment to Facility Operating License, Proposed No Significant Hazards Consideration Determination, and Opportunity for a Hearing

The U.S. Nuclear Regulatory Commission (the Commission) is considering issuance of an amendment to Facility Operating License No. DPR-65 issued to Northeast Nuclear Energy Company, et al. (the licensee) for operation of the Millstone Nuclear Power Station, Unit No. 2, located in New London, Connecticut.

The proposed amendment would provide a one-time change to Millstone Unit 2 (MP2) Technical Specification 3.9.1, "Refueling Operations, Boron Concentration." The proposed change would remove the requirement that the boron concentration in all filled portions of the Reactor Coolant System be "uniform." This change would only

be applicable during the MP2 Cycle 13 mid-cycle core offload.

On March 14, 1996, during surveillance testing, it was discovered that a Low Pressure Safety Injection (LPSI) valve could not be closed. In order to repair the valve, the Shutdown Cooling System will have to be removed from service since it is not possible to isolate flow through a stuck open LPSI valve with Shutdown Cooling in operation. The repair requires an offload of the core to the Spent Fuel Pool which will permit removal of the Shutdown Cooling System from service.

Since the core offload could not have been anticipated at the time of shutdown, the Reactor Coolant System was not borated to the refueling concentration required by the Technical Specifications (TSs).

The proposed one-time TS change would strike the words "of all filled portions" and "uniform and" and add a footnote indicating that, for the Cycle 13 mid-cycle core offload activities, it is acceptable for the boron concentrations of the water volumes in the steam generators and the connecting piping to be as low as 1300 ppm.

The Bases for 3.9.1 would be modified to explain that the boron concentration of the water volumes in the Pressurizer, Shutdown Cooling System, Reactor Vessel, Refueling Pool, and the associated connecting piping will be maintained at 1820 ppm boron concentration. This concentration will be high enough to ensure that, even in the unlikely event that all of the lower boron concentration water from the Steam Generators and connecting piping were to mix with the Shutdown Cooling System water, the resulting Shutdown Cooling System boron concentration will remain greater than the minimum required refueling boron concentration.

Before issuance of the proposed license amendment, the Commission will have made findings required by the Atomic Energy Act of 1954, as amended (the Act) and the Commission's regulations.

The Commission has made a proposed determination that the amendment request involves no significant hazards consideration. Under the Commission's regulations in 10 CFR 50.92, this means that operation of the facility in accordance with the proposed amendment would not (1) involve a significant increase in the probability or consequences of an accident previously evaluated; or (2) create the possibility of a new or different kind of accident from any accident previously evaluated; or (3) involve a significant reduction in a margin of safety. As required by 10 CFR 50.91(a), the licensee has provided its

analysis of the issue of no significant hazards consideration, which is presented below:

The proposed changes do not involve [a significant hazards consideration] because the changes would not:

1. Involve a significant increase in the probability or consequence of an accident previously evaluated.

Refueling Operations Technical Specification 3.9.1 requires that, with the reactor vessel head unbolted or removed, the boron concentration of all filled portions of the Reactor Coolant System and the refueling canal shall be maintained uniform and sufficient to ensure that the more restrictive of the following conditions is met:

- a. Either a Keff of 0.95 or less, or
- b. A boron concentration of greater than or equal to 1720 ppm.

The proposed technical specification change would strike the words "of all filled portions" and "uniform and" and add a footnote indicating that for the Cycle 13 mid-cycle core offload activities, it is acceptable for the boron concentrations of the water volumes in the steam generators and connecting piping to be as low as 1300 ppm. In addition, a surveillance will be added to determine that the boron concentration in the steam generators is greater than or equal to 1300 ppm prior to entry into Mode 6.

The impact of the change on the boron dilution accident and the loss of shutdown cooling flow has been evaluated. Based upon this evaluation, the proposed change to Technical Specification 3.9.1 does not involve a significant increase in the probability or consequences of these accidents. The probability of a boron dilution accident or a loss of shutdown cooling event is not increased by allowing the RCS [reactor coolant system] boron concentration in the stagnant regions of the RCS to be less than the previously required concentration since this is compensated by increasing the boron concentration requirement of the shutdown cooling loop in Mode 6. The consequences of a boron dilution accident would not be increased. In fact, the compensatory measure of increasing the RCS boron concentration in the shutdown cooling loops and reactor vessel core regions will result in a higher initial boron concentration for the boron dilution accident, which would actually increase the time to core criticality, ensuring that the operator has at least 30 minutes to intervene. The consequences of a loss of shutdown cooling flow are not increased as the core would continue to remain greater than 5% subcritical without operator intervention even if the less borated water in the stagnant regions of the RCS reached the core regions without mixing.

2. Create the possibility of a new or different kind of accident from any previously evaluated.

By maintaining 1820 ppm in the active region of the RCS, the required shutdown margin is assured, even in the unlikely event that the stagnant [regions] of the RCS mix with the active regions. Thus, the proposed technical specification change would not create the possibility of a new or different type of accident than previously evaluated.

Further, the proposed change has no impact on the mitigation of a boron dilution accident or a loss of shutdown cooling event.

3. Involve a significant reduction in the margin of safety.

The proposed technical specification change will not result in a significant reduction in the margin of safety. The results of the boron dilution accident, and the loss of shutdown cooling event are not adversely impacted by the modification to the RCS boration technical specification. In the event of a boron dilution accident, the operator will continue to have at least 30 minutes to prevent core criticality. Without crediting operator intervention, the potential core boron reduction associated with a loss of shutdown cooling event will not result in core criticality. As such, there is no reduction in the 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 proposes to determine that the amendment request involves no significant hazards consideration.

The Commission is seeking public comments on this proposed determination. Any comments received within 30 days after the date of publication of this notice will be considered in making any final determination.

Normally, the Commission will not issue the amendment until the expiration of the 30-day notice period. However, should circumstances change during the notice period such that failure to act in a timely way would result, for example, in derating or shutdown of the facility, the Commission may issue the license amendment before the expiration of the 30-day notice period, provided that its final determination is that the amendment involves no significant hazards consideration. The final determination will consider all public and State comments received. Should the Commission take this action, it will publish in the Federal Register a notice of issuance and provide for opportunity for a hearing after issuance. The Commission expects that the need to take this action will occur very infrequently.

Written comments may be submitted by mail to the Rules Review and Directives Branch, Division of Freedom of Information and Publications Services, Office of Administration, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001, 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 July 12, 1996, 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 Learning Resources Center, Three Rivers Community-Technical College, 574 New London Turnpike, Norwich, Connecticut 06360 and the Waterford Library, ATTN: Vince Juliano, 49 Rope Ferry Road, Waterford Connecticut 06385. If a request for a hearing or petition for leave to intervene is filed by the above date, the Commission or an Atomic Safety and Licensing Board, designated by the Commission or by the Chairman of the Atomic Safety and Licensing Board Panel, will rule on the request and/or petition; and the Secretary or the designated Atomic Safety and Licensing Board will issue a notice of hearing or an appropriate order.

As required by 10 CFR 2.714, a petition for leave to intervene shall set forth with particularity the interest of the petitioner in the proceeding, and how that interest may be affected by the results of the proceeding. The petition should specifically explain the reasons why intervention should be permitted with particular reference to the following factors: (1) The nature of the petitioner's right under the Act to be made party to the proceeding; (2) the nature and extent of the petitioner's property, financial, or other interest in the proceeding; and (3) the possible effect of any order which may be entered in the proceeding on the petitioner's interest. The petition should also identify the specific aspect(s) of the subject matter of the proceeding as to

which petitioner wishes to intervene. Any person who has filed a petition for leave to intervene or who has been admitted as a party may amend the petition without requesting leave of the Board up to 15 days prior to the first prehearing conference scheduled in the proceeding, but such an amended petition must satisfy the specificity requirements described above.

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 a hearing is requested, the Commission will make a final determination on the issue of no significant hazards consideration. The final determination will serve to decide when the hearing is held.

If the final determination is that the amendment request involves no significant hazards consideration, the Commission may issue the amendment and make it immediately effective, notwithstanding the request for a hearing. Any hearing held would take place after issuance of the amendment.

If the final determination is that the amendment request involves a significant hazards consideration, any hearing held would take place before the issuance of any amendment.

A request for a hearing or a petition for leave to intervene must be filed with the Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001, Attention: Docketing and Services Branch, or may be delivered to the Commission's Public Document Room, the Gelman Building, 2120 L Street, NW., Washington, DC, by the above date. Where petitions are filed during the last 10 days of the notice period, it is requested that the petitioner promptly so inform the Commission by a toll-free telephone call to Western Union at 1-(800) 248-5100 (in Missouri 1-(800) 342-6700). The Western Union operator should be given Datagram Identification Number N1023 and the following message addressed to Phillip F. McKee: petitioner's name and telephone number, date petition was mailed, plant name, and publication date and page number of this Federal Register notice. A copy of the petition should also be sent to the Office of the General Counsel, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001, and to Ms. L.M. Cuoco, Senior Nuclear Counsel, Northeast Utilities Services Company, Post Office Box 270, Hartford, Connecticut 06141-0270, 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 June 3, 1996, 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 Learning Resources Center, Three Rivers Community-Technical College, 574 New London Turnpike, Norwich, Connecticut 06360 and the Waterford Library, ATTN: Vince Juliano, 49 Rope Ferry Road, Waterford, Connecticut 06385.

Dated at Rockville, Maryland, this 6th day of June 1996.

For the Nuclear Regulatory Commission  
Phillip F. McKee,  
*Director, Northeast Utilities Project  
Directorate, Division of Reactor Projects—  
I/II, Office of Nuclear Reactor Regulation.*  
[FR Doc. 96-14899 Filed 6-11-96; 8:45 am]  
BILLING CODE 7590-01-P

## POSTAL SERVICE

### Privacy Act of 1974; System of Records

**AGENCY:** Postal Service.

**ACTION:** Notice of the addition of a routine use to an existing system of records.

**SUMMARY:** This document publishes notice of the addition of a routine use to Privacy Act system of records USPS 050.020, Finance Records—Payroll System. The routine use allows disclosure of limited information to the Department of Health and Human Services (DHHS) for the purpose of identifying postal employees who are absent parents owing child support obligations and/or parents involved in parental kidnapping and child custody cases.

This notice complies with subsection (e)(11) of the Privacy Act (5 U.S.C. 552a), which requires agencies to publish advance notice of any new use of information in a system of records.

**DATES:** Any interested party may submit written comments on the proposed routine use. This proposal will become effective without further notice July 22, 1996, unless comments received on or before that date result in a contrary determination.

**ADDRESSES:** Written comments on this proposal should be mailed or delivered to Payroll Accounting/Records, United States Postal Service, 475 L'Enfant Plaza SW, Room 8650, Washington, DC 20260-5242. Copies of all written comments will be available at the above address for public inspection and photocopying between 8 a.m. and 4:45 p.m., Monday through Friday.

**FOR FURTHER INFORMATION CONTACT:** Betty E. Sheriff, (202) 268-2608.

**SUPPLEMENTARY INFORMATION:** Privacy Act system of records USPS 050.020, Finance Records—Payroll System, contains records about current and former postal employees. The records are used for handling payroll and other administrative functions. It is proposed that the system be amended to add routine use No. 31, which will allow the Postal Service to disclose limited information to the Department of Health and Human Services (DHHS) for the

purpose of identifying postal employees who are absent parents owing child support obligations and/or individuals involved in parental kidnapping and child custody cases.

The Office of Child Support Enforcement of the DHHS operates a Federal Parent Locator Service (FPLS) pursuant to section 653 of Title 42, U.S.C. The FPLS was established to locate absent parents and later broadened to locate persons involved in parental kidnapping and child custody cases. The FPLS obtains from state child support enforcement agencies information about individuals who owe child support obligations and/or individuals who are involved in the unlawful taking or restraint of a child. It compares that information to federal employment data and returns matching records to the state child support enforcement agencies for follow-up. Proposed routine use No. 31 allows the Postal Service to disclose to DHHS information about current or former postal employees for matching under the FPLS. Information disclosed will be limited to those data elements considered relevant to that purpose.

The proposed routine use is compatible with the purpose for collecting the information; that is, for handling all necessary payroll functions. It is the policy of the Postal Service that postal employees should honor their parental responsibilities and financial obligations. In implementing that policy, the Postal Service helps enforce court orders for child support by garnishment of wages. Because information within system USPS 050.020 is collected to handle payroll functions, and wage garnishment is a primary means of child support enforcement, proposed routine use No. 31 is clearly compatible with the purpose of the system.

Pursuant to 5 U.S.C. 552a(e)(11), interested persons are invited to submit written data, views, or arguments on this proposal. A report of the proposed routine use has been sent to Congress and to the Office of Management and Budget for their evaluation.

USPS Privacy Act system 050.020 was last published in its entirety in the Federal Register on December 4, 1992 (57 FR 57515-57519) and was amended in the Federal Register on November 22, 1993 (58 FR 61718-61719). The Postal Service proposes adding routine use No. 31 as shown below.

## USPS 050.020

### SYSTEM NAME:

Finance Records—Payroll System,  
050.020.

\* \* \* \* \*

### ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

\* \* \* \* \*

31. Disclosure of limited information about current or former postal employees, who are identified through computer matching, may be made to the Department of Health and Human Services pursuant to 42 U.S.C. 653, Parent Locator Service, for further release to state child support enforcement agencies when needed for locating noncustodial parents in order to establish and/or enforce child support obligations and for locating parents who may be involved in parental kidnapping or child custody cases.

Stanley F. Mires,

*Chief Counsel, Legislative.*

[FR Doc. 96-14917 Filed 6-11-96; 8:45 am]

BILLING CODE 7710-12-P

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-37280; File No. SR-Amex-96-19]

### Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change by the American Stock Exchange, Inc., Relating to the Elimination of Position and Exercise Limits for FLEX Equity Options

June 5, 1996.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on May 21, 1996, the American Stock Exchange, Inc. ("Amex" or "Exchange") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

#### I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule change

The Amex, pursuant to Rule 19b-4 of the Act, proposes to amend Exchange

<sup>1</sup> 15 U.S.C. § 78s(b)(1) (1988).

<sup>2</sup> 17 CFR 240.19b-4.

Rule 906G to eliminate position and exercise limits for FLEX Equity 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, the Amex included statements concerning the purpose of and basis for the proposed rule change, and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Amex has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

### A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

#### 1. Purpose

In December 1995, the Exchange filed with the Commission a proposal to expand its Flexible Exchange Option<sup>3</sup> program to include FLEX options on equity securities.<sup>4</sup> That proposal sets forth position limits for FLEX Equity Options at three times the position limits for the corresponding Non-FLEX Equity Options. The Exchange now proposes to eliminate position and exercise limits for FLEX Equity Options.

The Exchange believes that the elimination of such limits is appropriate given the institutional nature of the market for FLEX Equity Options. Currently, according to the Exchange, many large investors find the use of exchange-traded options impractical because of the constraints imposed by position limits. In the alternative, in the absence of position limits, additional investors will be attracted to exchange-traded options, thereby reducing transaction costs as well as improving price efficiency for all exchange-traded option market participants.

The Exchange also believes that FLEX Equity Options, unconstrained by position limits, may become an important part of large investors' investment strategies. For instance, in the absence of position limits, investors will be able to use options to implement

<sup>3</sup>In general, FLEX Equity Options provide investors with the ability to customize basic option features, including size, expiration date, exercise style, and exercise price.

<sup>4</sup>See Securities Exchange Act Release No. 37053 (March 29, 1996), 61 FR 15537 (April 8, 1996) (File No. SR-Amex-95-57) (notice of filing relating to the listing and trading of Flexible Exchange Options on specified equity securities). The Commission notes that the FLEX Equity Option filing is currently being reviewed.

specific viewpoints regarding the underlying common stock; viewpoints that take into account specific near- and long-term expectations for the underlying stock price and judgments on price volatility. Similarly, the ability to execute large exchange-traded option transactions will permit large investors to implement transactions that reflect the strength of their interest in buying or selling the underlying shares, as well as their concern or lack of concern for the timing of the sale.

The Exchange also anticipates that issuers of stocks underlying FLEX Equity Options will use these options, primarily through the sale of puts, as part of their stock repurchase programs.<sup>5</sup> For example, General Electric and Philip Morris each recently announced corporate repurchase programs of approximately 100 million shares. Selling puts to implement these programs would have required the use of one million standardized option contracts, an amount far in excess of the position limits currently available for options on these companies. Similarly, the Amex attached to its proposal twenty-seven news stories of companies whose stocks underlie Amex traded option contracts announcing other corporate repurchase programs during 1995 and the first quarter of 1996.<sup>6</sup> In each instance, the announced size of the buyback significantly exceeded the number of shares that could be repurchased under the position limits currently imposed on FLEX Equity Options. While the Exchange does not expect that corporate issuers will use the sale of put options to buy all the securities that are covered by their repurchase programs, FLEX Equity Options without position limits will at least provide issuers with a meaningful alternative. The inability of corporations to use the sale of exchange-traded equity put options on a significant scale relegates this activity to less transparent markets.

The Exchange believes that making the Exchange-traded options market more accessible to large investors will create more "complete" markets and thereby better serve investors and issuers. In addition, the Exchange believes that institutional investors, large individual investors, and corporate issuers repurchasing their own shares will find FLEX Equity Options without position limits extremely attractive.

<sup>5</sup>The Commission notes that issuers would, of course, need to comply with all applicable provisions of the federal securities laws in conducting their share repurchase programs.

<sup>6</sup>The Commission notes that the new stories are available for examination at the Amex or at the Commission, as specified in Item IV below.

Moreover, this activity will occur in the regulated, transparent domestic FLEX Equity Option markets rather than in offshore markets which do not come under Commission oversight.

Pursuant to Section 13(d) of the Act and the rules and regulations thereunder, the inclusion of any option position is required when reporting the beneficial ownership of more than 5% of any equity security.<sup>7</sup> The integration of options and reporting requirements in the underlying security pursuant to Section 13(d) makes large option positions widely known and easily monitored by regulators and other market participants. In this light, FLEX Equity Options trading will have the transparency of any exchange-traded option transaction or position (open interest) plus the call market focus of liquidity inherent in the Request For Quote ("REQ") process. Similar to non-FLEX options, positions in FLEX options are required to be reported to the Exchange when an account establishes an aggregate same-side of the market position of 200 or more FLEX option contracts. The Exchange's proposal is based on the belief that manipulation is best controlled through active and transparent markets.

The Exchange recognizes the theoretical opportunity for a would-be manipulator to initiate a large FLEX Equity Option RFQ with no intention of actually trading. Such tactics, however, would be patently obvious to Exchange compliance officials as well as to the Commission. Moreover, trading against a bogus FLEX Equity Option RFQ seems readily actionable under existing laws and regulations.

#### 2. Statutory Basis

The Amex believes that the proposed rule change is consistent with Section 6(b) of the Act in general, and with Section 6(b)(5) in particular,<sup>8</sup> in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

### B. Self-Regulatory Organization's Statement on Burden on Competition

The Amex does not believe that the proposed rule change will impose any inappropriate burden on competition.

<sup>7</sup>Pursuant to Rule 13d-3 under the Act, a person will be deemed to be the beneficial owner of a security if that person has the right to acquire beneficial ownership of such security within sixty days, including the right to acquire through the exercise of any option.

<sup>8</sup>15 U.S.C. § 78f(b)(5) (1988).

*C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others*

No written comments were solicited or received with respect to the proposed rule change.

**III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action**

Within 35 days of the publication of this notice in the Federal Register or within such 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 Amex 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 also will be available for inspection and copying at the principal office of the Amex. All submissions should refer to File No. SR-Amex-96-19 and should be submitted by July 3, 1996.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>9</sup>

Margaret H. McFarland,

*Deputy Secretary.*

[FR Doc. 96-14811 Filed 6-11-96; 8:45 am]

**BILLING CODE 8010-01-M**

[Release No. 34-37281; File No. SR-Amex-96-14]

**Self-Regulatory Organizations; Order Approving Proposed Rule Change by the American Stock Exchange, Inc. Relating to the Exchange Board of Governors**

June 6, 1996.

**I. Introduction**

On April 18, 1996, the American Stock Exchange, Inc. ("Amex" or "Exchange") submitted to the Securities and Exchange Commission ("Commission"), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> a proposed rule change to amend Articles II, III and XII of the Exchange Constitution relating to the Board of Governors ("Board"). The proposed amendments would permit the appointment of a second Vice-Chairman, allow for the inclusion of the second highest ranking Exchange executive officer on the Board, and permit certain Governors to be eligible for nomination to a third term. Notice of the proposed rule change appeared in the Federal Register on April 29, 1996.<sup>3</sup> No comment letters were received on the proposed rule change. This order approves the Amex's proposal.

**II. Description of Proposal**

**A. Board Position Amendments**

Article II, Section 2 of the Exchange Constitution currently calls for the appointment of one Vice-Chairman from among the Exchange members serving on the Board, and it has been customary over the years to alternate between the trading floor and "upstairs" communities as the source of that Vice-Chairman. Given the importance of both these communities to the Exchange, the Amex believes that it is desirable to be able to have one Vice-Chairman from each constituency. Accordingly, the proposed amendments will permit (but not require the appointment of two member Vice-Chairmen, and will specify that if there are two Vice-Chairmen, one must come from the trading floor and one from upstairs.<sup>4</sup>

<sup>1</sup> 15 U.S.C. § 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

<sup>3</sup> See Securities Exchange Act Release No. 37138 (April 23, 1996), 61 FR 18765 (April 29, 1996).

<sup>4</sup> Proposed Article II, Section 2 provides that the Board shall elect "one or more" Vice-Chairmen of the Board. The Amex believes that when read together with Article II, Section 3(b), it is clear that there may be only two Vice-Chairmen. Indeed, this approval order only permits the appointment of a maximum of two Vice-Chairmen. The Exchange, however, has represented that it will revise Article II, Section 2 to clarify that a maximum of two Vice-

The Exchange would also like to create a new position of Executive Vice-Chairman, who will be the second highest ranking officer of the Exchange and who will serve as a member of the Board of Governors. The Executive Vice-Chairman would be appointed by the Chairman of the Board, subject to approval by the affirmative vote of a majority of the entire Board. If the Executive Vice-Chairman position is not filled and the Exchange has a President, then the President will serve on the Board. If at any time neither of those offices are filled, then the Chief Executive would be the only non-elected<sup>5</sup> member of the Board.

**B. Third Term Amendment**

It has become apparent to the Exchange that at times the special limitations in the Constitution relating to which kind of Governors can serve third terms at any given time could be a limitation on having the best possible slate of public Governor candidates. Accordingly, it is proposed that the Exchange increase from two to three the maximum number of third term Governors who can be representatives of the public. There is no change to the overall limitation that no more than four third-term Governors may be serving at one time.

**C. Committee Amendments**

The Exchange is also proposing to amend Article XII, Section 2 of the Exchange Constitution, Composition of the Emergency Committee. This Section currently provides that the Emergency Committee is to be composed of the Chairman of the Board of Governors, the Vice-Chairman of the Board, and the three senior members of the Board who are regular, options principal, associate or allied members of the Exchange. The proposed amendment would change the composition of the Committee such that any Executive Vice-Chairman or President would be on the Committee. Moreover, if there are two Vice-Chairmen, both would serve on this Committee.

Finally, the Exchange is proposing to amend Article II, Section 4(a) of the Constitution, Executive Committee, to ensure that if there are two Vice-Chairmen, both are included on the Executive Committee.

Chairmen may be appointed. See Letter from Claudia Crowley, Special Counsel, Legal & Regulatory Policy, Amex, to Glen Barrentine, Division of Market Regulation, Commission, dated April 26, 1996.

<sup>5</sup> The term "non-elected" in this context means not elected by the membership. The Chief Executive, or Chairman of the Board, is elected by the Board of Governors. See Amex Constitution, Article II, Section 2.

<sup>9</sup> 17 CFR 200.30-3(a)(12).

### III. Discussion

The Commission finds that the proposed rule changes are consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange and, specifically, with the requirements of Section 6(b).<sup>6</sup> In particular, the Commission believes that the proposal is consistent with Sections 6(b)(3) and 6(b)(5) of the Act, respectively, in that it assures fair representation of exchange members in the selection of its directors and administration of its affairs,<sup>7</sup> and is consistent with the protection of investors and the public and with the maintenance of fair and orderly markets.<sup>8</sup>

More specifically, the Commission finds that the Amex's proposal to permit the appointment of two member Vice-Chairmen, one from the trading floor and one from the upstairs community, serves to codify the Exchange's custom of equal representation between upstairs members and floor members and is, therefore, consistent with the fair representation requirement of Section 6(b)(3).

Regarding the creation of the Executive Vice-Chairman position, the Commission believes that this should permit the Exchange to improve the administration of its affairs, and is thus consistent with Section 6(b)(3).

With respect to increasing from two to three the maximum number of third term Governors who can be representatives of the public, the Commission believes that the proposal appropriately balances the Exchange's competing interests of needing to retain certain governors with special levels of expertise on its Board, while at the same time continuing to promote diversity of Board representation among the different categories of member firms and, more importantly, the public. The Commission notes that the Exchange will continue to have a prohibition against more than four governors serving a third term and that this should ensure continued diversity of viewpoints on the Exchange's Board, while giving the Exchange the flexibility to extend the number of terms of its

public Board members for sound business reasons.

Finally, the Commission believes that the changes to the Emergency Committee and the Executive Committee are appropriate in light of the creation of the Executive Vice-Chairman and additional Vice-Chairman positions. In this regard, the Commission believes that these changes do not substantially alter the composition of these Committees. Accordingly, the Commission believes that the proposal is consistent with the requirements of Sections 6(b)(3) and 6(b)(5) of the Act.

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,<sup>9</sup> that the proposed rule change (SR-Amex-96-14) is approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>10</sup>

Margaret H. McFarland,

*Deputy Secretary.*

[FR Doc. 96-14906 Filed 6-11-96; 8:45 am]

BILLING CODE 8010-01-M

[Release No. 34-37282; File No. SR-NASD-96-20]

### Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change by National Association of Securities Dealers, Inc. Relating to Changes in the Structure of the NASD Board of Governors

June 6, 1996.

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 May 28, 1996,<sup>1</sup> the National Association of Securities Dealers, Inc. ("NASD" or "Association") filed with the Securities and Exchange Commission ("SEC" or "Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the NASD. The Commission is publishing this notice to

<sup>9</sup> 15 U.S.C. § 78s(b)(2).

<sup>10</sup> 17 CFR 200.30-3(a)(12).

<sup>1</sup> On June 5, 1996, the NASD filed Amendment No. 1 to the proposed rule change. Amendment No. 1 amends Article VI, Section 5 to clarify that, in a contested election, the term of office of a candidate certified by the National Nominating Committee for inclusion on the ballot for the election of Governors pursuant to Article VI, Section 7(c) would be identical to the term of office of a candidate nominated by the National Nominating Committee pursuant to Article VI, Section 7(c). Amendment No. 1 also amends Article VI, Section 7(a) to clarify that any person elected to the Board of Governors must be nominated or certified by the National Nominating Committee. See Letter from Suzanne E. Rothwell, Associate General Counsel, NASD to Katherine A. England, Assistant Director, Division of Market Regulation, Commission (dated June 4, 1996).

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 NASD is proposing to amend the NASD's By-Laws. The text of the proposed rule change is available at the Office of the Secretary, NASD and at the Commission.

#### II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the 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

###### Background

In 1995, the NASD Board of Governors ("Board") appointed The Select Command on Structure and Governance ("Select Committee") to examine the corporate structure, governance, and functions of the NASD and to recommend changes and improvements to enable the NASD to meet its regulatory and business obligations. The Select Committee reported to the Board at its September 1995 meeting and recommended, among other things, the establishment of two distinct subsidiaries; one to perform the regulatory functions of the NASD and the other to run The Nasdaq Stock Market ("Nasdaq"). The Select Committee recommended that each subsidiary have an independent Board of Directors and that the NASD remain as parent corporation overseeing the operations of both subsidiaries.

In January 1996, the NASD created a new subsidiary, NASD Regulation, Inc. ("NASD Regulation") to provide regulation and member and constituent services, with the NASD retaining responsibility for general oversight over the effectiveness of the self-regulatory and business operations of the NASD and its major subsidiaries, Nasdaq and NASD Regulations, and final policymaking authority for the association as a whole. The NASD also

<sup>6</sup> 15 U.S.C. § 78f(b).

<sup>7</sup> 15 U.S.C. § 78f(b)(3). Section 6(b)(3) of the Act also provides that one or more directors be representative of issuers and investors and not associated with a member of the exchange or a broker-dealer. Article II, Section 1(a)(2) of the Amex Constitution provides that at least 12 Board members must be representatives of the public. This rule proposal does not change this requirement in the Exchange Constitution.

<sup>8</sup> 15 U.S.C. § 78f(b)(5).

adopted Select Committee proposals to restructure and reduce the size of the NASD Board and to implement policies to ensure a balance of non-industry and industry representation on the Nasdaq and NASD Regulation Boards. In Notice to Members 95-101 (December 11, 1995), members were asked to vote on By-Law changes to implement these policies. The amendments proposed in the Notice to Members would have: (1) deleted Article V of the NASD By-Laws related to Affiliated Registered Securities Associations; (2) amended Article VII of the NASD By-Laws to create a national nominating committee to nominate persons to serve on the Board of Governors and reconstitute the Board as a majority non-industry Board; and (3) amend Article X to identify the Chief Executive Officers as the most senior executive of the NASD.

Following member approval of the proposed By-Law changes, the SEC, on April 11, 1996, granted temporary approval for a period of 90 days to the amendments to Article VII Sections 4 and 6 that restructure the Board and to a new NASD rule providing for the delegation of the authority to act on behalf of the NASD to NASD Regulation and Nasdaq pursuant to the "Plan of Allocation and Delegation of Functions by NASD to Subsidiaries" ("Delegation Plan").<sup>2</sup> The Delegation Plan sets forth the purposes, functions and governance procedures of the three corporations working together.

In order to complete the reorganization and restructuring contemplated by Notice to Members 95-101 and by the Delegation Plan, the NASD published for member vote further amendments to the NASD By-Laws in Special Notice to Members 96-35.<sup>3</sup> The last date for member vote is June 22, 1996. The proposed rule change filed herein, therefore, incorporates amendments approved by the membership in Notice to Members 95-101 and Special Notice to Members 96-35, that were not previously approved by the Commission in Release 34-37106.

<sup>2</sup> Securities Exchange Act Release No. 37106 (April 11, 1996), 61 FR 16944 (April 18, 1996) ("Release 34-37106"); Securities Exchange Act Release No. 37107 (April 11, 1996), 61 FR 16948 (April 18, 1996) ("Release 34-37107").

<sup>3</sup> The rule language published for member vote in Special Notice to Members 96-35 treated as if adopted the rule changes published for member vote in Notice to Members 95-101 and 96-01 (January 1996). The latter Notice proposed to adopt amendments to the By-Laws to require members to file required documents electronically. These amendments will be filed shortly.

#### Description of Proposed Rule Change<sup>4</sup>

The proposed rule change would permit the NASD to continue the restructuring necessary to implement the principles articulated in the report of the Select Committee. The NASD is proposing to amend its By-Laws to complete the reorganization proposed in Notice to Members 95-101 and to make the By-Laws consistent with the Delegation Plan approved by the Commission in Release 34-37107 by providing for the creation of a national nominating committee to identify and nominate for election industry and non-industry persons to serve on the Board and by deleting sections and language now unnecessary or inappropriate as a result of the Delegation Plan. Included in the proposed rule change is the deletion of nearly all references to the Districts and local administration, because responsibility for the local administration of regulatory affairs under the Delegation Plan has been assigned to NASD Regulation.<sup>5</sup> The NASD is also proposing to amend its By-Laws to conform terms and rule citations to those used in the reorganized NASD Manual, including, for example, replacing the term "Code of Procedure" with "Procedural Rules,"<sup>6</sup> and to make various miscellaneous clarifying corrections to the By-Laws. Changes to punctuation and other minor, non-substantive changes to the rule language will not be described below. Finally, all references to the NASD "Certificate of Incorporation" are being changed to the "Restated Certificate of Incorporation" to reflect that the Certificate of Incorporation has been amended to be consistent with the changes previously adopted and proposed herein to the By-Laws.<sup>7</sup>

#### Article I. Definitions

The NASD is proposing three new definitions. "Delegation Plan" is the term by which the "Plan of Allocation

<sup>4</sup> Certain minor, non-substantive changes from the rule language published for member vote in Special Notice to Members 96-35 have been made to the rule language proposed herein to correct inadvertent errors and, in particular, to ensure that the language of the proposed rule change is consistent with the reorganization of the NASD Manual.

<sup>5</sup> In recognition of this assignment of responsibility, the Board of Directors of NASD Regulation adopted a resolution at its May 13, 1996, meeting to appoint the Districts and District Committees as Districts and District Committees of NASD Regulation.

<sup>6</sup> The new version of the NASD Manual is divided into four sections (Administrative, Corporate Organization, Rules of the Association, and SEC Rules and Regulation T) and includes an expanded key work index. See Notice to Members 96-25 (April 1996).

and Delegation of Functions by NASD to Subsidiaries" will be known.

"Corporations" and "Boards" are the terms that will refer to the NASD, its subsidiaries and their boards of directors.

In addition, the definition of "Act" is proposed to be revised to match the definition in the Delegation Plan, and the definition of "rules of the Corporation" to be consistent with the various references to rule in the reorganized NASD Manual.<sup>7</sup>

Finally, the definition of "bank" is proposed to be revised to expand the reference to national banks to include the citation that such banks are included in the definition that are "under the authority of the Comptroller of the Currency pursuant to the first section of Public Law 87-722 (12 U.S.C. 92a). \* \* \*."

#### Article II. Qualifications of Members and Associated Persons

##### *Sec. 1. Persons Eligible To Become Members and Associated Persons of Members*

No change.

##### *Sec. 2. Authority of Board To Adopt Qualification Requirements*

The NASD is proposing to delete the second sentence of Subsection (c), which authorizes the Board to amend its rules related to qualification requirements without recourse to the membership for vote, because the provision is redundant to Sec. 1(a)(2) of Article VI (formerly Article VII).

##### *Sec. 3. Ineligibility of Certain Persons for Membership or Association*

The NASD is proposing to replace "Code of Procedure" in Subsection (d) with the more general term "Procedural Rules," as used in the reorganized NASD Manual.

##### *Sec. 4. Definition of Disqualification*

No change.

#### Article III. Membership

##### *Sec. 1. Application for Membership*

In a change made necessary by the Delegation Plan, the NASD is proposing to amend Subsection (a)(3) of this provision to extend to the Nasdaq and NASD Regulation Boards, committee members, officers, and employees protection from liability for action taken within the scope of authority, except for

<sup>7</sup> The definition published for member vote in Special Notice to Members 96-35, attached as Exhibit 2 to the proposed rule change, has been modified to eliminate certain rule language that would not have been consistent with the reorganized NASD Manual.

willful malfeasance. See also Article IV, Sec. 2(a)(2) of the By-Laws. The NASD is further proposing to replace "Board of Governors" with "Corporation" in Subsection (a)(4) because it is the corporate staff that requests information and processes applications for membership.

Consistent with the reorganized NASD Manual, which moved membership application procedures to the Procedural Rules, the NASD is proposing to delete rule language in Subsection (b) providing a procedure for the processing of membership applications and to add language requiring that applications be processed in the manner set forth in the Procedural Rules.

The NASD is also proposing to delete Subsection (c), as part of the general deletion references to Districts.

*Sec. 2. Similarity of Membership Names*  
No change.

*Sec. 3. Executive Representative*  
No change.

*Sec. 4. Membership Roll*  
No change.

*Sec. 5. Resignation of Members*

The NASD is proposing to replace "Code of Procedure" with "Procedural Rules."

*Sec. 6. Retention of Jurisdiction*

The NASD is proposing to replace "Code of Procedure" with "Procedural Rules."

*Sec. 7. Transfer and Termination of Membership*

The NASD is proposing to replace "Rules of Fair Practice" with "rules of the Corporation" in Subsection (a).

*Sec. 8. Registration of Branch Offices*

The NASD is proposing to amend Subsection (a) to change the cross-reference from Article VI to Article V, as current Article V is proposed to be deleted.

*Sec. 9. Vote of Branch Offices*

The NASD is proposing to delete this section, as part of general deletion of references to Districts.

*Sec. 10. District Committees' Right to Classify Branches*

The NASD is proposing to delete this section, as part of the general deletion of references to districts.

Article IV. Registered Representatives and Associated Persons

*Sec. 1. Qualification Requirements*

No change.

*Sec. 2. Application for Registration*

The NASD is proposing to amend Subsection (a)(1) to make a non-substantiative correction to replace the word "including" with "and." As in Article III, Sec. 1(a)(3), in a change made necessary by the Delegation Plan, the NASD is proposing to amend Subsection (a)(2) to extend to the Nasdaq and NASD Regulation Boards, committee members, officers, and employees protection from liability for action taken within the scope of authority, except for willful malfeasance. See also Article IV, Sec. 2(a)(2) of the By-Laws. Moreover, all references to the "Board of Governors" are proposed to be changed to "Corporation."

*Sec. 3. Notification by Member to Corporation and Associated Person of Termination; Amendments to Notification*

The NASD is proposing to amend Subsection (a) to replace "Code of Procedure" with "rules of the Corporation," "Board of Governors" with "Corporation," and "Association" with "Corporation."

*Sec. 4. Retention of Jurisdiction*

The NASD is proposing to amend the introduction to replace "Code of Procedure" with "rules of the Corporation" and to amend the introduction and Subsection (b) to clarify that the reference to Rule 8210 is to an NASD rule

Article V. Affiliates

The NASD is proposing to delete Article V to remove an unnecessary reference to the affiliation of other Registered Securities Associations with the NASD. Such affiliations remain authorized by Section 15A of the Act.

Article VI. Dues, Assessments and Other Charges

This Article is proposed to be redesignated as Article V.

*Sec. 1. Power of Board To Fix and Levy Assessments*

The NASD is proposing to replace references to the "Board of Governors" with "Corporation" in the section heading and text, and to delete language that is redundant to Sec. 1(a)(2) of Article VI (formerly Article VII) that authorizes the Board to adopt changes to any fee, due, or assessment without recourse to the membership for vote.

*Sec. 2. Reports of Members*

No change.

*Sec. 3. Suspension or Cancellation of Membership or Registration*

No change.

*Sec. 4. Reinstatement of Membership or Registration*

No change.

Article VII. Board of Governors

This Article is proposed to be redesignated as Article VI.

*Sec. 1. Powers and Authority of Board of Governors*

The NASD is proposing to replace "Rules," with the more general reference to the defined term "rules of the Corporation" in Subsections (a)(2) and (3).

In conjunction with the implementation of the Delegation Plan, the NASD is proposing to add a new Subsection (c) that sets forth the authority of the Corporation to delegate functions, provided that such delegations are not inconsistent with the Delegation Plan.

*Sec. 2. Authority To Suspend for Failure to Submit Required Information*

The NASD is proposing to change numerous references to the "President" in this Subsection (b) and in other By-Law sections to "Chief Executive Officer" to make clear that the person referenced is the most senior executive of the Association.

*Sec. 3. Authority To Take Action Under Emergency or Extraordinary Market Conditions*

The NASD is proposing to eliminate the special committee established by Section 3 that has authority to take action in case of emergencies or extraordinary market conditions when the full Board is not available. Instead, the NASD is proposing that either the full Board, or any person or persons designated by the Board, have authority to take action under emergency conditions.

*Sec. 4. Composition and Qualifications of the Board*

The amendments approved by the Commission in Release No. 34-37106 reorganized Section 4 to Article VII into one provision that reconstituted the NASD Board of Governors as a smaller, majority Non-industry Board, comprising the Chief Executive Officer, one or more Non-Industry Governors representative of issuers and investors and not associated with an NASD member, and one or more Industry Governors. This change reduced the minimum size of the Board from 25 to 5. The rule change also adopted

definitions of Industry and Non-Industry Governors.

The NASD is proposing to reorganize this section into two subsections. The amendments retain in Subsection (a) the new organization of the Board as a majority Non-Industry Board but delete the definitions of Industry and Non-Industry Governor, because those terms, and a definition of Public Governor, are now contained at Section I.A. of the Delegation Plan, which definitions also apply to the Directors of Nasdaq and NASD Regulation.<sup>8</sup> As revised, this section requires that the Board of Governors be composed in a manner consistent with the Delegation Plan and Section 15A(b)(4) of the Securities Exchange Act of 1934. This will ensure that the Board will at all times include full representation of issuers, investors, and the securities industry, with a Non-Industry majority. In addition, new Subsection (b) incorporates from Article X (to be redesignated Article VII), Section 1 rule language providing for the election by the Board of Governors of a Chairman and such other persons having titles as the Board may choose.

#### *Sec. 5. Term of Office of Governors*

The NASD is proposing to amend this provision to provide that, except for the Chief Executive Officer, no Governor may serve more than two consecutive three-year terms; with the limited exception that a Governor appointed to fill a term of less than one year may serve up to two consecutive terms following the expiration of that Governor's current term.

#### *Sec. 6. Filling of Vacancies*

The NASD is proposing to amend this provision to clarify that the filling of vacancies cannot be inconsistent with the Delegation Plan.

#### *Sec. 7. Election of Board Members*

Consistent with Section I.C. of the Delegation Plan, which describes the procedures for the nomination and election of NASD Governors, the NASD is proposing to amend this Section to replace all current language with new Subsections (a), (b) and (c) that provide that the members of the NASD Board of Governors shall be elected by a plurality of the votes of the members of the NASD that are present in person or represented by proxy at the annual meeting of the NASD and entitled to vote. The provision further authorizes the Board of Governors to establish a National Nominating Committee, which will

consist of six or more persons meeting qualifications to be established by the NASD Board in conformance with the Delegation Plan,<sup>9</sup> to nominate or certify one or more persons for each governorship up for election. Any person nominated or certified for election to the Board is required to have demonstrated to the National Nominating Committee that that person meets the applicable qualifications for the position.

#### *Sec. 8. Filling of Vacancies on Board*

This provision is proposed to be deleted consistent with the prior approval of a new provision as Section 6 that provides a procedure for the filling of vacancies on the Board of Governors in Release 34-37106. See discussion above regarding Section 6.

#### *Sec. 9. Meetings of Board*

This section is proposed to be redesignated as Sec. 8. The title of this provision is proposed to be changed to "Meetings of the Board; Quorum; Required Vote." The NASD is proposing to clarify that a quorum of the Board shall consist of a majority of the "total number" of the Governors, rather than a majority of the "members" of the Board. The current rule language permitting meetings by mail, telephone or telegraph is proposed to be amended to permit members of the Board or any committee of the NASD to participate in a meeting by communications facilities that permit the parties to hear and speak to each other. It is further clarified that participation in a meeting constitutes the person's presence at a meeting. The current rule language is retained that no member of the Board shall vote by proxy at any meeting.

#### *Sec. 10. Offices of Corporation*

This section is proposed to be deleted as unnecessary as it restates what is true by operation of law; namely, that the NASD may maintain such offices as the Board of Governors may deem necessary.<sup>10</sup>

<sup>9</sup> See Release 34-37107. The Delegation Plan provides that the National Nominating Committee shall be composed of at least 6 and not more than 9 members, equally balanced between Industry and Non-industry Committee Members (including at least 2 Public Committee Members), with 2 members of the National Nominating Committee selected by NASD, NASD Regulation, and Nasdaq, respectively. The National Nominating Committee shall propose to the NASD Board one or more nominees for each vacant or new Governor position, and for each Director position on the Boards of Directors of the Subsidiaries.

<sup>10</sup> In Notice to Members 95-101, this provision was proposed to be deleted and replaced by new Section 9 that would provide authority to the Board for action by written consent. In Special Notice to Members 96-35, the new provision was proposed

Article VIII. District Committees and Article IX. Nominating Committees

These two articles that address the creation of District Committees and of District Nominating Committees, respectively, are proposed to be deleted, as part of the general deletion of references to Districts. As noted above, the local administration of regulatory affairs under the Delegation Plan is now the responsibility of NASD Regulation, and the NASD Regulation Board has appointed the Districts and District Committees as that corporation's mechanisms for local administration.

#### *Article X. Officers and Employees*

This Article is proposed to be redesignated as Article VII. The words "and Employees" have been deleted from the article title, because this article concerns only officers of the Corporation, not employees.

#### *Sec. 1. Election of Officers of the Board*

This provision has been relocated in Article VII (redesignated VI), Section 4(b). The current rule language specifies that the provision applies to the election by the Board of a "Chairman, one or more Vice Chairmen, and such other officers as it shall deem necessary or advisable. \* \* \*" The proposed rule change in Section 4(b) would modify the rule language of the provision to reference only the Chairman "and such other persons having titles as it shall deem necessary or advisable. \* \* \*"

#### *Sec. 2. Officers of the Corporation*

This Section is proposed to be redesignated as Sec. 1. The title is proposed to be deleted as redundant of the article title. This provision is proposed to be amended to specify that the powers and duties assigned to the Chief Executive Officer of the Corporation may not be inconsistent with the requirements of the Delegation Plan, and therefore deletes the Chief Executive Officer's ex-officio membership in all committees.

#### *Sec. 3. Absence of President*

This Section is proposed to be redesignated as Sec. 2. The title is proposed to be changed to "Absence of Chief Executive Officer."

#### *Sec. 4. Employment of Counsel*

This Section is proposed to be redesignated as Sec. 3.

#### *Sec. 5. Administrative Staff*

This Section is proposed to be redesignated as Sec. 4. The NASD is

to be deleted since this authority is already provided by operation of Delaware General Corporation Law.

<sup>8</sup> See also Section I.C. of the Delegation Plan, which contains provisions applicable to the composition, nomination, and election of Governors. Release 34-37107.

proposing to amend this provision to clarify that determinations of the NASD Board regarding the employment of administrative staff shall not be inconsistent with the Delegation Plan.

*Sec. 6. Compensation of Board and Committee Members*

This Section is proposed to be redesignated as Sec. 5. The provision is proposed to be revised to delete a reference to District Committees and to reference, instead, any committee of the Corporation.

Article XI. Committees

This Article is proposed to be redesignated as Article VIII.

*Sec. 1. National Committees*

The NASD is proposing to delete the section subtitle of "National Committees" as unnecessary in light of the deletion of Section 2 and to amend the provision to clarify that the determination of the Board with respect to the establishment of committees shall not be inconsistent with the Delegation Plan.

*Sec. 2. Committees of the Districts*

This provision is proposed to be deleted, as part of the general deletion of references to Districts.

*Sec. 3. Removal of Committee Member*

This section is proposed to be redesignated as Sec. 2. The NASD is proposing to amend this provision to change the reference to Article XI to Article VIII, and delete references to District Committees.

*Sec. 4. Executive Committee*

This provision is proposed to be deleted, because the authority to create an Executive Committee exists by operation of Delaware General Corporation Law and Section 1 of this Article.

Article XII. Rules of Fair Practice

This Article is proposed to be redesignated as Article IX. The NASD is proposing to delete "Sec. 1," because there is only one section.

Article XIII. Disciplinary Proceedings

This Article is proposed to be redesignated as Article X.

*Sec. 1*

The NASD is proposing to delete language that is redundant to Sec. 1(a)(2) of Article VI (formerly Article VII) that authorizes the Board of Governors to amend the Procedural Rules without the need for membership vote.

*Sec. 2*

No change.

Article XIV. Powers of Board To Prescribe Sanctions

This Article is proposed to be redesignated as Article XI.

*Sec. 1*

The NASD is proposing in Subsection (c) to change the word "Code" to "Arbitration Code" to clarify the reference to this code and in Subsection (e) to delete references to committees that are now committees of NASD Regulation.

Article XV. Uniform Practice Code

This Article is proposed to be redesignated as Article XII.

*Sec. 1. Authority To Adopt Code*

The NASD is proposing to delete the last sentence of the section, which is redundant to Sec. 1(a)(2) of Article VI (formerly Article VII).

*Sec. 2. Administration of Code*

The NASD is proposing to replace the word "code" with "Uniform Practice Code" in the last sentence to clarify the reference.

*Sec. 3. Transactions Subject to Code*

The NASD is proposing to replace the word "code" with "Uniform Practice Code" in the last sentence to clarify the reference.

Article XVI. Limitation of Powers

This Article is proposed to be redesignated as Article XIII.

*Sec. 1. Prohibitions*

No change.

*Sec. 2. Use of Name of Corporation by Members*

No change.

*Sec. 3. Unauthorized Expenditures*

The NASD is proposing to delete the reference to District Committees and replace "President" with "Chief Executive Officer."

*Sec. 4. Conflicts of Interest*

The NASD is proposing to delete language which is now redundant of language of the Procedural Rules in the reorganized NASD Manual.

*Sec. 5. Municipal Securities*

No change.

*Sec. 6. Government Securities*

No change.

Article XVII. Procedure for Adopting Amendments to By-Laws

This Article is proposed to be redesignated as Article XIV. The NASD is proposing to delete "Sec. 1," because there is only one section.

Article XVIII. Corporate Seal

This Article is proposed to be redesignated as Article XV. The NASD is proposing to delete "Sec. 1," because there is only one section.

Article XIX. Checks.

This Article is proposed to be redesignated as Article XVI. The NASD is proposing to delete "Sec. 1," because there is only one section.

Article XX. Annual Financial Statement

This Article is proposed to be redesignated as Article XVII. The NASD is proposing to delete "Sec. 1," because there is only one section.

Requested Effective Date

The NASD is requesting that the proposed rule change be effective no later than July 11, 1996, as the 90-day temporary approval granted by the SEC to the proposed restructuring of the NASD Board and to the Delegation Plan expires on July 10, 1996.

The NASD believes that the proposed rule change is consistent with the provisions of Sections 15A(b)(2), (4), and (6) of the Act<sup>11</sup> in that the restructured organization will: (1) provide for the organization of the Association in a manner that will permit the Association, through its operating subsidiaries, to carry out the purposes of the Act, to comply with the Act, and to enforce compliance by Association members and persons associated with members with the Act, the rules and regulations thereunder, the rules of the Association and the federal securities laws; (2) provide for the fair representation of members, issuers and investors on the Board of Governors and in the administration of the NASD's affairs; and (3) enhance the NASD's ability to protect investors and the public interest in furtherance of the purposes of the Act.

*(B) Self-Regulatory Organization's Statement on Burden on Competition*

The NASD does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act, as amended.

<sup>11</sup> 15 U.S.C. § 78o-3.

*(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. However, in connection with the publication of certain parts of the proposed rule change for member vote in Notice to Members 95-101, attached as Exhibit 2 to rule filing SR-NASD-96-02, the NASD receive three comments, which were attached as Exhibit 4 to SR-NASD-96-02. The NASD's statement on the comments received with respect to Notice to Members 95-101 is set forth in rule filing SR-NASD-96-02 and was published by the Commission in Release 34-37106.

III. Date of Effectiveness of the Proposed Rule Change And Timing for Commission Action

Within 35 days of the date of publication of this notice in the Federal Register or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

A. by order approve such proposed rule change, or

B. institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, N.W., Washington, D.C. 20549. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying 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 the file number in the caption above and should be submitted by July 3, 1996.

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. 96-14905 Filed 6-11-96; 8:45 am]

BILLING CODE 8010-01-M

[Release No. 34-37279; File No. SR-PHLX-96-16]

**Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change by the Philadelphia Stock Exchange Relating to Listing Standards**

June 5, 1996.

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 May 20, 1996, the Philadelphia Stock Exchange, Inc. ("PHLX" or "Exchange") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange, pursuant to Rule 19b-4 of the Act, proposes to revise PHLX Rule 804(2) in order to correct a drafting error, which occurred when the rule was originally adopted.<sup>1</sup> The text of the proposed rule change is as follows [new text is italicized; deleted text is bracketed]:

Alternative Criteria for Listing-Tier I

PHLX Rule 804 No change.

(1) No change.

(2) *At least 1,000,000 shares publicly held with at least [800 public shareholders if the issuer has between 500,000 and 1 million shares publicly held, or at least] 400 public shareholders [if the issuer has either (i) over 1 million shares publicly held or (ii) over 500,000 shares publicly held and average daily trading volume in excess of 2,000 shares per day for a six month period preceding the date of application].*

(3)-(7) No change.

<sup>1</sup> See Securities Exchange Act Release No. 34235 (June 17, 1994), 59 FR 32736 (June 24, 1994) (File No. SR-PHLX-93-31) (order approving proposed rule change establishing new listing and maintenance standards).

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The self-regulatory organization has prepared summaries, set forth in Section A, B, and C below, of the most significant aspects of such statements.

A. *Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change*

1. Purpose

In June 1994, the Exchange adopted new listing criteria for equity securities under a two tier approach.<sup>2</sup> Tier I securities are listed pursuant to Rule 803 or 804. Rule 803 is the main Tier I listing rule whereas Rule 804 sets forth alternative criteria geared toward research and development companies. Both Rule 803 and Rule 804 are based substantially upon the Memorandum of Understanding ("MOU") on the uniform model marketplace exemption that had been approved by the National Association of Securities Dealers, Inc. ("NASD") and the North American Securities Administrative Association, Inc. ("NASAA").<sup>3</sup> Rule 804 was supposed to mirror Alternative 2 of the MOU listing criteria, however, when it was drafted, subsection (2), which sets forth the public float and public shareholder requirements, incorrectly incorporated some of the language of the Alternative 1 public float/shareholder requirements. To date, the Exchange has not listed any companies pursuant to the alternative criteria in Rule 804.

The proposed revision would require issuers that seek listing pursuant to Rule 804 to show that there are at least 1,000,000 shares publicly held and at least 400 public shareholders in the security. This rule once revised would reflect the original intent of the Exchange and the MOU.<sup>4</sup>

<sup>2</sup> *Id.*

<sup>3</sup> See Securities Act Release No. 6810 (Dec. 6, 1988) (publicizing the release of the MOU).

<sup>4</sup> The MOU between NASAA and the NASD contained the same drafting error as the drafting error described herein. The MOU incorrectly incorporated some of the language from Tier I public float and public shareholder requirements into the Tier II requirements. In the MOU between NASAA and the Exchange on October 12, 1994, the same error occurred.

2. Statutory Basis

The proposed rule change is consistent with Section 6 of the Act in general, and in particular, with Section 6(b)(5), in that it is designed to promote just and equitable principles of trade, to prevent fraudulent and manipulative acts and practices, 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, as well as to protect investors and the public interest by adopting minimum standards for prospective issuers which show that the company is appropriate for public trading.

*B. Self-Regulatory Organization's Statement on Burden on Competition*

The PHLX does not believe that the proposed rule change will impose any inappropriate burden on competition.

*C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others*

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days of the publication of this notice in the Federal Register or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

- (A) by order approve 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 Exchange. All submissions should refer to File No. SR-PHLX-96-16 and should be submitted by July 3, 1996.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.  
 Margaret H. McFarland,  
*Deputy Secretary.*  
 [FR Doc. 96-14812 Filed 6-11-96; 8:45 am]  
**BILLING CODE 8010-01-M**

**SMALL BUSINESS ADMINISTRATION**

**[Declaration of Disaster Loan Area #2860]**

**Kentucky; Declaration of Disaster Loan Area**

As a result of the President's major disaster declaration on June 1, 1996, I find that Bullitt and Spencer Counties in the State of Kentucky constitute a disaster area due to damages caused by severe storms, flooding, and tornadoes that occurred on May 28, 1996. Applications for loans for physical damages may be filed until the close of business on July 30, 1996, and for loans for economic injury until the close of business on March 3, 1997 at the address listed below:

U.S. Small Business Administration,  
 Disaster Area 2 Office, One Baltimore Place, Suite 300, Atlanta, GA 30308 or other locally announced locations. In addition, applications for economic injury loans from small businesses located in the following contiguous counties may be filed until the specified date at the above location: Anderson, Hardin, Jefferson, Nelson, and Shelby Counties in Kentucky, and Harrison County in Indiana.

Interest rates are:

	Percent
For Physical Damage:	
Homeowners With Credit Available Elsewhere .....	7.625
Homeowners Without Credit Available Elsewhere .....	3.875
Businesses With Credit Available Elsewhere .....	8.000
Businesses and Non-Profit Organizations Without Credit Available Elsewhere .....	4.000

	Percent
Others (Including Non-Profit Organizations) With Credit Available Elsewhere .....	7.125
For Economic Injury: Businesses and Small Agricultural Cooperatives Without Credit Available Elsewhere .....	4.000

The number assigned to this disaster for physical damage is 286012. For economic injury the numbers are 891600 for Kentucky and 891700 for Indiana.

(Catalog of Federal Domestic Assistance Program Nos. 59002 and 59008)

Dated: June 4, 1996.  
 Bernard Kulik,  
*Associate Administrator for Disaster Assistance.*  
 [FR Doc. 96-14903 Filed 6-11-96; 8:45 am]  
**BILLING CODE 8025-01-P**

**[Declaration of Disaster Loan Area #2859]**

**West Virginia; Declaration of Disaster Loan Area**

As a result of the President's major disaster declaration on May 23, 1996, I find that the Counties of Barbour, Boone, Harrison, Lincoln, Logan, McDowell, Mercer, Mingo, Pendleton, Pocahontas, Raleigh, Randolph, Tucker, Upshur, Wayne, Wetzell, and Wyoming in the State of West Virginia constitute a disaster area due to damages caused by flooding and heavy rains which occurred May 15 through May 21, 1996. Applications for loans for physical damages may be filed until the close of business on July 22, 1996, and for loans for economic injury until the close of business on February 24, 1997 at the address listed below:

U.S. Small Business Administration,  
 Disaster Area 1 Office, 360 Rainbow Blvd. South, 3rd Fl., Niagara Falls, NY 14303

or other locally announced locations. In addition, applications for economic injury loans from small businesses located in the following contiguous counties may be filed until the specified date at the above location: Cabell, Doddridge, Fayette, Grant, Greenbrier, Hardy, Kanawha, Lewis, Marion, Marshall, Monongalia, Preston, Putnam, Summers, Taylor, Tyler, and Webster Counties in West Virginia; Boyd, Lawrence, Martin, and Pike Counties in Kentucky; Garrett County, Maryland; Augusta, Bath, Bland, Buchanan, Giles, Highland, Rockingham, and Tazewell Counties in Virginia; Lawrence and Monroe Counties in Ohio; and Greene County, Pennsylvania.

Interest rates are:

	Percent
For Physical Damage:	
Homeowners With Credit Available Elsewhere .....	7.625
Homeowners Without Credit Available Elsewhere .....	3.875
Businesses With Credit Available Elsewhere .....	8.000
Businesses and Non-Profit Organizations Without Credit Available Elsewhere .....	4.000
Others (Including Non-Profit Organizations) With Credit Available Elsewhere .....	7.125
For Economic Injury: Businesses and Small Agricultural Cooperatives Without Credit Available Elsewhere .....	4.000

The number assigned to this disaster for physical damage is 285906. For economic injury the numbers are 890900 for West Virginia; 891000 for Kentucky; 891100 for Maryland; 891200 for Ohio; 891300 for Pennsylvania; and 891400 for Virginia.

(Catalog of Federal Domestic Assistance Program Nos. 59002 and 59008)

Date: June 4, 1996.

Bernard Kulik,

Associate Administrator for Disaster Assistance.

[FR Doc. 96-14904 Filed 6-11-96; 8:45 am]

BILLING CODE 8025-01-P

**DEPARTMENT OF STATE**

**Office of Defense Trade Controls**

[Public Notice 2395]

**Statutory Debarment Under the International Traffic in Arms Regulations**

**AGENCY:** Office of Defense Trade Controls, Department of State.

**ACTION:** Notice.

**SUMMARY:** Notice is hereby given of which persons have been statutorily debarred pursuant to § 127.7(c) of the International Traffic in Arms Regulations (ITAR) (22 CFR Parts 120-130).

**EFFECTIVE DATE:** June 12, 1996.

**FOR FURTHER INFORMATION CONTACT:** Philip S. Rhoads, Chief, Compliance Enforcement Branch, Office of Defense Trade Controls, Department of State (703-875-6650).

**SUPPLEMENTARY INFORMATION:** Section 38(g)(4)(A) of the Arms Export Control Act (AECA), 22 U.S.C. § 2778, prohibits licenses or other approvals for the export of defense articles and defense

services to be issued to a person, or any party to the export, who has been convicted of violating certain U.S. criminal statutes, including the AECA. The term "person", as defined in 22 C.F.R. § 120.14 of the International Traffic in Arms Regulations (ITAR), means a natural person as well as a corporation, business association, partnership, society, trust, or any other entity, organization or group, including governmental entities. The ITAR, specifically § 126.7(e), defines the term "party to the export" to include the president, the chief executive officer, and other senior officers and officials of the license applicant; the freight forwarders or designated exporting agent of the license applicant; and any consignee or end-user of any item to be exported. The statute permits certain limited exceptions to this prohibition to be made on a case-by-case basis. 22 U.S.C. § 2778(g)(4).

The ITAR, Section 127.7, authorizes the Assistant Secretary of State for Political-Military Affairs to prohibit certain persons convicted of violating, or conspiring to violate, the AECA, from participating directly or indirectly in the export of defense articles or in the furnishing of defense services for which a license or approval is required. Such a prohibition is referred to as a "statutory debarment," which may be imposed on the basis of judicial proceedings that resulted in a conviction for violating, or of conspiring to violate, the AECA. See 22 C.F.R. § 127.7(c). The period for debarment will normally be three years from the date of conviction. At the end of the debarment period, licensing privileges may be reinstated at the request of the debarred person following the necessary interagency consultations, after a thorough review of the circumstances surrounding the conviction, and a finding that appropriate steps have been taken to mitigate any law enforcement concerns, as required by the AECA, 22 U.S.C. § 2778(g)(4).

Statutory debarment is based solely upon a conviction in a criminal proceeding, conducted by a United States court. Thus, the administrative debarment procedures, as outlined in the ITAR, 22 CFR Part 128, are not applicable in such cases.

The Department of State will not consider applications for licenses or requests for approvals that involve any person or any party to the export who has been convicted of violating, or of conspiring to violate, the AECA during the period of statutory debarment. Persons who have been statutorily debarred may appeal to the Under Secretary for International Security

Affairs for reconsideration of the ineligibility determination. A request for reconsideration must be submitted in writing within 30 days after a person has been informed of the adverse decision. 22 CFR § 127.7(d).

The Department of State policy permits debarred persons to apply for reinstatement of export privileges one year after the date of the debarment, in accordance with the AECA, 22 U.S.C. § 2778(g)(4)(A), and the ITAR, Section 127.7. A reinstatement request is made to the Director of the Office of Defense Trade Controls. Any decision to reinstate export privileges can be made only after the statutory requirements under Section 38(g)(4) of the AECA have been satisfied through a process administered by the Office of Defense Trade Controls. If reinstatement is granted, the debarment will be suspended.

Pursuant to the AECA, 22 U.S.C. § 2778(g)(4)(A), and the ITAR, 22 CFR § 127.7, the Assistant Secretary for Political-Military Affairs has statutorily debarred three persons who have been convicted of conspiring to violate or violating the AECA.

Teledyne Industries, Inc. d/b/a Teledyne Wah Chang Albany has been debarred for a one-year period from the date of its most recent conviction pursuant to a Consent Agreement between the Department of State and Teledyne Industries, Inc. d/b/a Teledyne Wah Chang Albany. All other persons listed below have been debarred for a three-year period following the date of their conviction, and have been so notified by a letter from the Office of Defense Trade Controls. Pursuant to ITAR, Section 127.7(c), the names of these persons, their offense, date(s) of conviction and court(s) of conviction are hereby being published in the Federal Register. Anyone who requires additional information to determine whether a person has been debarred should contact the Office of Defense Trade Controls.

This notice involves a foreign affairs function of the United States encompassed within the meaning of the military and foreign affairs exclusion of the Administrative Procedure Act. Because the exercise of this foreign affairs function is discretionary, it is excluded from review under the Administrative Procedure Act.

In accordance with these authorities the following persons are debarred for a period of three years following their conviction for conspiring to violate or violating the AECA (name/address/offense/conviction date/court citation):

1. Teledyne Industries, Inc., d/b/a Teledyne Wah Chang Albany, P.O. Box 460, 1600

- N.E. Old Salem Road, Albany, OR 97231-0460, 18 U.S.C. § 371 (conspiracy to violate 22 U.S.C. § 2778) January 30, 1995, *United States v. Teledyne Industries, et al.*, U.S. District Court, District of Columbia, Criminal Docket No. CR-94-0286
2. Teledyne Industries, Inc., d/b/a Teledyne Wah Chang Albany, P.O. Box 460, 1600 N.E. Old Salem Road, Albany, OR 97231-0460, 18 U.S.C. § 371 (conspiracy to violate 22 U.S.C. § 2778) January 26, 1995, *United States v. Teledyne Industries, et al.*, U.S. District Court, Southern District of Florida, Criminal Docket No. 93-241-CR-Highsmith
3. Swissco Management Group, Inc., 15485 Eagle Nest Lane, #210, Miami Lakes, FL 33014, 18 U.S.C. § 371 (conspiracy to violate 22 U.S.C. § 2778), August 7, 1995, *United States v. Teledyne Industries, et al.*, U.S. District Court, Southern District of Florida, Criminal Docket No. 93-241-CR-Highsmith
4. Edward A. Johnson, 1655 Ferguson Drive, N.W., Albany, OR 18 U.S.C. § 371 (conspiracy to violate 22 U.S.C. § 2778), and 22 U.S.C. § 2778 (violating the AECA), August 7, 1995, *United States v. Teledyne Industries, et al.*, U.S. District Court, Southern District of Florida, Criminal Docket No. 93-241-CR-Highsmith

Dated: May 6, 1996.

Michael T. Dixon,

*Acting Director, Office of Defense Trade Controls, Bureau of Political-Military Affairs, Department of State.*

[FR Doc. 96-14826 Filed 6-11-96; 8:45 am]

BILLING CODE 4710-25-M

## BUREAU OF POLITICAL-MILITARY AFFAIRS, DEPARTMENT OF STATE

### Bureau of Political-Military Affairs

[Public Notice 2404]

#### Imposition of Missile Proliferation Sanctions Against Entities in Iran and North Korea

**AGENCY:** Bureau of Political-Military Affairs Department of State.

**ACTION:** Notice.

**SUMMARY:** The United States Government has determined that entities in North Korea and Iran have engaged in missile technology proliferation activities that require imposition of sanctions pursuant to the Arms Export Control Act and the Export Administration Act of 1979 (as carried out under Executive Order 12424 of August 19, 1994), as amended by the National Defense Authorization Act for Fiscal Year 1991, and the National Defense Authorization Act for Fiscal Years 1992 and 1993.

**EFFECTIVE DATE:** May 24, 1996.

**FOR FURTHER INFORMATION CONTACT:** Vann H. Van Diepen, Office of Chemical, Biological & Missile

Nonproliferation, Bureau of Political-Military Affairs, Department of State, (202-647-1142).

**SUPPLEMENTARY INFORMATION:** Pursuant to Section 73(a)(1) of the Arms Export Control Act (22 U.S.C. 2797b(a)(1)), Section 11B(b)(1) of the Export Administration Act of 1979, as amended (50 U.S.C. app. 2410b(b)(1)), as carried out under Executive Order 12924 of August 19, 1994 (hereinafter cited as the "Export Administration Act of 1979"), and Executive Order 12851 of June 11, 1993, the United States Government determined on May 24, 1996, that the following foreign persons have engaged in missile technology proliferation activities that require the imposition of the sanctions described in Section 73(a)(2)(A) of the Arms Export Control Act (22 U.S.C. 2797b(a)(2)(A)) and Section 11B(b)(1)(B)(i) of the Export Administration Act of 1979 (50 U.S.C. app. 2410b(b)(1)(B)(i)) on these entities and their sub-units and successors:

1. Changgwang Sinyong Corporation (aka the Korea Mining Development Trading Bureau) (North Korea)
2. Ministry of Defense Armed Forces Logistics (Iran)
3. State Purchasing Office (Iran)

Accordingly, the following sanctions are being imposed on these entities and their sub-units and successors:

(A) Licenses for export to the entities described above of Missile Technology Control Regime (MTCR) equipment or technology controlled pursuant to the Export Administration Act of 1979 will be denied for two years; and

(B) Licenses for export to the entities described above of MTCR equipment or technology controlled pursuant to the Arms Export Control Act will be denied for two years; and

(C) No United States Government contracts relating to MTCR equipment or technology and involving the entities described above will be entered into for two years.

Additionally, because of North Korea's status as a country with a non-market economy that was not a member of the Warsaw Pact, the following sanctions must be applied pursuant to section 74(8)(B) of the Arms Export Control Act to all activities of the North Korean government relating to the development or production of missile equipment or technology, as well as all activities of the North Korean government affecting the development or production of electronics, space systems or equipment, and military aircraft:

(A) Licenses for export to the government activities described above of MTCR equipment or technology

controlled pursuant to the Arms Export Control Act will be denied for two years; and

(B) No U.S. government contracts relating to MTCR equipment or technology and involving the government activities described above will be entered into for two years.

With respect to items controlled pursuant to the Export Administration Act of 1979, the export sanction does not apply to exports made pursuant to certain General licenses.

These measures shall be implemented by the responsible agencies as provided in Executive Order 12851 of June 11, 1993.

Dated: May 29, 1996.

Eric D. Newsom,

*Acting Assistant Secretary of State for Political-Military Affairs.*

[FR Doc. 96-14823 Filed 6-11-96; 8:45 am]

BILLING CODE 4710-25-M

## DEPARTMENT OF TRANSPORTATION

### Office of the Secretary

#### Reports, Forms and Recordkeeping Requirements Agency Information Collection Activity Under OMB Review

**AGENCY:** Department of Transportation (DOT), Office of the Secretary (OST).

**ACTION:** Notice.

**SUMMARY:** In compliance with the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*), this notice announces that the Information Collection Request (ICR) abstracted below has been forwarded to the Office of Management and Budget (OMB) for review and comment. The ICR describes the nature of the information collection and its expected cost and burden. The Federal Register Notice with a 60-day comment period soliciting comments on the following collection of information was published on February 15, 1996 [61 FR 6056].

**DATES:** Comments must be submitted on or before July 8, 1996.

**FOR FURTHER INFORMATION CONTACT:** Charles McGuire, (202) 366-1037, and refer to the OMB Control Number.

#### SUPPLEMENTARY INFORMATION:

*Title:* Tariffs.

*OMB Control Number:* 2106-0009.

*Abstract:* Chapter 415 of Title 49 of the United States Code requires that every air carrier and foreign air carrier file with the Department of Transportation (DOT), publish and keep open (i.e. post) for public inspection, tariffs showing all "foreign" or international fares, rates, and related charges for air transportation between

points served by it, and points served by it and any other air carrier or foreign air carrier when through fares, rates and related charges have been established; and showing, to the extent required by DOT regulations, all classifications, rules, regulations, practices, and services in connection with such air transportation. Once tariffs are filed and approved by DOT, they become a legally binding contract of carriage between carriers and users of foreign air transportation.

Part 221 of the Department's Economic Regulations (14 CFR Part 221) sets forth specific technical and substantive requirements governing the filing of tariff material with the DOT Office of International Aviation's Pricing and Multilateral Affairs Division. A carrier initiates a tariff filing whenever it wants to amend an existing tariff for commercial or competitive reasons or when it desires to file a new one. Tariffs filed pursuant to Part 221 are used by carriers, computer reservations systems, travel agents, DOT, other government agencies and the general public to determine the prices, rules and related charges for international passenger air transportation.

DOT needs U.S. and foreign air carrier passenger tariff information to monitor international air commerce, carry out carrier route selections and conduct international negotiations.

**Respondents:** The vast majority of the air carriers filing international tariffs are large operators with revenues in excess of several million dollars each year. Small air carriers operating aircraft with 60 seats or less and 18,000 pounds payload or less that offer on-demand air-taxi service are not required to file such tariffs. Estimated Number of Respondents: 230.

**Annual Reporting and Recordkeeping Burden:** Average Annual Burden Per Respondent: 5,700 hours. Estimated Total Annual Burden on Respondents: 1,300,000 hours.

**Frequency:** Initiated by carrier.

Send comments to the Office of Information and Regulatory Affairs, Office of Management and Budget, 725-17th Street, NW, Washington, DC 20503, Attention OST Desk Officer.

Issued in Washington, DC, on June 6, 1996.  
Phillip A. Leach,

*Clearance Officer, United States Department of Transportation.*

[FR Doc. 96-14880 Filed 6-11-96; 8:45 am]

BILLING CODE 4910-62-P

## Coast Guard

[CGD 96-028]

### Differential Global Positioning System; Geiger Key, Florida: Environmental Assessment and Finding

**AGENCY:** Coast Guard, DOT.

**ACTION:** Notice of availability.

**SUMMARY:** The Coast Guard has prepared an Environmental Assessment (EO) and proposed Finding of No Significant Impact (FONSI) for its activating of a broadcast site of the Differential Global Positioning System (DGPS) service at Geiger Key, Florida. The EA concludes that there will be no significant impact on the environment and that preparation of an Environmental Impact Statement will not be necessary. This Notice announces the availability of the EA and proposed FONSI and solicits comments on them.

**DATES:** Comments must be received on or before July 12, 1996.

**ADDRESS:** Comments may be mailed to the Executive Secretary, Marine Safety Council, U.S. Coast Guard Headquarters, 2100 Second Street SW., Washington, DC 20593-0001, or may be delivered to room 3406 at the same address between 8 a.m. and 3 p.m., Monday through Friday, except Federal holidays. The telephone number is (202) 267-1477.

**FOR FURTHER INFORMATION CONTACT:** LCDR Gene Schlechte, United States Coast Guard Navigation Center, at (703) 313-5888. Copies of the EA and proposed FONSI may be obtained by calling Mr. Schlechte, or by faxing him at (703) 313-5920. Copies of the EA—without enclosures—are also available on the Electronic Bulletin Board System (BBS) at the Navigation Information Service (NIS) in Alexandria, Virginia, at (703) 313-5910. For information on the BBS, call the watchstander of NIS at (703) 313-5900.

#### SUPPLEMENTARY INFORMATION:

##### Request for Comments

Copies of the EA and proposed FONSI are available for the address given in **ADDRESS** and from the numbers given in **FOR FURTHER INFORMATION CONTACT:** The Coast Guard encourages interested persons to submit comments on these documents. It may revise these documents in view of the comments. If it does, it will announce their availability in revised form by a later notice in the Federal Register.

##### Background

As required by Congress, the Coast Guard is preparing to install the equipment necessary to implement the

Differential Global Positioning System (DGPS) service in the southeastern United States. DGPS is a new radionavigation service that improves upon the 100 meter accuracy of the existing Global Positioning System (GPS) to provide an accuracy of 8 to 20 meters. For vessels, this degree of accuracy is critical for precise electronic navigation in harbors and harbor approaches and will reduce the number of vessel groundings, collisions, personal injuries, fatalities, and potential hazardous cargo spills resulting from such incidents.

After extensive study, the Coast Guard has selected a preferred alternative at Geiger Key, Monroe County, FL. Significant concerns were raised about siting DGPS equipment at the alternative site at U.S. Coast Guard Base Key West, Monroe County, FL. The close proximity to the docking facilities to the transmitting antenna has the potential to adversely affect CG and Naval vessels carrying ordnance. The RF radiation of the antenna also has the potential of interfering with Group Key West communications adjacent to the proposed project area. In addition, the density of existing structures and the planned growth (new construction) of the base has the potential to create satellite signal reception errors due to multipath distortion from the buildings, vessels, and vehicles. Such reception errors will adversely effect the performance and safety function of the DGPS service provided. DGPS signal transmissions will be broadcast in the marine radiobeacon frequency band (283.5 to 325 KHz) using less than 35 watts (effective radiated power). Signal transmissions at these low frequencies and power levels have not been found to be harmful to the surrounding environment.

##### Proposed Installation at Geiger Key, FL

(a) **Site**—The Geiger Key, FL, site is located on the U.S. Naval Air Station (NAS) Key West, FL. The site is located on Geiger Key lying and being in the County of Monroe, State of Florida being more particularly described as follows: Lot 1, 2, 3, 4, 5, 30, 31, 32, 33, 34, Block 16 of "Boca Chica Ocean Shores" as recorded in Plat Book 5 at Page 49 of Public Records of Monroe County, Florida.

(b) **Radiobeacon Antenna**—The Coast Guard will install a 74 foot self supporting whip antenna with an accompanying ground plane. A ground plane for this 90 foot antenna consists of approximately 120 copper radials (6 gauge copper wire) installed 6 inches (or less) beneath soil and projecting outward from the antenna base. The

optimum radial length is 300 feet, but this length may be shortened to fit within property boundaries. Wherever possible, a cable plow method will be used in the radial installation to minimize soil disturbance.

(c) *DGPS Antennas*—Two 30 foot masts to support six small (4 inches by 18 inches diameter) receiving antennas will be required. The masts will be installed on concrete foundations. The antennas support the primary and backup reference receivers and integrity monitors.

(d) *Equipment shelter*—DGPS transmitting equipment will be housed in a 10 foot 8 inch by 16 foot 8 inch shelter.

(e) *Utilities*—The Coast Guard proposes to use available commercial power as the primary source for the electronic equipment with battery power as a backup. A telephone line and modem will be required at each site for remote monitoring and operation.

#### Proposed Finding

Implementation of a DGPS service at Geiger Key, FL, is determined to have no significant effect on the quality of the human environment or require preparation of an Environmental Impact Statement.

Dated: June 6, 1996.

N.T. Saunders,

*Rear Admiral, U.S. Coast Guard, Chief, Operations.*

[FR Doc. 96-14865 Filed 6-11-96; 8:45 am]

BILLING CODE 4910-14-M

#### Federal Aviation Administration

##### Notice of Intent To Rule on Application (#96-02-U-00-EUG) To Use the Revenue From a Passenger Facility Charge (PFC) at Eugene Airport/Mahlon Sweet Field, Submitted by the City of Eugene, Eugene, OR

**AGENCY:** Federal Aviation Administration (FAA), DOT.

**ACTION:** Correction to the notice of intent to rule on application to use the revenue from a Passenger Facility Charge (PFC) at Eugene Airport/Mahlon Sweet Field, Eugene, Oregon.

**SUMMARY:** This correction amends the information included in the previously published notice.

In notice document 96-10518 beginning on page 18771 in the issue of Monday, April 29, 1996, in the first column under BACKGROUND INFORMATION, the second paragraph should read as follows:

The following is a brief overview of the application.

Level of proposed PFC: \$3.00.

Actual charge effective date: November 1, 1993.

Proposed charge expiration date: December 1, 1998.

Total estimated PFC revenues: \$1,850,000.00.

Brief description of proposed project: Land acquisition—Phase I.

#### FOR FURTHER INFORMATION CONTACT:

Ms. Carolyn Read, (206) 227-2661; Seattle Airports District Office, SEA-ADO; Federal Aviation Administration; 1601 Lind Avenue SW., Suite 250; Renton, WA 98055-4056. The application may be reviewed in person at this same location.

Issued in Renton, Washington, on June 5, 1996.

David A. Field,

*Manager, Planning, Programming and Capacity Branch, Northwest Mountain Region.*

[FR Doc. 96-14876 Filed 6-11-96; 8:45 am]

BILLING CODE 4910-13-M

#### Office of the Secretary

##### Federal Highway Administration

##### Announcement of Conference on DOT Drug and Alcohol Testing Requirements for Mexican Carriers

**AGENCIES:** Office of the Secretary, Federal Highway Administration, DOT.

**ACTION:** Notice.

**SUMMARY:** The Office of the Secretary (OST), the Federal Highway Administration (FHWA), and the Mexico Secretariat of Communication in Transportation (SCT) are holding a conference on the implementation by Mexican motor carriers of the DOT-required drug and alcohol testing rules. Members of the Mexican motor carrier industry and the general public are invited to attend. The governments of Mexico and the United States are working cooperatively to ensure that companies needing to comply with the rules are able to do so by the effective date. This conference will provide Mexican carriers with an opportunity to meet SCT and DOT personnel and speak with them on all issues related to implementation of these rules. Both governments strongly urge attendance and participation of Mexican carriers.

**DATES:** June 24, 1996.

**ADDRESSES:** Holiday Inn, Downtown Market Square, 318 West Durango Street, San Antonio, Texas. The conference will run from 8:00 a.m. to 5:00 p.m.

**FOR FURTHER INFORMATION CONTACT:**

Mary Bernstein, Director, Office of Drug

Enforcement and Program Compliance, Room 10317, (202-366-3784), 400 7th Street, SW, Washington, D.C. 20590.

**SUPPLEMENTARY INFORMATION:** The Omnibus Transportation Employee Testing Act of 1991 required the Secretary of Transportation to issue regulations requiring controlled substances and alcohol testing of commercial motor vehicle drivers who are subject to the commercial driver's licensing requirements of the Commercial Motor Vehicle Safety Act of 1986, 49 U.S.C. Chapter 313. The final rules, 49 CFR Part 40, "Procedures for Transportation Drug and Alcohol Testing Programs," and 49 CFR Part 382, "Commercial Driver's License Program and Controlled Substance and Alcohol Use and Testing,"

implementing such testing, were published on February 15, 1994. Following comments from United States, foreign industry, and other interested parties, FHWA amended Part 382 on September 22, 1995 (60 FR 49322) and extended the drug and alcohol testing requirements to foreign employers and drivers who drive into the United States. The implementation dates of the requirements of 49 CFR Part 40 and Part 382 will go into effect on July 1, 1996, for large foreign employers (with more than 50 drivers), and will go into effect on July 1, 1997, for small foreign employers (with less than 50 drivers).

Currently, Mexico has a drug and alcohol testing program which is wholly supported and operated by the government. This program will remain intact under the control and enforcement of SCT and run concurrently with, but in addition to, the DOT program requirements. Mexican motor carriers must comply with DOT requirements on their own, by partnering with SCT, or by contracting the requirements to consortia/third party administrators (C/TPA) working on the employer's behalf. The DOT is providing technical assistance in a number of areas to speed up the implementation process.

This conference will be an opportunity for the Mexican employers and their industry associations to have a dialogue with OST, FHWA, and SCT personnel regarding implementation issues, questions, and concerns. OST, FHWA, and SCT personnel will present to the participants a concise overview of the rule requirements. Although the primary purpose of this conference is to meet with Mexican motor carrier industry officials, other Mexican or United States interested parties, such as laboratories, consortia, third party

administrators, manufacturers of alcohol testing equipment, and urine collection and alcohol testing services are invited. SCT has decided, and DOT agrees, that only authorized Mexican personnel will perform medical review officer and substance abuse professional functions.

The conference is free-of-charge to participants. However, attendees will need to pay for the costs of their own travel and hotel accommodations. Hotel rooms will be available at a discounted rate for conference attendees. Please contact the Holiday Inn at (210) 225-3211, for room rate information and to make reservations. Mexican carriers interested in attending this meeting should register by faxing the following information to DOT at (202) 366-3897 by June 19, 1996: name of the individual(s) attending; company name, address, and telephone number; number of drivers in the company; and, number of drivers crossing the border into the United States.

Vendors who want exhibit space will need to work directly with the hotel. Vendors who are planning on attending and having an exhibit, should also register by faxing the following information to DOT at (202) 366-3897 by June 19, 1996: name of the individual(s) attending; company name, address, and telephone number; and, indicate type of service provided (e.g., laboratory, alcohol testing equipment, consortium, etc.).

Issued this 5th day of June, 1996, at Washington, D.C.

Mary Bernstein,

Director, Office of Drug Enforcement and Program Compliance.

[FR Doc. 96-14879 Filed 6-11-96; 8:45 am]

BILLING CODE 4910-62-P

## National Highway Traffic Safety Administration

[Docket No. 96-060; Notice 1]

### Notice of Receipt of Petition for Decision That Nonconforming 1993 Mercedes-Benz 280E and 1994-1996 Mercedes-Benz E280 Passenger Cars Are Eligible for Importation

**AGENCY:** National Highway Traffic Safety Administration, DOT.

**ACTION:** Notice of receipt of petition for decision that nonconforming 1993 Mercedes-Benz 280E and 1994-1996 Mercedes-Benz E280 passenger cars are eligible for importation.

**SUMMARY:** This notice announces receipt by the National Highway Traffic Safety Administration (NHTSA) of a petition for a decision that 1993 Mercedes-Benz

280E and 1994-1996 Mercedes-Benz E280 passenger cars that were not originally manufactured to comply with all applicable Federal motor vehicle safety standards are eligible for importation into the United States because (1) they are substantially similar to vehicles that were originally manufactured for importation into and sale in the United States and that were certified by their manufacturer as complying with the safety standards, and (2) they are capable of being readily altered to conform to the standards.

**DATES:** The closing date for comments on the petition is July 12, 1996.

**ADDRESSES:** Comments should refer to the docket number and notice number, and be submitted to: Docket Section, Room 5109, National Highway Traffic Safety Administration, 400 Seventh St., SW, Washington, DC 20590. [Docket hours are from 9:30 am to 4 pm].

**FOR FURTHER INFORMATION CONTACT:** George Entwistle, Office of Vehicle Safety Compliance, NHTSA (202-366-5306).

#### SUPPLEMENTARY INFORMATION:

##### Background

Under 49 U.S.C. § 30141(a)(1)(A) (formerly section 108(c)(3)(A)(i)(I) of the National Traffic and Motor Vehicle Safety Act (the Act)), a motor vehicle that was not originally manufactured to conform to all applicable Federal motor vehicle safety standards shall be refused admission into the United States unless NHTSA has decided that the motor vehicle is substantially similar to a motor vehicle originally manufactured for importation into and sale in the United States, certified under 49 U.S.C. § 30115 (formerly section 114 of the Act), and of the same model year as the model of the motor vehicle to be compared, and is capable of being readily altered to conform to all applicable Federal motor vehicle safety standards.

Petitions for eligibility decisions may be submitted by either manufacturers or importers who have registered with NHTSA pursuant to 49 CFR Part 592. As specified in 49 CFR 593.7, NHTSA publishes notice in the Federal Register of each petition that it receives, and affords interested persons an opportunity to comment on the petition. At the close of the comment period, NHTSA decides, on the basis of the petition and any comments that it has received, whether the vehicle is eligible for importation. The agency then publishes this decision in the Federal Register.

G&K Automotive Conversion, Inc. of Santa Ana, California ("G&K")

(Registered Importer No. R-90-007) has petitioned NHTSA to decide whether 1993 Mercedes-Benz 280E and 1994-1996 Mercedes-Benz E280 passenger cars are eligible for importation into the United States. The vehicles which G&K believes are substantially similar are the 1993 Mercedes-Benz 300E and 1994-1996 Mercedes-Benz E320. G&K has submitted information indicating that Daimler Benz, A.G., the company that manufactured the 1993 Mercedes-Benz 300E and 1994-1996 Mercedes-Benz E320, certified those vehicles as conforming to all applicable Federal motor vehicle safety standards and offered them for sale in the United States.

The petitioner contends that it carefully compared the 1993 Mercedes-Benz 280E and 1994-1996 Mercedes-Benz E280 to the 1993 Mercedes-Benz 300E and 1994-1996 Mercedes-Benz E320, and found those vehicles to be substantially similar with respect to compliance with most applicable Federal motor vehicle safety standards.

G&K submitted information with its petition intended to demonstrate that the 1993 Mercedes-Benz 280E and 1994-1996 Mercedes-Benz E280, as originally manufactured, conform to many Federal motor vehicle safety standards in the same manner as the 1993 Mercedes-Benz 300E and 1994-1996 Mercedes-Benz E320 that were offered for sale in the United States, or are capable of being readily altered to conform to those standards.

Specifically, the petitioner claims that the 1993 Mercedes-Benz 280E and 1994-1996 Mercedes-Benz E280 are identical to the certified 1993 Mercedes-Benz 300E and 1994-1996 Mercedes-Benz E320 with respect to compliance with Standards Nos. 102 *Transmission Shift Lever Sequence* \* \* \*, 103 *Defrosting and Defogging Systems*, 104 *Windshield Wiping and Washing Systems*, 105 *Hydraulic Brake Systems*, 106 *Brake Hoses*, 107 *Reflecting Surfaces*, 109 *New Pneumatic Tires*, 113 *Hood Latch Systems*, 116 *Brake Fluid*, 124 *Accelerator Control Systems*, 201 *Occupant Protection in Interior Impact*, 202 *Head Restraints*, 203 *Impact Protection for the Driver From the Steering Control System*, 204 *Steering Control Rearward Displacement*, 205 *Glazing Materials*, 206 *Door Locks and Door Retention Components*, 207 *Seating Systems*, 209 *Seat Belt Assemblies*, 210 *Seat Belt Assembly Anchorages*, 211 *Wheel Nuts, Wheel Discs and Hubcaps*, 212 *Windshield Retention*, 216 *Roof Crush Resistance*, 219 *Windshield Zone Intrusion*, and 302 *Flammability of Interior Materials*.

Petitioner also contends that the vehicle is capable of being readily altered to meet the following standards, in the manner indicated:

**Standard No. 101 Controls and Displays:** (a) Substitution of a lens marked "Brake" for a lens with an ECE symbol on the brake failure indicator lamp; (b) placement of the appropriate symbol on the seat belt warning lamp; (c) recalibration of the speedometer/odometer from kilometers to miles per hour.

**Standard No. 108 Lamps, Reflective Devices and Associated Equipment:** (a) Installation of U.S.-model headlamp assemblies and front sidemarkers; (b) installation of U.S.-model taillamp assemblies which incorporate rear sidemarkers; (c) installation of a high mounted stop lamp.

**Standard No. 110 Tire Selection and Rims:** installation of a tire information placard.

**Standard No. 111 Rearview Mirrors:** replacement of the passenger side rear view mirror, which is convex, with a U.S.-model component.

**Standard No. 114 Theft Protection:** installation of a buzzer microswitch in the steering lock assembly, and a warning buzzer.

**Standard No. 115 Vehicle Identification Number:** installation of a VIN plate that can be read from outside the left windshield pillar, and a VIN reference label on the edge of the door or latch post nearest the driver.

**Standard No. 118 Power Window Systems:** rewiring of the power window system so that the window transport is inoperative when the ignition is switched off.

**Standard No. 208 Occupant Crash Protection:** installation of a seat belt warning buzzer. The petitioner states that the vehicle is equipped with an automatic restraint system consisting of a driver's and passenger's side air bag and knee bolsters. The petitioner further states that the vehicle is equipped with Type 2 seat belts in the front and rear outboard designated seating positions, and with a Type 1 seat belt in the rear center designated seating position.

**Standard No. 214 Side Impact Protection:** installation of door beams.

**Standard No. 301 Fuel System Integrity:** installation of a rollover valve in the fuel tank vent line between the fuel tank and the evaporative emissions collection canister.

Additionally, the petitioner states that the bumpers on the 1993 Mercedes-Benz 280E and 1994-1996 Mercedes-Benz E280 must be reinforced to comply with the Bumper Standard found in 49 CFR Part 581.

The petitioner further states that before the vehicle will be imported into the United States, its VIN will be inscribed on fourteen major car parts, and a theft prevention certification label will be affixed, in compliance with the Theft Prevention Standard in 49 CFR Part 541.

Interested persons are invited to submit comments on the petition described above. Comments should refer to the docket number and be submitted to: Docket Section, National Highway Traffic Safety Administration, Room 5109, 400 Seventh Street, S.W., Washington, DC 20590. It is requested but not required that 10 copies be submitted.

All comments received before the close of business on the closing date indicated above will be considered, and will be available for examination in the docket at the above address both before and after that date. To the extent possible, comments filed after the closing date will also be considered. Notice of final action on the petition will be published in the Federal Register pursuant to the authority indicated below.

Authority: 49 U.S.C. 30141(a)(1)(A) and (b)(1); 49 CFR 593.8; delegations of authority at 49 CFR 1.50 and 501.8.

Issued on: June 4, 1996.

Clive Van Orden,

*Chief of Equipment and Imports Division,  
Office of Vehicle Safety Compliance.*

[FR Doc. 96-14938 Filed 6-11-96; 8:45 am]

BILLING CODE 4910-59-P

**[Docket No. 95-66; Notice 2]**

**Decision That Nonconforming 1992 Volkswagen Passat 4-Door Sedan Passenger Cars Are Eligible for Importation**

**AGENCY:** National Highway Traffic Safety Administration (NHTSA), DOT.

**ACTION:** Notice of decision by NHTSA that nonconforming 1992 Volkswagen Passat 4-Door Sedan passenger cars are eligible for importation.

**SUMMARY:** This notice announces the decision by NHTSA that 1992 Volkswagen Passat 4-Door Sedan passenger cars not originally manufactured to comply with all applicable Federal motor vehicle safety standards are eligible for importation into the United States because they are substantially similar to a vehicle originally manufactured for importation into and sale in the United States and certified by its manufacturer as complying with the safety standards (the U.S.-certified version of the 1992

Volkswagen Passat 4-Door Sedan), and they are capable of being readily altered to conform to the standards.

**DATES:** This decision is effective as of July 12, 1996.

**FOR FURTHER INFORMATION CONTACT:** George Entwistle, Office of Vehicle Safety Compliance, NHTSA (202-366-5306).

**SUPPLEMENTARY INFORMATION:**

**Background**

Under 49 U.S.C. § 30141(a)(1)(A) (formerly section 108(c)(3)(A)(i) of the National Traffic and Motor Vehicle Safety Act (the Act)), a motor vehicle that was not originally manufactured to conform to all applicable Federal motor vehicle safety standards shall be refused admission into the United States unless NHTSA has decided that the motor vehicle is substantially similar to a motor vehicle originally manufactured for importation into and sale in the United States, certified under 49 U.S.C. § 30115 (formerly section 114 of the Act), and of the same model year as the model of the motor vehicle to be compared, and is capable of being readily altered to conform to all applicable Federal motor vehicle safety standards.

Petitions for eligibility decisions may be submitted by either manufacturers or importers who have registered with NHTSA pursuant to 49 CFR Part 592. As specified in 49 CFR 593.7, NHTSA publishes notice in the Federal Register of each petition that it receives, and affords interested persons an opportunity to comment on the petition. At the close of the comment period, NHTSA decides, on the basis of the petition and any comments that it has received, whether the vehicle is eligible for importation. The agency then publishes this decision in the Federal Register.

Champagne Imports, Inc. of Lansdale, Pennsylvania ("Champagne") (Registered Importer 90-009) petitioned NHTSA to decide whether 1992 Volkswagen Passat 4-Door Sedan passenger cars are eligible for importation into the United States. NHTSA published notice of the petition on August 25, 1995 (60 FR 44375) to afford an opportunity for public comment. As stated in the notice of petition, the vehicle which Champagne believes is substantially similar is the 1992 Volkswagen Passat 4-Door Sedan that was manufactured for importation into, and sale in, the United States and certified by its manufacturer, Volkswagenwerke A.G., as conforming to all applicable Federal motor vehicle safety standards.

The petitioner claimed that it carefully compared the non-U.S. certified 1992 Volkswagen Passat 4-Door Sedan to its U.S. certified counterpart, and found the two vehicles to be substantially similar with respect to compliance with most Federal motor vehicle safety standards.

Champagne submitted information with its petition intended to demonstrate that the non-U.S. certified 1992 Volkswagen Passat 4-Door Sedan, as originally manufactured, conforms to many Federal motor vehicle safety standards in the same manner as its U.S. certified counterpart, or is capable of being readily altered to conform to those standards.

Specifically, the petitioner claimed that the non-U.S. certified 1992 Volkswagen Passat 4-Door Sedan is identical to its U.S. certified counterpart with respect to compliance with Standards Nos. 102 *Transmission Shift Lever Sequence* \* \* \*, 103 *Defrosting and Defogging Systems*, 104 *Windshield Wiping and Washing Systems*, 105 *Hydraulic Brake Systems*, 106 *Brake Hoses*, 107 *Reflecting Surfaces*, 109 *New Pneumatic Tires*, 113 *Hood Latch Systems*, 116 *Brake Fluid*, 124 *Accelerator Control Systems*, 201 *Occupant Protection in Interior Impact*, 202 *Head Restraints*, 203 *Impact Protection for the Driver From the Steering Control System*, 204 *Steering Control Rearward Displacement*, 205 *Glazing Materials*, 206 *Door Locks and Door Retention Components*, 207 *Seating Systems*, 209 *Seat Belt Assemblies*, 210 *Seat Belt Assembly Anchorages*, 211 *Wheel Nuts, Wheel Discs and Hubcaps*, 212 *Windshield Retention*, 216 *Roof Crush Resistance*, 219 *Windshield Zone Intrusion*, and 302 *Flammability of Interior Materials*.

Additionally, the petitioner stated that the non-U.S. certified 1992 Volkswagen Passat 4-Door Sedan complies with the Bumper Standard found in 49 CFR Part 581.

Petitioner also contended that the vehicle is capable of being readily altered to meet the following standards, in the manner indicated:

Standard No. 101 *Controls and Displays*: (a) Substitution of a lens marked "Brake" for a lens with an ECE symbol on the brake failure indicator lamp; (b) installation of a seat belt warning lamp; (c) recalibration of the speedometer/odometer from kilometers to miles per hour.

Standard No. 108 *Lamps, Reflective Devices and Associated Equipment*: (a) Installation of U.S.-model headlamp assemblies which incorporate sealed beam headlamps; (b) installation of

U.S.-model front and rear sidemarker/reflector assemblies; (c) installation of U.S.-model taillamp assemblies; (d) installation of a high-mounted stop lamp.

Standard No. 110 *Tire Selection and Rims*: Installation of a tire information placard.

Standard No. 111 *Rearview Mirror*: Replacement of the passenger side rearview mirror with a U.S.-model component.

Standard No. 114 *Theft Protection*: Installation of a warning buzzer microswitch and a warning buzzer in the steering lock assembly.

Standard No. 115 *Vehicle Identification Number*: Installation of a VIN plate that can be read from outside the left windshield pillar, and a VIN reference label on the edge of the door or latch post nearest the driver.

Standard No. 118 *Power Window Systems*: Rewiring of the power window system so that the window transport is inoperative when the ignition is switched off.

Standard No. 208 *Occupant Crash Protection*: (a) Installation of a U.S.-model seat belt in the driver's position, or a belt webbing-actuated microswitch inside the driver's seat belt retractor; (b) installation of an ignition switch-actuated seat belt warning lamp and buzzer; (c) installation of a passive restraint system consisting of driver's and passenger's side automatic seat belts, knee bolsters, and associated hardware that have identical part numbers to those found on the vehicle's U.S. certified counterpart. The petitioner stated that the vehicle is equipped at its rear outboard seating positions with combination lap and shoulder restraints that release by means of a single push button, and with a lap belt at its center seating position.

Standard No. 214 *Side Impact Protection*: Installation of reinforcing beams.

Standard No. 301 *Fuel System Integrity*: Installation of a rollover valve in the fuel tank vent line between the fuel tank and the evaporative emissions collection canister.

One comment was received in response to the notice of petition, from Volkswagen of America, Inc. ("Volkswagen"), the United States representative of Volkswagen AG, the vehicle's manufacturer. In its comment, Volkswagen stated that the petition accurately reflected the modifications needed to conform to the non-U.S. certified 1992 Volkswagen Passat 4-Door Sedan to the requirements of Standard Nos. 101, 108, 110, 111, 114, 115, and 118. Volkswagen contended that the petition inaccurately characterized the

modifications that are necessary to conform the vehicle to Standard Nos. 208, 210, 214, 301, and the Bumper Standard found in 49 CFR Part 581.

Volkswagen claimed that the modifications that were described in the petition as necessary to conform the vehicle to Standard Nos. 208 and 210 are "relatively complex" because the vehicle is equipped with a motorized automatic belt system. Volkswagen notes that it has conducted Standard No. 208 crash tests only on 1992 Passats equipped with the 16-valve 4-cylinder engine and the VR6 that are sold in the United States market, as opposed to the 2 liter, 4-cylinder engine that is found on the subject vehicle. Volkswagen observed that the petition failed to note that the vehicle's U.S. certified counterpart is equipped at both front outboard seating positions with manual lap belts in addition to motorized automatic shoulder belts, and that the inboard seat tracks for the U.S. certified vehicle differ from those on the European model to assure compliance with Standard No. 208 crash tests and Standard No. 210 seat belt anchorage strength requirements. The company characterized these differences as critical because the manual lap belt anchorages and the retractor for the motorized shoulder belt are attached to the seat. Volkswagen contended that replacement of the inboard seat tracks, which requires welding, and the addition of reinforced tracks for the motorized automatic belt system in the A-pillar and roof rail are necessary to assure compliance with the Standard No. 208 crash test and the Standard No. 210 seat belt anchorage strength requirements.

Additionally, the company contended that a substantial amount of wiring and a number of electrical switches and relays must be installed for the motorized automatic belt system to work properly and safely. Volkswagen also claimed that the steering wheel on the U.S. certified 1992 Passat differs from that on its European counterpart in that its hub has a "deep dish design" to assure compliance with Standard 208 crash test injury criteria.

Noting that the European version of the 1992 Passat is equipped with reinforcing beams that are required for compliance with the static crush test requirements of Standard 214, Volkswagen challenged the petition's claim that the vehicle must be modified to include this equipment.

Volkswagen also noted that it has only crash tested vehicles with engines and fuel systems sold in the United States for compliance with Standard 301, and that such testing, or least a

detailed analysis is necessary to support the petitioner's claim that the subject vehicle, which is equipped with a 2 liter, 4-cylinder engine that was not certified for the United States, can be modified to comply with the standard.

Volkswagen finally disagreed with the petitioner's claim that the non-U.S. certified 1992 Passat complies with the Bumper Standard. The company contended that critical attachment hardware components and the bumper beam differ in the vehicle's U.S. certified counterpart, and that these parts would have to be installed for the European version of the vehicle to achieve compliance with the standard.

NHTSA accorded Champagne an opportunity to respond to Volkswagen's comments. In its response, Champagne noted that it has been conforming vehicles to Standard Nos. 208 and 210 for over twelve years, and that although the systems that must be installed to achieve such compliance are "relatively complex," their installation is well within Champagne's area of expertise and technical ability. Champagne further noted that NHTSA has not denied import eligibility to a vehicle in the past on the basis that it is equipped with a different size engine from that found on its U.S. certified counterpart. Champagne acknowledged that its petition omitted the fact that the non-U.S. certified 1992 Passat is equipped with manual seat belts at both front outboard seating positions, and asserted that these belts are identical to those found on the vehicle's U.S. certified counterpart. Champagne disputed Volkswagen's contention that it is necessary to change the inboard seat tracks and add reinforced motorized automatic belt system tracks in the A-pillar and roof rail to conform the non-U.S. certified 1992 Passat to Standard Nos. 208 and 210. Champagne asserted that the vehicle is equipped with inboard seat tracks that are identical to, and have the same part number as those found on its U.S. certified counterpart. Moreover, Champagne contended that the vehicle is equipped with reinforced tracks in the A-pillar and with mounting points for the seat belt rail which must be installed to complete the automatic restraint system. Champagne also disputed Volkswagen's contention that welding is necessary to accomplish these modifications. Champagne acknowledged that it must replace the steering wheel on the non-U.S. certified 1992 Passat with one identical to that found on the vehicle's U.S.- certified counterpart.

Champagne also acknowledged that the petition erroneously stated that reinforcing beams would have to be

installed to conform the vehicle to Standard No. 214.

With respect to the Standard No. 301 compliance issues raised by Volkswagen, Champagne observed that Volkswagen applies the same good engineering judgment in the design and installation of the fuel system in its 2 liter engine as it does for those installed in U.S. certified models. Because the body crash characteristics do not differ between U.S. and non-U.S. certified versions of the 1992 Passat, Champagne stated that it can be reasonably assumed that fuel system integrity characteristics are the same as well.

With respect to the Bumper Standard issues raised by Volkswagen, Champagne reiterated its belief that the non-U.S. certified 1992 Passat is equipped with a bumper system identical to that found on its U.S. certified counterpart. However, to eliminate any doubts regarding this matter, Champagne stated that it would reinforce the existing bumper structure and replace the bumper attachment hardware with that found on the vehicle's U.S. certified counterpart.

NHTSA accorded Volkswagen an opportunity to respond to Champagne's comments. In its response, Volkswagen noted that its original comments were based on information provided by the vehicle's manufacturer, and that "[w]ith worldwide production and increasing efforts to harmonize parts, it is possible that the factory made a production change and installed the U.S. versions of the seat tracks in the European vehicle." Volkswagen reiterated that the installation of a motorized automatic belt system requires "significant electrical and mechanical work to assure proper and safe performance," and left to NHTSA's discretion the matter of whether this work should be inspected before the vehicle is released.

NHTSA has reviewed each of the issues that Volkswagen has raised regarding Champagne's petition. NHTSA believes that Champagne's responses adequately address each of those issues. NHTSA further notes that the modifications described by Champagne to conform the vehicle to Standard No. 301 and the Bumper Standard have been performed with relative ease on thousands of nonconforming vehicles imported over the years, and would not preclude the non-U.S. certified 1992 Volkswagen Passat 4-Door Sedan from being found "capable of being readily modified to comply with all Federal motor vehicle safety standards." Additionally, the modifications described by Champagne to conform the vehicle to Standard Nos. 208 and 210 would not preclude such

a finding, in view of the fact that numerous vehicles have been so modified by Champagne and other registered importers in recent years, and that such modifications are well within the expertise of those registered importers. NHTSA has accordingly decided to grant the petition.

#### Vehicle Eligibility Number for Subject Vehicles

The importer of a vehicle admissible under any final decision must indicate on the form HS-7 accompanying entry the appropriate vehicle eligibility number indicating that the vehicle is eligible for entry. VSP-148 is the vehicle eligibility number assigned to vehicles admissible under this decision.

#### Final Determination

Accordingly, on the basis of the foregoing, NHTSA hereby decides that a 1992 Volkswagen Passat 4-Door Sedan not originally manufactured to comply with all applicable Federal motor vehicle safety standards is substantially similar to a 1992 Volkswagen Passat 4-Door Sedan originally manufactured for importation into and sale in the United States and certified under 49 U.S.C. § 30115, and is capable of being readily altered to conform to all applicable Federal motor vehicle safety standards.

Authority: 49 U.S.C. 30141(a)(1)(A) and (b)(1); 49 CFR 593.8; delegations of authority at 49 CFR 1.50 and 501.8.

Issued on: June 6, 1996.

Clive Van Orden,

*Chief of Equipment and Imports Division,  
Office of Vehicle Safety Compliance.*

[FR Doc. 96-14939 Filed 6-11-96; 8:45 am]

BILLING CODE 4910-59-P

#### [Docket No. 96-063; Notice 1]

#### **Notice of Receipt of Petition for Decision That Nonconforming 1993 Mercedes-Benz 220E and 1994-1996 Mercedes-Benz E220 Passenger Cars Are Eligible for Importation**

**AGENCY:** National Highway Traffic Safety Administration, DOT.

**ACTION:** Notice of receipt of petition for decision that nonconforming 1993 Mercedes-Benz 220E and 1994-1996 Mercedes-Benz E220 passenger cars are eligible for importation.

**SUMMARY:** This notice announces receipt by the National Highway Traffic Safety Administration (NHTSA) of a petition for a decision that 1993 Mercedes-Benz 220E and 1994-1996 Mercedes-Benz E220 passenger cars that were not originally manufactured to comply with all applicable Federal motor vehicle

safety standards are eligible for importation into the United States because (1) they are substantially similar to vehicles that were originally manufactured for importation into and sale in the United States and that were certified by their manufacturer as complying with the safety standards, and (2) they are capable of being readily altered to conform to the standards.

**DATES:** The closing date for comments on the petition is July 12, 1996.

**ADDRESSES:** Comments should refer to the docket number and notice number, and be submitted to: Docket Section, Room 5109, National Highway Traffic Safety Administration, 400 Seventh St., SW, Washington, DC 20590. [Docket hours are from 9:30 am to 4 pm]

**FOR FURTHER INFORMATION CONTACT:** George Entwistle, Office of Vehicle Safety Compliance, NHTSA (202-366-5306).

**SUPPLEMENTARY INFORMATION:**

**Background**

Under 49 U.S.C. § 30141(a)(1)(A) (formerly section 108(c)(3)(A)(i)(I) of the National Traffic and Motor Vehicle Safety Act (the Act)), a motor vehicle that was not originally manufactured to conform to all applicable Federal motor vehicle safety standards shall be refused admission into the United States unless NHTSA has decided that the motor vehicle is substantially similar to a motor vehicle originally manufactured for importation into and sale in the United States, certified under 49 U.S.C. § 30115 (formerly section 114 of the Act), and of the same model year as the model of the motor vehicle to be compared, and is capable of being readily altered to conform to all applicable Federal motor vehicle safety standards.

Petitions for eligibility decisions may be submitted by either manufacturers or importers who have registered with NHTSA pursuant to 49 CFR Part 592. As specified in 49 CFR 593.7, NHTSA publishes notice in the Federal Register of each petition that it receives, and affords interested persons an opportunity to comment on the petition. At the close of the comment period, NHTSA decides, on the basis of the petition and any comments that it has received, whether the vehicle is eligible for importation. The agency then publishes this decision in the Federal Register.

G&K Automotive Conversion, Inc. of Santa Ana, California ("G&K") (Registered Importer No. R-90-007) has petitioned NHTSA to decide whether 1993 Mercedes-Benz 220E and 1994-

1996 Mercedes-Benz E220 passenger cars are eligible for importation into the United States. The vehicles which G&K believes are substantially similar are the 1993 Mercedes-Benz 300E and 1994-1996 Mercedes-Benz E320. G&K has submitted information indicating that Daimler Benz, A.G., the company that manufactured the 1993 Mercedes-Benz 300E and 1994-1996 Mercedes-Benz E320, certified those vehicles as conforming to all applicable Federal motor vehicle safety standards and offered them for sale in the United States.

The petitioner contends that it carefully compared the 1993 Mercedes-Benz 220E and 1994-1996 Mercedes-Benz E220 to the 1993 Mercedes-Benz 300E and 1994-1996 Mercedes-Benz E320, and found those vehicles to be substantially similar with respect to compliance with most applicable Federal motor vehicle safety standards.

G&K submitted information with its petition intended to demonstrate that the 1993 Mercedes-Benz 220E and 1994-1996 Mercedes-Benz E220, as originally manufactured, conform to many Federal motor vehicle safety standards in the same manner as the 1993 Mercedes-Benz 300E and 1994-1996 Mercedes-Benz E320 that were offered for sale in the United States, or are capable of being readily altered to conform to those standards.

Specifically, the petitioner claims that the 1993 Mercedes-Benz 220E and 1994-1996 Mercedes-Benz E220 are identical to the certified 1993 Mercedes-Benz 300E and 1994-1996 Mercedes-Benz E320 with respect to compliance with Standards Nos. 102 *Transmission Shift Lever Sequence* \* \* \*, 103 *Defrosting and Defogging Systems*, 104 *Windshield Wiping and Washing Systems*, 105 *Hydraulic Brake Systems*, 106 *Brake Hoses*, 107 *Reflecting Surfaces*, 109 *New Pneumatic Tires*, 113 *Hood Latch Systems*, 116 *Brake Fluid*, 124 *Accelerator Control Systems*, 201 *Occupant Protection in Interior Impact*, 202 *Head Restraints*, 203 *Impact Protection for the Driver From the Steering Control System*, 204 *Steering Control Rearward Displacement*, 205 *Glazing Materials*, 206 *Door Locks and Door Retention Components*, 207 *Seating Systems*, 209 *Seat Belt Assemblies*, 210 *Seat Belt Assembly Anchorages*, 211 *Wheel Nuts, Wheel Discs and Hubcaps*, 212 *Windshield Retention*, 216 *Roof Crush Resistance*, 219 *Windshield Zone Intrusion*, and 302 *Flammability of Interior Materials*.

Petitioner also contends that the vehicle is capable of being readily

altered to meet the following standards, in the manner indicated:

Standard No. 101 *Controls and Displays*: (a) Substitution of a lens marked "Brake" for a lens with an ECE symbol on the brake failure indicator lamp; (b) placement of the appropriate symbol on the seat belt warning lamp; (c) recalibration of the speedometer/odometer from kilometers to miles per hour.

Standard No. 108 *Lamps, Reflective Devices and Associated Equipment*: (a) Installation of U.S.-model headlamp assemblies and front sidemarkers; (b) installation of U.S.-model taillamp assemblies which incorporate rear sidemarkers; (c) installation of a high mounted stop lamp.

Standard No. 110 *Tire Selection and Rims*: Installation of a tire information placard.

Standard No. 111 *Rearview Mirrors*: Replacement of the passenger side rear view mirror, which is convex, with a U.S.-model component.

Standard No. 114 *Theft Protection*: Installation of a buzzer microswitch in the steering lock assembly, and a warning buzzer.

Standard No. 115 *Vehicle Identification Number*: Installation of a VIN plate that can be read from outside the left windshield pillar, and a VIN reference label on the edge of the door or latch post nearest the driver.

Standard No. 118 *Power Window Systems*: Rewiring of the power window system so that the window transport is inoperative when the ignition is switched off.

Standard No. 208 *Occupant Crash Protection*: Installation of a seat belt warning buzzer. The petitioner states that the vehicle is equipped with an automatic restraint system consisting of a driver's and passenger's side air bag and knee bolsters. The petitioner further states that the vehicle is equipped with Type 2 seat belts in the front and rear outboard designated seating positions, and with a Type 1 seat belt in the rear center designated seating position.

Standard No. 214 *Side Impact Protection*: Installation of door beams.

Standard No. 301 *Fuel System Integrity*: Installation of a rollover valve in the fuel tank vent line between the fuel tank and the evaporative emissions collection canister.

Additionally, the petitioner states that the bumpers on the 1993 Mercedes-Benz 220E and 1994-1996 Mercedes-Benz E220 must be reinforced to comply with the Bumper Standard found in 49 CFR Part 581.

The petitioner further states that before the vehicle will be imported into the United States, its VIN will be

inscribed on fourteen major car parts, and a theft prevention certification label will be affixed, in compliance with the Theft Prevention Standard in 49 CFR Part 541.

Interested persons are invited to submit comments on the petition described above. Comments should refer to the docket number and be submitted to: Docket Section, National Highway Traffic Safety Administration, Room 5109, 400 Seventh Street, S.W., Washington, DC 20590. It is requested but not required that 10 copies be submitted.

All comments received before the close of business on the closing date indicated above will be considered, and will be available for examination in the docket at the above address both before and after that date. To the extent possible, comments filed after the closing date will also be considered. Notice of final action on the petition will be published in the Federal Register pursuant to the authority indicated below.

Authority: 49 U.S.C. 30141(a)(1)(A) and (b)(1); 49 CFR 593.8; delegations of authority at 49 CFR 1.50 and 501.8.

Issued on: June 4, 1996.

Clive Van Orden,

*Chief of Equipment and Imports Division  
Office of Vehicle Safety Compliance.*

[FR Doc. 96-14940 Filed 6-11-96; 8:45 am]

BILLING CODE 4910-59-P

**[Docket No. 96-062; Notice 1]**

**Notice of Receipt of Petition for Decision That Nonconforming "1993-1996 Mercedes-Benz 220TE" Station Wagons Are Eligible for Importation**

**AGENCY:** National Highway Traffic Safety Administration, DOT.

**ACTION:** Notice of receipt of petition for decision that nonconforming "1993-1996 Mercedes-Benz 220TE" station wagons are eligible for importation.

**SUMMARY:** This notice announces receipt by the National Highway Traffic Safety Administration (NHTSA) of a petition for a decision that "1993-1996 Mercedes-Benz 220TE" station wagons that were not originally manufactured to comply with all applicable Federal motor vehicle safety standards are eligible for importation into the United States because (1) they are substantially similar to vehicles that were originally manufactured for importation into and sale in the United States and that were certified by their manufacturer as complying with the safety standards, and (2) they are capable of being readily altered to conform to the standards.

**DATES:** The closing date for comments on the petition is July 12, 1996.

**ADDRESSES:** Comments should refer to the docket number and notice number, and be submitted to: Docket Section, Room 5109, National Highway Traffic Safety Administration, 400 Seventh St., SW, Washington, DC 20590. [Docket hours are from 9:30 am to 4 pm]

**FOR FURTHER INFORMATION CONTACT:** George Entwistle, Office of Vehicle Safety Compliance, NHTSA (202-366-5306).

**SUPPLEMENTARY INFORMATION:**

**Background**

Under 49 U.S.C. § 30141(a)(1)(A) (formerly section 108(c)(3)(A)(i)(I) of the National Traffic and Motor Vehicle Safety Act (the Act)), a motor vehicle that was not originally manufactured to conform to all applicable Federal motor vehicle safety standards shall be refused admission into the United States unless NHTSA has decided that the motor vehicle is substantially similar to a motor vehicle originally manufactured for importation into and sale in the United States, certified under 49 U.S.C. § 30115 (formerly section 114 of the Act), and of the same model year as the model of the motor vehicle to be compared, and is capable of being readily altered to conform to all applicable Federal motor vehicle safety standards.

Petitions for eligibility decisions may be submitted by either manufacturers or importers who have registered with NHTSA pursuant to 49 CFR Part 592. As specified in 49 CFR 593.7, NHTSA publishes notice in the Federal Register of each petition that it receives, and affords interested persons an opportunity to comment on the petition. At the close of the comment period, NHTSA decides, on the basis of the petition and any comments that it has received, whether the vehicle is eligible for importation. The agency then publishes this decision in the Federal Register.

G&K Automotive Conversion, Inc. of Santa Ana, California ("G&K") (Registered Importer No. R-90-007) has petitioned NHTSA to decide whether "1993-1996 Mercedes-Benz 220TE" station wagons are eligible for importation into the United States. The vehicles which G&K believes are substantially similar are the 1993 Mercedes-Benz 300TE and 1994-1996 Mercedes-Benz E320 wagon. G&K has submitted information indicating that Daimler Benz, A.G., the company that manufactured the 1993 Mercedes-Benz 300TE and 1994-1996 Mercedes-Benz E320 wagon, certified those vehicles as

conforming to all applicable Federal motor vehicle safety standards and offered them for sale in the United States.

The petitioner contends that it carefully compared a "1994 Mercedes-Benz 220TE" to the 1993 Mercedes-Benz 300TE and 1994-1996 Mercedes-Benz E320 wagon, and found the vehicles to be substantially similar with respect to compliance with most applicable Federal motor vehicle safety standards.

G&K submitted information with its petition intended to demonstrate that the "1994 Mercedes-Benz 220TE", as originally manufactured, conforms to many Federal motor vehicle safety standards in the same manner as the 1993 Mercedes-Benz 300TE and 1994-1996 Mercedes-Benz E320 wagon that were offered for sale in the United States, or is capable of being readily altered to conform to those standards.

Specifically, the petitioner claims that the "1993-1996 Mercedes-Benz 220TE" is identical to the certified 1993 Mercedes-Benz 300TE and 1994-1996 Mercedes-Benz E320 wagon with respect to compliance with Standards Nos. 102 *Transmission Shift Lever Sequence* \* \* \*, 103 *Defrosting and Defogging Systems*, 104 *Windshield Wiping and Washing Systems*, 105 *Hydraulic Brake Systems*, 106 *Brake Hoses*, 107 *Reflecting Surfaces*, 109 *New Pneumatic Tires*, 113 *Hood Latch Systems*, 116 *Brake Fluid*, 124 *Accelerator Control Systems*, 201 *Occupant Protection in Interior Impact*, 202 *Head Restraints*, 203 *Impact Protection for the Driver From the Steering Control System*, 204 *Steering Control Rearward Displacement*, 205 *Glazing Materials*, 206 *Door Locks and Door Retention Components*, 207 *Seating Systems*, 209 *Seat Belt Assemblies*, 210 *Seat Belt Assembly Anchorages*, 211 *Wheel Nuts, Wheel Discs and Hubcaps*, 212 *Windshield Retention*, 216 *Roof Crush Resistance*, 219 *Windshield Zone Intrusion*, and 302 *Flammability of Interior Materials*.

Petitioner also contends that the vehicle is capable of being readily altered to meet the following standards, in the manner indicated:

Standard No. 101 *Controls and Displays*: (a) Substitution of a lens marked "Brake" for a lens with an ECE symbol on the brake failure indicator lamp; (b) placement of the appropriate symbol on the seat belt warning lamp; (c) recalibration of the speedometer/odometer from kilometers to miles per hour.

Standard No. 108 *Lamps, Reflective Devices and Associated Equipment*: (a) Installation of U.S.-model headlamp

assemblies and front sidemarkers; (b) installation of U.S.-model taillamp assemblies which incorporate rear sidemarkers; (c) installation of a high mounted stop lamp.

**Standard No. 110 *Tire Selection and Rims:*** Installation of a tire information placard.

**Standard No. 111 *Rearview Mirrors:*** Replacement of the passenger side rear view mirror, which is convex, with a U.S.-model component.

**Standard No. 114 *Theft Protection:*** Installation of a buzzer microswitch in the steering lock assembly, and a warning buzzer.

**Standard No. 115 *Vehicle Identification Number:*** Installation of a VIN plate that can be read from outside the left windshield pillar, and a VIN reference label on the edge of the door or latch post nearest the driver.

**Standard No. 118 *Power Window Systems:*** Rewiring of the power window system so that the window transport is inoperative when the ignition is switched off.

**Standard No. 208 *Occupant Crash Protection:*** Installation of a seat belt warning buzzer. The petitioner states that the vehicle is equipped with an automatic restraint system consisting of a driver's and passenger's side air bag and knee bolsters. The petitioner further states that the vehicle is equipped with Type 2 seat belts in the front and rear outboard designated seating positions, and with a Type 1 seat belt in the rear center designated seating position.

**Standard No. 214 *Side Impact Protection:*** Installation of door beams.

**Standard No. 301 *Fuel System Integrity:*** Installation of a rollover valve in the fuel tank vent line between the fuel tank and the evaporative emissions collection canister.

Additionally, the petitioner states that the bumpers on the "1993-1996 Mercedes-Benz 220TE" must be reinforced to comply with the Bumper Standard found in 49 CFR Part 581.

The petitioner further states that before the vehicle will be imported into the United States, its VIN will be inscribed on fourteen major car parts, and a theft prevention certification label will be affixed, in compliance with the Theft Prevention Standard in 49 CFR Part 541.

Interested persons are invited to submit comments on the petition described above. Comments should refer to the docket number and be submitted to: Docket Section, National Highway Traffic Safety Administration, Room 5109, 400 Seventh Street, S.W., Washington, DC 20590. It is requested but not required that 10 copies be submitted.

All comments received before the close of business on the closing date indicated above will be considered, and will be available for examination in the docket at the above address both before and after that date. To the extent possible, comments filed after the closing date will also be considered. Notice of final action on the petition will be published in the Federal Register pursuant to the authority indicated below.

Authority: 49 U.S.C. 30141(a)(1)(A) and (b)(1); 49 CFR 593.8; delegations of authority at 49 CFR 1.50 and 501.8.

Dated: June 4, 1996.

Clive Van Orden,

*Chief of Equipment and Imports Division,  
Office of Vehicle Safety Compliance.*

[FR Doc. 96-14941 Filed 6-11-96; 8:45 am]

BILLING CODE 4910-59-P

### **Surface Transportation Board<sup>1</sup>**

**[STB Finance Docket No. 32970]**

#### **BHP Copper, Inc.—Continuance in Control Exemption—BHP Nevada Railroad Company**

BHP Copper, Inc. (BHP Copper), a noncarrier holding company, has filed a notice of exemption to continue in control of BHP Nevada Railroad Company (BNR), upon BNR's becoming a Class III rail carrier. Consummation was expected to occur on or after May 31, 1996.

BNR, a noncarrier, has concurrently filed a notice of exemption in *BHP Nevada Railroad Company—Acquisition and Operation Exemption—Northern Nevada Railroad Corporation*, STB Finance Docket No. 32969, to acquire approximately 150.241 miles of rail lines of Northern Nevada Railroad Corporation (NN) in Elko and White Pine Counties, NV.

BHP Copper controls two other nonconnecting Class III rail carriers: San Manuel Arizona Railroad Company (SMA) and Magma Arizona Railroad Company (MAA) operating in Arizona.

BHP Copper states that: (1) BNR will not connect with any of the other railroads in its corporate family; (2) the continuance in control is not part of a series of anticipated transactions that would connect BNR with any other railroad in its corporate family; and (3) the transaction does not involve a Class

I railroad. The transaction therefore is exempt from the prior approval requirements of 49 U.S.C. 11343. See 49 CFR 1180.2(d)(2).

Under 49 U.S.C. 10502(g), the Board may not use its exemption authority to relieve a rail carrier of its statutory obligation to protect the interests of its employees. Section 11326(c), however, does not provide for labor protection for transactions under sections 11324 and 11325 that involve only Class III railroad carriers. Because this transaction involves Class III rail carriers only, the Board, under the statute, may not impose labor protective conditions for this transaction.

Petitions to revoke the exemption under 49 U.S.C. 10502(d) may be filed at any time. The filing of a petition to reopen will not automatically stay the transaction.

An original and 10 copies of all pleadings, referring to STB Finance Docket No. 32970, must be filed with the Surface Transportation Board, Office of the Secretary, Case Control Branch, 1201 Constitution Avenue, N.W., Washington, DC 20423 and served on: Fritz R. Kahn, Fritz R. Kahn, P.C., Suite 750 West, 1100 New York Avenue, NW., Washington, DC 20005-3934.

Decided: June 4, 1996.

By the Board, David M. Konschnik,  
Director, Office of Proceedings.

Vernon A. Williams,

*Secretary.*

[FR Doc. 96-14900 Filed 6-11-96; 8:45 am]

BILLING CODE 4915-00-P

**[STB Finance Docket No. 32969]**

#### **BHP Nevada Railroad Company—Acquisition and Operation Exemption—Northern Nevada Railroad Corporation**

BHP Nevada Railroad Company (BNR), a noncarrier, has filed a verified notice of exemption under 49 CFR 1150.31 to acquire the rail lines and other assets of Northern Nevada Railroad Corporation (NN) from milepost 0.0 at Cobre to the end of the line at milepost 148.941 at Riepetown, and from milepost 0.0 at McGill Junction to the end of the line at milepost 1.3 at McGill, a total of approximately 150.241 miles in Elko and White Pine Counties, NV.

<sup>1</sup> The ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803, which was enacted on December 29, 1995, and took effect on January 1, 1996, abolished the Interstate Commerce Commission and transferred certain functions to the Surface Transportation Board (Board). This notice relates to functions that are subject to Board jurisdiction pursuant to 49 U.S.C. 11323-24.

<sup>1</sup> The ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803, which was enacted on December 29, 1995, and took effect on January 1, 1996, abolished the Interstate Commerce Commission and transferred certain functions to the Surface Transportation Board (Board). This notice relates to functions that are subject to Board jurisdiction pursuant to 49 U.S.C. 10901.

Consummation was expected to occur on or after May 31, 1996.

This proceeding is related to *BHP Copper—Continuance in Control Exemption—BHP Nevada Railroad Company*, STB Finance Docket No. 32970, wherein BHP Copper has concurrently filed a verified notice to continue to control BHP Nevada Railroad Company, upon its becoming a Class III rail carrier.

If the notice contains false or misleading information, the exemption is void *ab initio*. Petitions to revoke the exemption under 49 U.S.C. 10502(d) may be filed at any time. The filing of a petition to revoke will not automatically stay the transaction.

An original and 10 copies of all pleadings, referring to STB Finance Docket No. 32969, must be filed with the Surface Transportation Board, Office of the Secretary, Case Control Branch, 1201 Constitution Avenue, N.W., Washington, DC 20423 and served on: Fritz R. Kahn, Fritz R. Kahn, P.C., Suite 750 West, 1100 New York Avenue, NW, Washington, DC 20005-3934.

Decided: June 4, 1996.

By the Board, David M. Konschnik,  
Director, Office of Proceedings.

Vernon A. Williams,  
Secretary.

[FR Doc. 96-14901 Filed 6-11-96; 8:45 am]

BILLING CODE 4915-00-P

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## DEPARTMENT OF THE TREASURY

### Customs Service

#### Proposed Collection; Comment Request; Commercial Invoices

**AGENCY:** U.S. Customs, Department of the Treasury.

**ACTION:** Notice and request for comments.

**SUMMARY:** As part of its continuing effort to reduce paperwork and respondent burden, Customs invites the general public and other Federal agencies to comment on an information collection requirement concerning the Commercial Invoices. This request for comment is being made pursuant to the Paperwork Reduction Act of 1995 (Public Law 104-13; 44 U.S.C. 3505(c)(2)).

**DATES:** Written comments should be received on or before August 12, 1996, to be assured of consideration.

**ADDRESSES:** Direct all written comments to U.S. Customs Service, Printing and Records Services Group, Room 6216, 1301 Constitution Ave., NW, Washington, D.C. 20229.

**FOR FURTHER INFORMATION CONTACT:** Requests for additional information or

copies of the form(s) and instructions should be directed to U.S. Customs Service, Attn.: J. Edgar Nichols, Room 6216, 1301 Constitution Avenue NW, Washington, D.C. 20229, Tel. (202) 927-1426.

**SUPPLEMENTARY INFORMATION:** Customs invites the general public and other Federal agencies to comment on proposed and/or continuing information collections pursuant to the Paperwork Reduction Act of 1995 (Public Law 104-13; 44 U.S.C. 3505(c)(2)). The comments should address the accuracy of the burden estimates and ways to minimize the burden including the use of automated collection techniques or the use of other forms of information technology, as well as other relevant aspects of the information collection. The comments that are submitted will be summarized and included in the Customs request for Office of Management and Budget (OMB) approval. All comments will become a matter of public record. In this document Customs is soliciting comments concerning the following information collection:

*Title:* Commercial Invoices.

*OMB Number:* 1515-0120.

*Form Number:* N/A.

*Abstract:* The collection of Commercial Invoices is necessary for the proper assessment of Customs duties. The information which is supplied by the foreign shipper is used to assure compliance with statutes and regulations.

*Current Actions:* There are no changes to the information collection. This submission is being submitted to extend the expiration date.

*Type of Review:* Extension (without change).

*Affected Public:* Business or other for-profit institutions.

*Estimated Number of Respondents:* 350,000.

*Estimated Time Per Respondent:* 10 seconds.

*Estimated Total Annual Burden Hours:* 84,000.

*Estimated Total Annualized Cost on the Public:* \$1,201,200.00.

Dated: June 3, 1996.

V. Carol Barr,

Printing and Records Services Group.

[FR Doc. 96-14920 Filed 6-11-96; 8:45 am]

BILLING CODE 4820-02-P

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#### Proposed Collection; Comment Request; Crew's Effects Declaration

**AGENCY:** U.S. Customs, Department of the Treasury.

**ACTION:** Notice and request for comments.

**SUMMARY:** As part of its continuing effort to reduce paperwork and respondent burden, Customs invites the general public and other Federal agencies to comment on an information collection requirement concerning the Crew's Effects Declaration. This request for comment is being made pursuant to the Paperwork Reduction Act of 1995 (Pub. L. 104-13; 44 U.S.C. 3505(c)(2)).

**DATES:** Written comments should be received on or before August 12, 1996, to be assured of consideration.

**ADDRESSES:** Direct all written comments to U.S. Customs Service, Printing and Records Services Group, Room 6216, 1301 Constitution Ave., NW, Washington, D.C. 20229.

**FOR FURTHER INFORMATION CONTACT:** Requests for additional information or copies of the form(s) and instructions should be directed to U.S. Customs Service, Attn.: J. Edgar Nichols, Room 6216, 1301 Constitution Avenue NW, Washington, D.C. 20229, Tel. (202) 927-1426.

**SUPPLEMENTARY INFORMATION:** Customs invites the general public and other Federal agencies to comment on proposed and/or continuing information collections pursuant to the Paperwork Reduction Act of 1995 (Public Law 104-13; 44 U.S.C. 3505(c)(2)). The comments should address the accuracy of the burden estimates and ways to minimize the burden including the use of automated collection techniques or the use of other forms of information technology, as well as other relevant aspects of the information collection. The comments that are submitted will be summarized and included in the Customs request for Office of Management and Budget (OMB) approval. All comments will become a matter of public record. In this document Customs is soliciting comments concerning the following information collection:

*Title:* Crew's Effects Declaration.

*OMB Number:* 1515-0061.

*Form Number:* Customs Form 1304.

*Abstract:* Customs Form 1304 contains a list of Crew's effects that are accompanying them on the trip, which are required to be manifested, and also the statement of the master of the vessel attesting to the truthfulness of the merchandise being carried on board the vessel as Crew's effects.

*Current Actions:* There are no changes to the information collection. This submission is being submitted to extend the expiration date.

*Type of Review:* Extension (without change).

*Affected Public:* Business or other for-profit institutions.

*Estimated Number of Respondents:* 9,000.

*Estimated Time Per Respondent:* 5 minutes.

*Estimated Total Annual Burden Hours:* 17,168.

*Estimated Total Annualized Cost on the Public:* \$188,150.

Dated: June 3, 1996.

V. Carol Barr,

Printing and Records Services Group.

[FR Doc. 96-14921 Filed 6-11-96; 8:45 am]

BILLING CODE 4820-02-P

### **Proposed Collection; Comment Request; Country of Origin Marking Requirements for Containers or Holders**

**AGENCY:** U.S. Customs, Department of the Treasury.

**ACTION:** Notice and request for comments.

**SUMMARY:** As part of its continuing effort to reduce paperwork and respondent burden, Customs invites the general public and other Federal agencies to comment on an information collection requirement concerning the Country of Origin Marking Requirements for Containers or Holders. This request for comment is being made pursuant to the Paperwork Reduction Act of 1995 (Public Law 104-13; 44 U.S.C. 3505(c)(2)).

**DATES:** Written comments should be received on or before August 12, 1996, to be assured of consideration.

**ADDRESSES:** Direct all written comments to U.S. Customs Service, Printing and Records Services Group, Room 6216, 1301 Constitution Ave., NW., Washington, D.C. 20229.

**FOR FURTHER INFORMATION CONTACT:** Requests for additional information or copies of the form(s) and instructions should be directed to U.S. Customs Service, Attn.: J. Edgar Nichols, Room 6216, 1301 Constitution Avenue NW., Washington, D.C. 20229, Tel. (202) 927-1426.

**SUPPLEMENTARY INFORMATION:** Customs invites the general public and other Federal agencies to comment on proposed and/or continuing information collections pursuant to the Paperwork Reduction Act of 1995 (Public Law 104-13; 44 U.S.C. 3505(c)(2)). The comments should address the accuracy of the burden estimates and ways to minimize the burden including the use of automated collection techniques or the use of other forms of information technology, as well as other relevant

aspects of the information collection. The comments that are submitted will be summarized and included in the Customs request for Office of Management and Budget (OMB) approval. All comments will become a matter of public record. In this document Customs is soliciting comments concerning the following information collection:

*Title:* Country of Origin Marking Requirements for Containers or Holders.  
*OMB Number:* 1515-0163.

*Form Number:* N/A.

*Abstract:* Containers or Holders imported into the United States destined for an ultimate purchaser must be marked with the English name of the country of origin at the time of importation into Customs territory.

*Current Actions:* There are no changes to the information collection. This submission is being submitted to extend the expiration date.

*Type of Review:* Extension (without change).

*Affected Public:* Business or other for-profit institutions.

*Estimated Number of Respondents:* 250.

*Estimated Time Per Respondent:* 15 seconds.

*Estimated Total Annual Burden Hours:* 41.

*Estimated Total Annualized Cost on the Public:* \$533.00.

Dated: June 3, 1996.

V. Carol Barr,

Printing and Records Services Group.

[FR Doc. 96-14922 Filed 6-11-96; 8:45 am]

BILLING CODE 4820-02-P

### **Proposed Collection; Comment Request; General Declaration (Outward/Inward)**

**AGENCY:** U.S. Customs, Department of the Treasury.

**ACTION:** Notice and request for comments.

**SUMMARY:** As part of its continuing effort to reduce paperwork and respondent burden, Customs invites the general public and other Federal agencies to comment on an information collection requirement concerning the General Declaration (Outward/Inward). This request for comment is being made pursuant to the Paperwork Reduction Act of 1995 (Public Law 104-13; 44 U.S.C. 3505(c)(2)).

**DATES:** Written comments should be received on or before August 12, 1996, to be assured of consideration.

**ADDRESS:** Direct all written comments to U.S. Customs Service, Printing and

Records Services Group, Room 6216, 1301 Constitution Ave., NW., Washington, DC 20229.

**FOR FURTHER INFORMATION CONTACT:** Requests for additional information or copies of the form(s) and instructions should be directed to U.S. Customs Service, Attn.: J. Edgar Nichols, Room 6216, 1301 Constitution Avenue NW., Washington, DC 20229, Tel. (202) 927-1426.

**SUPPLEMENTARY INFORMATION:** Customs invites the general public and other Federal agencies to comment on proposed and/or continuing information collections pursuant to the Paperwork Reduction Act of 1995 (Public Law 104-13; 44 U.S.C. 3505(c)(2)). The comments should address the accuracy of the burden estimates and ways to minimize the burden including the use of automated collection techniques or the use of other forms of information technology, as well as other relevant aspects of the information collection. The comments that are submitted will be summarized and included in the Customs request for Office of Management and Budget (OMB) approval. All comments will become a matter of public record. In this document Customs is soliciting comments concerning the following information collection:

*Title:* General Declaration (Outward/Inward).

*OMB Number:* 1515-0002.

*Form Number:* Customs Form 7507.

*Abstract:* Customs Form 7507 allows the agent or pilot to make entry or exit of the aircraft, as required by statute. The form is used to document clearance by the arriving aircraft at the required inspectional facilities and inspections by appropriate regulatory agency staffs.

*Current Actions:* There are no changes to the information collection. This submission is being submitted to extend the expiration date.

*Type of Review:* Extension (without change).

*Affected Public:* Business or other for-profit institutions.

*Estimated Number of Respondents:* 500.

*Estimated Time Per Respondent:* 5 minutes.

*Estimated Total Annual Burden Hours:* 124,950.

*Estimated Total Annualized Cost on the Public:* \$1,874,250.

Dated: June 3, 1996.

V. Carol Barr,

Printing and Records Services Group.

[FR Doc. 96-14923 Filed 6-11-96; 8:45 am]

BILLING CODE 4820-02-P

**Proposed Collection; Comment Request; Application for Extension of Bond for Temporary Importation**

**AGENCY:** U.S. Customs, Department of the Treasury.

**ACTION:** Notice and request for comments.

**SUMMARY:** As part of its continuing effort to reduce paperwork and respondent burden, Customs invites the general public and other Federal agencies to comment on an information collection requirement concerning the Application for Extension of Bond for Temporary Importation. This request for comment is being made pursuant to the Paperwork Reduction Act of 1995 (Pub. L. 104-13; 44 U.S.C. 3505(c)(2)).

**DATES:** Written comments should be received on or before August 12, 1996, to be assured of consideration.

**ADDRESS:** Direct all written comments to U.S. Customs Service, Printing and Records Services Group, Room 6216, 1301 Constitution Ave., NW., Washington, DC 20229.

**FOR FURTHER INFORMATION CONTACT:** Requests for additional information or copies of the form(s) and instructions should be directed to U.S. Customs Service, Attn.: J. Edgar Nichols, Room 6216, 1301 Constitution Avenue NW., Washington, DC 20229, Tel. (202) 927-1426.

**SUPPLEMENTARY INFORMATION:** Customs invites the general public and other Federal agencies to comment on proposed and/or continuing information collections pursuant to the Paperwork Reduction Act of 1995 (Pub. L. 104-13; 44 U.S.C. 3505(c)(2)). The comments should address the accuracy of the burden estimates and ways to minimize the burden including the use of automated collection techniques or the use of other forms of information technology, as well as other relevant aspects of the information collection. The comments that are submitted will be summarized and included in the Customs request for Office of Management and Budget (OMB) approval. All comments will become a matter of public record. In this document Customs is soliciting comments concerning the following information collection:

*Title:* Application for Extension of Bond for Temporary Importation.

*OMB Number:* 1515-0054.

*Form Number:* Customs Form 3173.

*Abstract:* Imported merchandise which is to remain in the U.S. Customs territory for 1-year or less without duty

payment is entered as a temporary importation. The importer may apply for an extension of this period on Customs Form 3173.

*Current Actions:* There are no changes to the information collection. This submission is being submitted to extend the expiration date.

*Type of Review:* Extension (without change).

*Affected Public:* Business or other for-profit institutions.

*Estimated Number of Respondents:* 1,155.

*Estimated Time Per Respondent:* 10 minutes.

*Estimated Total Annual Burden Hours:* 2,694.

*Estimated Total Annualized Cost on the Public:* \$43,100.

Dated: June 3, 1996.

V. Carol Barr,

Printing and Records Services Group.

[FR Doc. 96-14924 Filed 6-11-96; 8:45 am]

**BILLING CODE 4820-02-P**

**New Rules of Origin for Country of Origin Declarations Covering Textiles and Textile Products**

**AGENCY:** U.S. Customs Service, Treasury.

**ACTION:** General notice.

**SUMMARY:** This document reminds the public that new rules of origin will apply for purposes of preparing and filing country of origin declarations for importations of textiles and textile products entered, or withdrawn from warehouse, for consumption on or after July 1, 1996.

**FOR FURTHER INFORMATION CONTACT:** For operational aspects: Mark Laria, Chief, Commercial Enforcement, Office of Field Operations (202-927-0370). For information about the new rules of origin, contact the Textiles Branch, Office of Regulations and Rulings (202-482-7050).

**SUPPLEMENTARY INFORMATION:**

**Background**

Section 12.130, Customs Regulations (19 CFR 12.130) concerns the country of origin of textiles and textile products that are subject to section 204, Agricultural Act of 1956, as amended (7 U.S.C. 1854). Paragraph (f) of § 12.130 provides that all importations of textiles and textile products subject to section 204 shall be accompanied by the appropriate declaration(s) set forth in subparagraph (f)(1) (single country declaration) or subparagraph (f)(2) (multiple country declaration). Further,

paragraph (g) of § 12.130 provides that release of articles from Customs custody will be denied until the country of origin determination can be made by Customs. In the event that a textile or textile product is released from Customs custody and it is subsequently determined that the merchandise is not entitled to admission into the commerce of the United States because its country of origin was not accurately represented to Customs, a demand for redelivery will be made as provided in § 141.113(b), Customs Regulations (19 CFR 141.113(b)).

On September 5, 1995, Customs published in the Federal Register (60 FR 46188) a final rule document setting forth, in § 102.21, Customs Regulations (19 CFR 102.21), new rules of origin applicable to textile and apparel products. Those new rules control the determination of the country of origin of textile and apparel products for purposes of the Customs laws and the administration of quantitative restrictions and thus must be applied for purposes of preparing and filing the country declarations provided for in § 12.130(f) of the Customs Regulations. The new rules are effective for merchandise entered, or withdrawn from warehouse, for consumption on or after July 1, 1996. The new rules do not allow for any grace period.

The purpose of this notice is to remind importers that they should be particularly alert in the case of merchandise shipped prior to July 1, 1996, that will be entered for consumption, or withdrawn from warehouse for consumption, on or after that date. If the new rules of origin result in a country of origin determination that is different from that reached under previously applicable rules, the visa (if applicable), country declaration and country of origin marking pertaining to the merchandise may not be valid for entry and release purposes. Importers are also reminded that, pursuant to section 484, Tariff Act of 1930, as amended (19 U.S.C. 1484), reasonable care must be used when declaring the country of origin to Customs, which includes the accurate completion and/or verification of country declarations required under § 12.130 of the Customs Regulations.

Dated: June 6, 1996.

Samuel H. Banks,

Assistant Commissioner, Office of Field Operations.

[FR Doc. 96-14810 Filed 6-11-96; 8:45 am]

**BILLING CODE 4820-02-P**

**Federal Reserve**

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Wednesday  
June 12, 1996

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**Part II**

**Department of  
Justice**

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**Antitrust Division**

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**United States v. Health Choice of  
Northwest Missouri, Inc., et al.; Public  
Comments and Response on Proposed  
Final Judgment; Notice**

## DEPARTMENT OF JUSTICE

### Antitrust Division

#### **United States v. Health Choice of Northwest Missouri, Inc., et al.; Public Comments and Response on Proposed Final Judgment**

Pursuant to the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16 (b)-(h), the United States publishes below the comments received on the proposed Final Judgment in *United States v. Health Choice of Northwest Missouri, Inc., et al.*, Civil Action No. 95-6171-CV-SJ-6, United States District Court for the Western District of Missouri, together with the response of the United States to the comments.

Copies of the response and the public comments are available on request for inspection and copying in Room 215, Liberty Place Building, Antitrust Division, U.S. Department of Justice, 325 Seventh Street, NW., Washington, DC 20530, and for inspection at the Office of the Clerk of the United States District Court for the Western District of Missouri, 200 United States Courthouse, 811 Grand Avenue, Kansas City, Missouri 64106.

Rebecca P. Dick,  
*Deputy Director, Office of Operations,  
Antitrust Division.*

In the United States District Court for the Western District of Missouri

United States of America, Plaintiff, vs. Health Choice of Northwest Missouri, Inc., Heartland Health System, Inc., and St. Joseph Physicians, Inc., Defendants. Case No. 95-6171-CV-SJ-6.

#### United States' Response to Public Comments

Pursuant to the requirements of the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16 (b)-(h) ("Tunney Act"), the United States hereby responds to the public comments received regarding the proposed Final Judgment in this case.

#### I

##### *Background*

On September 13, 1995, the United States filed the Complaint in this matter. The Complaint alleges that Defendants, in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1, conspired to prevent the development of competitive managed care health plans in Buchanan County, Missouri by, among other things, negotiating fees on behalf of most of the physicians in Buchanan County and forming an unlawfully structured physician-hospital organization. Complaint ¶¶ 24 and 25.

Simultaneously with the filing of the Complaint, the United States filed the

proposed Final Judgment, a Competitive Impact Statement ("CIS"), and a Stipulation signed by all the parties that allows for entry of the Final Judgment following compliance with the Tunney Act. The CIS explains in detail the provisions of the proposed Final Judgment, the nature and purpose of these proceedings, and the practices giving rise to the alleged violation.

As the Complaint and CIS explain, 85% of all the physicians living or practicing in Buchanan County agreed to negotiate collectively fees and other contract terms with managed care plans seeking to enter Buchanan County, with the purpose and effect of increasing physician fees and controlling the development of competitive managed care health plans in Buchanan County. Together with the only hospital in Buchanan County, they also formed Defendant Health Choice of Northwest Missouri, Inc. ("Health Choice") to provide managed care. At no time did the competing physicians share financial risk or otherwise integrate their practices.

Since the formation of Health Choice and until the filing of the Complaint, no managed care plan had been able to enter Buchanan County without contracting with Health Choice, despite the efforts of several plans to do so. By refusing to deal with managed care plans seeking to enter Buchanan County except through Health Choice, Defendant Heartland System, Inc. ("Heartland") and the physicians belonging to Defendant St. Joseph Physicians, Inc. ("SJPI") were able to obtain higher compensation and a more favorable hospital utilization review program from managed care plans than they would have been able to obtain independently.

The overarching goal of the proposed Judgment is to prevent Defendants from discouraging the development of competitive managed care in Buchanan County, while still permitting defendants to market a provider-controlled plan. The proposed Final Judgment consequently deals with a wide range of activities.

Except for publishing the comments and this response in the Federal Register, the plaintiff and defendants have completed the procedures the Tunney Act requires before the proposed Final Judgment may be entered.<sup>1</sup> The 60-day period for public

<sup>1</sup>The United States plans to publish the comments and this response promptly in the Federal Register. It will provide the Court with a Certificate of Compliance With The Requirements Of The Antitrust Procedures And Penalties Act and file a Motion For Entry Of Final Judgment once publication is made.

comments expired on December 4, 1995. As of March 27, 1996, the United States had received 155 comments.

The comments come from a variety of sources. The most comprehensive comments were submitted by the Coalition for Quality Healthcare ("Coalition"), which describes itself as a group of health care providers and consumers in Northwest Missouri (Comments 19, 34 and 82).<sup>2</sup> Another substantial comment is Comment 51, the comment of an unnamed ancillary services provider (*i.e.*, provider of home health care, hospice care, outpatient rehabilitation services, or durable medical equipment) located outside of Missouri. Nine comments were submitted by Buchanan County citizens,<sup>3</sup> in addition to 16 comments from Buchanan County ancillary services providers.<sup>4</sup> A total of 105 comments were submitted by either ancillary services providers' trade associations or individual ancillary services providers located outside of Buchanan County.<sup>5</sup> Finally, 19 comments were submitted by hospitals located outside of Buchanan County.<sup>6</sup>

#### II

##### *Response to Comments*

##### A. Overview

None of the comments oppose the main provisions of the proposed Final Judgment (Sections IV (C) and (D), V (C) and (D), and VI(B)). Only one, Comment 41, suggests that the Judgment fails to redress the violation of federal antitrust laws alleged in the Complaint. That Comment, and one other dealing with the composition of the Health Choice provider panel (Comment 2), are addressed in Subsection B below.

The remaining 153 comments relate almost exclusively to how the proposed Final Judgment deals with Heartland's referral policy regarding ancillary services, a copy of which is attached to the proposed Final Judgment. Most of these comments urge that the ancillary services referral policy should either be changed or deleted from the Judgment.

<sup>2</sup>The United States on January 19, 1996, numbered, indexed, and lodged with the Court all 143 comments it had received as of that date. For ease and convenience, the government in this Response refers to individual comments by those assigned numbers. The attached supplemental log lists the numbers assigned to the additional 12 comments the United States received from January 19 to March 27, 1996.

<sup>3</sup>Comments 1, 7-8, 11, 15-16, 25, and 142-143.

<sup>4</sup>Comments 3-6, 9-10, 12-14, 17-18, 20-21, 53, 151, and 155.

<sup>5</sup>Comments 22-24, 26-27, 29-33, 36-40, 42-50, 52, 54-56, 60-71, 74-81, 83, 85-128, 130-133, 136-141, 144, and 154.

<sup>6</sup>Comments 28, 35, 57-59, 72-73, 84, 129, 134-135, 145-150, and 152-153.

They raise five different antitrust issues that are addressed in Subsections C through G below.

Finally, Subsection H addresses the Coalition's contentions about the provisions of the proposed Final Judgment limiting Heartland's acquisition of physician practices (Comments 34 and 82). Subsection I addresses the Coalition's objections to the Judgment's compliance provisions (*Id.*).<sup>7</sup>

#### B. The Provider Panel Provisions Adequately Protect Competition

Commenter David L. Hutchinson of East Lansing, Michigan, Comment 41, suggests that the proposed Final Judgment will not be effective in allowing for the development of competitive managed care in Buchanan County because the Judgment permits too many Buchanan County physicians to participate on the Health Choice provider panel. In particular, Mr. Hutchinson is concerned because "Health Choice still retains 85% of the physicians working or residing in the area, this is still a monopoly because the remaining 15% will not be able to adequately compete in the quantity of service which they provide."

The United States agrees that there would be reason for concern if 85% of the physicians working or living in Buchanan County were owners of a Buchanan County managed care plan that negotiated with payers. As the CIS explains, the concern in such a situation is that there would be an insufficient number of physicians remaining in the market with the incentive to contract with competing managed care plans that might seek to enter Buchanan County, or to form their own plans. CIS at 17. This would likely increase the cost to consumers of obtaining health care services in Buchanan County.

The proposed Final Judgment, however, does not permit such a situation. The Defendants are not permitted to negotiate on behalf of competing physicians unless they meet the requirements of a qualified managed care plan. Proposed Final Judgment Sections IV (C) and (D), V (C) and (D), and VI(B). As explained in the CIS (pages 16-17), in order to satisfy those

requirements, no more than 30% of the physicians in any relevant market may be owners of the plan. *Id.*, Section II(I)(2). While the plan may, if it wishes, contract with more, or even all, of the remaining doctors (as non-provider-owned managed care plans are able to do), the plan may do that only if it is at risk for overcharging or overutilization by those subcontracting physicians. *Id.* This ensures that there will be a substantial pool of physicians in Buchanan County who have the incentives to contract with, or form their own, rival managed care plans in Buchanan County.<sup>8</sup> See CIS at 17-19.

#### C. The Referral Policy Provision Is Appropriate and Adequate Relief for the Violation Alleges in the Complaint and Will Encourage, Not Impinge Upon, Patient Choice

Heartland's ancillary services referral policy, with which Heartland must comply under the proposed Final Judgment, essentially requires Heartland representatives to inquire if the patient has a choice of ancillary services providers and then to honor that choice. The policy is designed to ensure that the patient has the opportunity to use an ancillary services provider other than Heartland if the patient so wishes. Many commenters contend that this referral policy is not in the public interest because they believe other policies would better ensure that patients will be able to make informed choices in selecting ancillary services providers.

In opposing the referral policy of the proposed Final Judgment, the Coalition contends that the policy, "violates a consumer/patient's right to make an informed choice among all ancillary services providers" and that it "enhances Heartland's capacity to monopolize the ancillary services market within Northwest Missouri and Northeast Kansas." Comment 82 at 2. The Coalition urges that the referral policy provision be deleted or, as an alternative, that the Court order Heartland to adopt the model referral policy that the Coalition developed after submitting its formal Comment (Comment 34) on November 21, 1995.<sup>9</sup>

<sup>8</sup> Comment 2, from Robert S. Keller, O.D. of St. Joseph, Missouri, argues that the Health Choice provider panel violates Medicare regulations by excluding optometrists. The proposed Final Judgment, however, does not preclude Health Choice from having optometrists or any other type of provider on its panel. Furthermore, this issue has nothing to do with the antitrust violation alleged in the Complaint, which the proposed Final Judgment seeks to remedy.

<sup>9</sup> The Coalition's model referral policy appears as Exhibit 9 to the Memorandum In Opposition To Proposed Final Judgment appended to the Coalition's December 1, 1995 Motion To Appear As

The Coalition's model policy would require Heartland to allow on its premises an "ombudsman," whose "salary and expenses could be shared equally among the competitors (including Heartland), in order to preserve the ombudsman's independence" (Comment 82 at 17), and who would "operate[ ] as an independent social worker" in order to "fully inform the patient of his options and see that the patient is given the freedom to choose any ancillary services provider." (Comment 82 at Exhibit 9).

Clearly, deleting the proposed Judgment's referral policy would weaken rather than strengthen the Judgment. Further, appointment of an ombudsman paid for collectively by all ancillary services providers, a novel remedy, is unnecessary here. Requiring Heartland to observe its already promulgated policy regarding referrals for ancillary services, which provides for ready access by patients to information about the full range of ancillary services providers, is a wholly effective remedy for the specific antitrust violation alleged in the Complaint and well within the reaches of the public interest within the meaning of the Tunney Act. *Cf., United States v. Microsoft Corp.*, 56 F.3d, 1448, 1459-60 (D.C. Cir. 1995)(decree adequate if within reaches of public interest).<sup>10</sup>

The Coalition is incorrect in asserting that the proposed Final Judgment "prevents patients from making an informed choice regarding ancillary services." (Comment 82, Memorandum In Opposition To Proposed Final Judgment, at 5, emphasis supplied). The proposed Final Judgment requires that Heartland (1) must honor a physician's order of a specific ancillary services provider unless the patient overrides that decision, (2) must ask the patient if the patient has a preference for an ancillary services provider and must honor any such preference, (3) must not tell the patient about Heartland's ancillary services providers unless the patient states he or she has no preference among ancillary services providers, (4) must honor the patient's

Amicus (Comment 82), which the government is addressing as a comment.

<sup>10</sup> Many of the comments urged that the decree require Heartland to use a rotation system by which referrals would be distributed among Heartland and the other ancillary services providers. Such a system would eliminate or reduce competition by allocating patients and would raise serious antitrust concerns. *Palmer v. BRG, Inc.*, 498 U.S. 46; *United States v. Heffernan*, 43 F.3d 1144, 1146-47 (7th Cir. 1994) (Posner, J.) (bid rotation agreement eliminates all competition among the participants and hence is even more serious than price fixing, which preserves competition in quality of service).

<sup>7</sup> This Response addresses all of the antitrust issues and issues relating to the substance of the Complaint and proposed Final Judgment that are raised in the comments. Unrelated arguments and objections are not discussed. For example, the nine comments from private citizens in Buchanan County complain primarily about the quality of services and billing practices of Heartland. These complaints do not involve antitrust concerns, they are irrelevant to this case, and the Antitrust Division of the United States Department of Justice lacks authority to consider or address them.

choice if the patient decides not to use the Heartland ancillary services providers, and, if asked, (5) must tell the patient that there are non-Heartland ancillary services providers who are listed in the telephone book, give the patient a reasonable amount of time to investigate other options, and then honor whatever choice the patient makes. If the patient again requests the names of other ancillary services providers, Heartland must name those providers.<sup>11</sup>

As numerous comments illustrate, there are myriad alternative provisions that could be proposed to resolve the hospital ancillary services referral issue. The government does not dispute that some of these may be reasonable alternatives. That, however, is not a sufficient reason to reject the negotiated settlement of this case, which provides adequate and appropriate relief to remedy the violation in this case and prevent its recurrence. *Microsoft*, 56 F.3d at 1460-61.

Significantly, the Complaint in this case did *not* charge Heartland with specific violations in the ancillary services market. Rather, the Complaint focuses on Heartland's efforts, along with the other defendants, to impede the development of competitive managed care health plans in Buchanan County. The ancillary services provision (Section VII(B)(1)) in the proposed Final Judgment is intended as a preventive measure to ensure that Heartland will follow its own preexisting ancillary services referral policy so that it will not abuse its market position in inpatient hospital services to restrict competition in the market for ancillary services by deterring managed care plans or other health care consumers from contracting with alternative ancillary services providers.

Finally, at least one comment suggests that the referral policy provision should be stricken from the Judgment because the Complaint does not allege a specific violation involving ancillary services

<sup>11</sup> Heartland's attorney has told us that Heartland is considering adopting the attached revised referral policy. Basically, that policy would have Heartland personnel provide a list of Buchanan County ancillary services providers, rather than the telephone book, to patients requesting information about non-Heartland ancillary services providers. It also requires Heartland to explain to a patient who is an enrollee in a managed care plan the financial consequences to the patient of not using the plan's preferred ancillary services provider. This revision contains protections for Heartland patients in addition to those required by the Final Judgment. Adoption of the revision would not violate the Final Judgment and does not require amendment of the Final Judgment. Implementation of the revision, given the presence of other provisions in the proposed Final Judgment, would largely dispose of the objections raised in Comments 23, 27, 52, 67, 79, 94, 98, 126, and 138.

but rather focuses more broadly on efforts to hamper the development of managed care in Buchanan County. Comment 82 at 2, 16. There is no requirement that the government's Complaint specifically mention Heartland's ancillary services activities in order to include ancillary services relief in the Final Judgment. Relief in a consent decree is appropriate as long as it is within the general scope of the case. *Int'l Assn. of Firefighters v. City of Cleveland*, 478 U.S. 501, 525 (1986).

The ancillary services provision of the proposed Final Judgment will help to prevent the recurrence of collaborative efforts to discourage the development of competitive managed care plans in Buchanan County, which is specifically alleged in the Complaint, and in the process also stop attempts to restrain competition in the provision of ancillary services to patients who are either uninsured or covered by other types of medical insurances. In particular, the ancillary services provision ensures that Heartland will honor the decisions of patients or their insurers regarding choice of ancillary services providers.<sup>12</sup>

#### D. The Referral Policy Provision Has No Preemptive Effect

Several commenters suggest that the ancillary services provision of the proposed Final Judgment will have *de jure* or *de facto* preemptive effect on other cases. This is not correct.

It is well established that "a consent judgment, even one entered at the behest of the Antitrust Division, does not immunize the defendant from liability for actions, including those contemplated by the decree, that violate the rights of nonparties." *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1, 13 (1979). Ancillary services providers and others consequently remain free to pursue their own federal or state antitrust or other actions against Heartland for any activity they believe is illegal, and they may seek whatever remedy they deem appropriate. The ancillary services provision in this matter, therefore, does

<sup>12</sup> Several other provisions are also incorporated into the proposed Final Judgment to ensure that patients and insurers are not coerced into using Heartland's ancillary services. Section VI(E) prohibits Heartland from forcing managed care plans in which Heartland does not have a financial interest from using Heartland's ancillary services in order to get Heartland's hospital services. Also, Section VII(B)(3) allows the United States access to Heartland's credentialing files to ascertain if Heartland has curtailed the hospital privileges of a physician employed by or affiliated with a competing managed care plan. The United States could also ascertain if Heartland had limited hospital privileges of a physician for ordering ancillary services from a vendor other than Heartland for any patient.

not have any "preemptive effect" upon the relief claimable by any plaintiff against Heartland or any other hospital, and would not prevent a court, in an appropriate case, from requiring different, or more expansive, relief.<sup>13</sup>

The proposed Final Judgment also does not establish a national ceiling, or even a ceiling in Buchanan County, on what can or may be in a hospital ancillary services referral policy. The ancillary services provision in the proposed Judgment is simply, on the facts and in the procedural setting of this case, adequate relief to protect against the possibility that Heartland could use its market position in inpatient services to restrict competition in the market for ancillary services.

#### E. Heartland May Comply With Federal or State Laws or Further Protect the Patient's Right To Choose

Several commenters have suggested that the ancillary services provision of the proposed Final Judgment conflicts with hospital accreditation standards and various federal and state laws and regulations.<sup>14</sup> There have also been claims that the proposed Final Judgment precludes Heartland from adopting additional measures intended to assist Heartland patients in choosing ancillary services providers. None of these claims and suggestions is correct.

Section VII(B)(1) of the proposed Final Judgment requires only those steps needed to correct or prevent competitive problems alleged or similar to those alleged in the Complaint. Heartland in addition is independently obligated to comply with hospital accreditation standards, Medicare regulations, state or federal laws, or the

<sup>13</sup> For example, the United States has been informed by the Missouri Attorney General's Office that the Missouri Attorney General is investigating Heartland's ancillary services referral practices, and other practices, to determine their legality under the Missouri Merchandising Practices Act, § 407.020 RSMo, and the Missouri Antitrust Law, §§ 416.031 RSMo. The proposed Final Judgment does not preclude or preempt any legal action by the Missouri Attorney General, or by private parties, seeking broader injunctive relief or different types of relief under either those laws or the federal antitrust laws. Moreover, in agreeing to this proposed Final Judgment, the United States does not express any view as to whether any of the practices permitted by the Attachment to the Final Judgment would be "unfair" within the meaning of the Missouri Merchandising Practices Act, § 407.020 RSMo.

<sup>14</sup> The Coalition, for example, asserts that the ancillary services provision of the proposed Final Judgment is inconsistent with hospital accreditation standards and Medicare regulations, primarily because "Heartland's referral policy does not allow ancillary services providers, who have an established relationship with the patient before admission to Heartland's acute care hospital, to participate in discharge planning for their patients.--." (Comment 82 at 13).

decrees in other state or federal law suits, including, if necessary, permitting outside ancillary services providers to participate in patient discharge planning. Moreover, as far as the government has been able to determine, nothing in the Heartland ancillary services referral policy, with which Section VII(B) of the proposed Final Judgment requires Heartland to comply, requires Heartland to do anything that any hospital accreditation standard or any federal or state statute, rule, or regulation of which the United States is aware prohibits. (See attached Joint Commission For Accreditation Of Healthcare Organizations accreditation standards and Medicare patient discharge planning regulations).

#### F. The Referral Policy Does Not Harm Heartland's Rivals or Buchanan County Consumers

The Coalition also contends that the referral provision will lead to a deterioration of competition in the provision of ancillary services in Buchanan County. *E.g.*, Comment 82 at 3-4, 10-13. But these contentions assume that before the proposed Final Judgment was negotiated, Heartland was following an ancillary services referral policy that was more favorable to competing providers than the policy put in place by the Final Judgment. In fact, the government's investigation revealed that Heartland, before accepting the proposed Final Judgment, may not have always been in compliance with its stated policy.<sup>15</sup> Coalition members and Buchanan County citizens will be *better*, not worse, off as a result of the proposed Final Judgment since the Judgment will now ensure compliance.

*Microsoft, supra*, recently noted in a strikingly similar context that "[w]hile the district court may inquire into whether a decree will result in any *positive* injury to third parties \* \* \*, in the absence of such injury, it should not reject an otherwise adequate remedy simply because a third party claims it could be better treated." 56 F.3d at 1461 n.9 (emphasis supplied). There was no positive injury to third parties in *Microsoft*, and there is none in the present case. In fact, competitors and consumers are benefited by the proposed Final Judgment.

#### G. The Ancillary Services Relief is Consistent With the Federal Antitrust Laws

Comment 51 suggests more explicitly than any of the other comments that the Heartland Referral Policy, which Section VII(B)(1) of the proposed Final Judgment requires Heartland to follow, is inconsistent with the federal antitrust laws, and more particularly, with *Key Enterprises, Inc. v. Venice Hospital*, 919 F.2d 1550 (11th Cir. 1990), *vacated, reh'g en banc granted*, 979 F.2d 806 (11th Cir. 1992), *order granting en banc review vacated*, 9 F.3d 893 (11th Cir. 1993) (per curiam), *cert. denied sub nom. Sammett Corp. v. Key Enterprises, Inc.*, \_\_\_ U.S. \_\_\_, 114 S.Ct. 2132 (1994). Relying on the later-vacated *Key Enterprises* decision, this comment contends that Heartland should be required to disseminate information about its ancillary services competitors, and to allow such competitors access to Heartland's hospital patients. Anything less would be, in the words of the Comment, "inconsistent with federal antitrust policy. \* \* \*" Comment 51 at 2.

The ancillary services provision of the proposed Final Judgment is consistent with both the federal antitrust laws and *Key Enterprises*. *Key Enterprises* was never finally resolved by the courts. A panel of the Court of Appeals reversed a trial court order that had overturned a \$2.3 million jury verdict in favor of a durable medical equipment supplier who claimed that a hospital with 76% of the available beds in a local market had violated Sections 1 and 2 of the Sherman Act by coercing or unduly influencing home health agencies in that community to refer their patients to a durable medical equipment supplier in which the hospital had a financial interest. 919 F.2d at 1553, 1555. Significantly, no injunctive or other equitable relief was at issue in *Key Enterprises*. The case was vacated after the Eleventh Circuit granted rehearing *en banc* and then settled prior to *en banc* review.<sup>16</sup>

Moreover, as noted earlier, this case is not about ancillary services markets. Heartland was not charged with restraining trade in or monopolizing any ancillary services market. Rather,

Heartland was charged with conspiring with physicians to discourage the development of competitive managed care in Buchanan County. The ancillary services provision of the proposed Final Judgment is prophylactic, intended simply to prevent Heartland from exploiting its position in additional ways. The provision is effective and well within the bounds of the public interest. Nothing in *Key Enterprises* or any other decision requires this Judgment to contain any more relief than it does.

#### H. The Physician Practices Acquisitions Provisions are Adequate To Remedy the Violation Alleged in the Complaint

The Coalition criticizes the provisions of the proposed Final Judgment that place limits and controls on Heartland's acquisition of physician practices. Comment 34 at 6; Comment 82 at 18-19. The Coalition argues that "the practical effect" of three of those provisions, Sections VIII(B)-(D), will be to allow Heartland to "monopolize the market for primary care physicians in Northwest Missouri and Northeast Kansas. \* \* \*" Comment 82 at 19.

The Judgment's physician practices acquisitions provisions, Sections VI(D) and VIII(B)-(D) of the decree, are, in conjunction with the physician credentialing provision of the proposed Final Judgment (Section VII(B)(3)), sufficient to ensure the development of conditions that permit the growth of competitive managed care in Buchanan County. They certainly will not promote the monopolization of primary care physician services in Northwest Missouri or Northeast Kansas.

Section VI(D) is the primary provision in the proposed Final Judgment regarding physician practices acquisitions. CIS at 20. It enjoins Heartland from acquiring during the next five years additional existing family practice and general internal medicine physician practices in Buchanan County without the prior written approval of the United States, and from acquiring any other existing active physician practice in Buchanan county without 90 days' prior notification. Section VI(D) was designed to, and will, prevent Heartland from obtaining control of so many physicians that it could raise prices for physician services above competitive levels or otherwise thwart competing managed care plans from entering and competing effectively in Buchanan County.

Sections VIII(B)-(D) set forth the exceptions to Section VI(D). Section VIII(B) allows Heartland to acquire the practice of a physician who derives only limited revenues (less than 20% of total

<sup>15</sup> This may be why Heartland's ancillary services rivals lost referrals. See Comment 82 at 12-13. If so, the proposed Final Judgment will correct the problem. Of course, another explanation for this loss of referrals may be that Heartland began offering better care and service, *i.e.*, that it was successfully competing on the merits. This would be lawful competition properly left in place by the proposed Final Judgment. *Cargill, Inc. v. Monfort, Inc.*, 479 U.S. 104, 116 (1986).

<sup>16</sup> At least four courts have refused to consider *Key Enterprises* because it has been vacated: *Pacifica Kidney Center, Inc. v. National Medical Care, Inc.*, 1993 WL 190858 (9th Cir. 1993) (unpublished disposition) at \*\*4 n. 3; *Home Health Specialists, Inc. v. Liberty Health System*, 1994-2 Trade Cas. ¶ 70,699 (E.D. Pa. 1994) at p. 72,794; *Atlanta Pulmonary Diagnostic Clinic v. Haynes*, 1994 WL 258260 (N.D. Ga. 1994); and *Northwest Title And Escrow Corp. v. Edina Realty, Inc.*, 1994-1 Trade Cas. ¶ 70,485 (D. Minn. 1993).

practice revenues) from patients in Buchanan County (*i.e.*, the established physician working primarily outside of Buchanan County and hence whose practice has little competitive impact in Buchanan County). Section VIII(C) allows Heartland to acquire within the first two years of a physician's arrival in Buchanan County the practice of any physician who Heartland actively recruited to Buchanan County (*i.e.*, the new physician who would not have come to Buchanan County but for Heartland and whose practice is not yet sufficiently established to have an independent competitive impact on the market). Section VIII(D) allows Heartland to acquire the practice of any family practice or general internal medicine physician already in Buchanan County who otherwise would no longer practice primary care medicine in Buchanan County (*i.e.*, the established physician working primarily in Buchanan County whose practice may have a significant independent competitive impact on the market but who is otherwise going to exit the market).

None of these three limited exceptions will result in the monopolization or a substantial lessening of competition in the physician services market in Buchanan County. Rather, Sections VI(D) and VIII (B)-(D), in conjunction with the physician credentialing provision (Section VII(B)(3)), will ensure that Heartland does not achieve by acquisition or credentialing the anticompetitive result (preventing the development of competitive managed care) that it initially sought to accomplish through agreement with the physicians of Buchanan County, and which is at the heart of the antitrust violation alleged in the Complaint. These provisions will result, at least for the near future, in the continued presence, if not the increase, of a substantial pool of primary care and other physicians not employed by Heartland in Buchanan County.<sup>17</sup>

That continuing pool of primary care and other physicians not employed by Heartland will also protect competition in ancillary services markets in Buchanan County. Comment 34 at 2, 5, 6; Comment 82 at 19. The Coalition correctly notes that many hospitalized patients look to their physician to recommend an ancillary services provider. Comment 34 at 2. There is consequently likely to remain during

<sup>17</sup> By its terms, this provision would not apply if any firm other than Heartland made a bona fide offer to purchase the practice for a price above the liquidation value of the practice. 4 CCH Trade Reg. Rpt. ¶13,104 at 20,574.

the term of this Judgment a substantial stream of ancillary services referrals from doctors who are not employed by Heartland and who therefore will not automatically refer their patients to Heartland's ancillary services providers.

Furthermore, the referral policy with which Heartland must comply (Section VII(B)(1) of the decree) will significantly curtail any adverse impact on competition in ancillary services in Buchanan County from possible future Heartland purchases of Buchanan County physician practices. The policy specifically requires Heartland to ask, and honor, a hospitalized patient's choice of ancillary services provider. Heartland must do that even if the patient's choice is different from the doctor's and the doctor is an employee of Heartland.

The Coalition also suggests that the proposed Final Judgment is deficient because it does not prohibit Heartland from bringing into Buchanan County a physician who has not previously practiced there. Comment 34 at 6; Comment 82 at 18. By increasing the supply of physicians in Buchanan County, such conduct could be procompetitive. The proposed Final Judgment therefore does not proscribe this activity. The United States, moreover, remains free to challenge such actions in the future in a separate, independent antitrust action if this activity should prove to be anticompetitive.

#### I. The Compliance Provisions Are Sufficient

The Coalition also believes that two of the compliance provisions of the proposed Final Judgment, Sections X and XI, should be modified to (1) require the defendants to submit written reports and the United States to conduct at least annual inspections, and (2) give the Court broader powers to monitor and enforce the Judgment as Judge Oliver required in *United States v. Associated Milk Producers, Inc.*, 394 F. Supp. 29, 46 (W.D. Mo. 1975). Comment 34 at 7; Comment 82 at 19-20. The United States believes that the compliance provisions of the proposed Final Judgment as they now stand are fully adequate to deter, detect, and correct any decree violations.

Sections X and XI of the proposed Final Judgment are standard judgment compliance provisions that the government has used repeatedly in its consent decrees and litigated judgments over the 20 years since *Associated Milk Producers* was entered. They include the requirement that Defendants obtain from their appropriate personnel, and maintain for the government's

inspection, annual written certifications that each such person (1) has read and agrees to abide by the Judgment, (2) understands that noncompliance with the Judgment may result in criminal contempt of court, and (3) has reported any violation of the Judgment to counsel for that Defendant.<sup>18</sup> Furthermore, Section XII of the proposed Final Judgment, another standard decree compliance provision, allows the government to (1) inspect and copy records or documents of any of the Defendants relating to matters contained in the Judgment, (2) interview personnel of any of the Defendants about such matters, and (3) require any of the Defendants to submit written reports, under oath if necessary, about any such matter.

The commenters do not suggest that these customary judgment compliance provisions have been inadequate to uncover and remedy decree violations in the government's earlier judgments. Nor do they offer any reason to expect a different result here.<sup>19</sup> The government will not hesitate, as the proposed Final Judgment permits (Section IX), to seek a modification of Sections X and XI if these provisions in practice prove to be inadequate to properly enforce this decree.

#### III

##### *The Legal Standard Government the Court's Public Interest Determination*

Once the United States moves for entry of the proposed Final Judgment, the Tunney Act directs the Court to determine whether entry of the proposed Final Judgment "is in the public interest." 15 U.S.C. § 16(e). In making that determination, "the court's function is not to determine whether the resulting array of rights and liabilities is one that will best serve society, but only to confirm that the resulting settlement is within the *reaches* of the public interest." *United States v. Western Elec. Co.*, 933 F.2d 1572, 1576 (D.C. Cir.), *cert. denied*, 114 S. Ct. 487 (1993) (emphasis added, internal quotation and citation omitted).<sup>20</sup> The Court should evaluate the relief set forth in the proposed Final Judgment and should enter the Judgment if it falls within the

<sup>18</sup> The *Associated Milk Producers* decree, even as supplemented by Judge Oliver, did not contain this provision. 394 F. Supp. at 49-58.

<sup>19</sup> Indeed, Judge Oliver in a subsequent government antitrust consent decree did not order these supplemental provisions. *United States v. Mid-American Dairymen, Inc.*, 1977-1 Trade Case. ¶ 61,508 (W.D. Mo. 1977).

<sup>20</sup> The *Western Electric* decision concerned a consensual modification of an existing antitrust decree. The Court of Appeals assumed that the Tunney Act was applicable.

government's "rather broad discretion to settle with the defendant within the reaches of the public interest."

*Microsoft*, 56 F.3d at 1461. *Accord*, *Associated Milk Producers*, 534 F.2d at 117-18.

The Court is not "to make *de novo* determination of facts and issues." *Western Elec.*, 993 F.2d at 1577. Rather, "[t]he balancing of competing social and political interests affected by a proposed antitrust decree must be left, in the first instance, to the discretion of the Attorney General." *Id.* (internal quotation and citation omitted throughout). In particular, the Court must defer to the Department's assessment of likely competitive consequences, which it may reject "only if it has exceptional confidence that adverse antitrust consequences will result—perhaps akin to the confidence that would justify a court in overturning the predictive judgments of an administrative agency." *Id.*<sup>21</sup>

The Court may not reject a decree simply "because a third party claims it could be better treated." *Microsoft*, 56 F.3d at 1461 n.9. The Tunney Act does not empower the Court to reject the remedies in the proposed Final Judgment based on the belief that "other remedies were preferable." *Id.* at 1460.<sup>22</sup> As Judge Greene has observed:

If courts acting under the Tunney Act disapproved proposed consent decrees merely because they did not contain the

exact relief which the court would have imposed after a finding of liability, defendants would have no incentive to consent to judgment and this element of compromise would be destroyed. The consent decree would thus as a practical matter be eliminated as an antitrust enforcement tool, despite Congress' directive that it be preserved.

*United States v. American Tel. & Tel. Co.*, 552 F. Supp. 131, 151 (D.D.C. 1982), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983) (Mem.).

Moreover, as noted above, the entry of a governmental antitrust decree forecloses no private party from seeking and obtaining appropriate antitrust remedies. Thus, Defendants will remain liable for any illegal acts, and any private party may challenge such conduct if and when appropriate. If any of the commenting parties has a basis for suing Defendants, they may do so. The legal precedent discussed above holds that the scope of a Tunney Act proceeding is limited to whether entry of this particular proposed Final Judgment, agreed to by the parties as settlement of *this* case, is in the public interest.

Finally, the Tunney Act does not contemplate judicial reevaluation of the wisdom of the government's determination of which violations to allege in the Complaint. The government's decision not to bring a particular case on the facts and law before it at a particular time, like any other decision not to prosecute, "involves a complicated balancing of a number of factors which are peculiarly within [the government's] expertise." *Heckler v. Chaney*, 470 U.S. 821, 831 (1985). Thus, the Court may not look beyond the Complaint "to evaluate claims that the government did not make and to inquire as to why they were not made." *Microsoft*, 56 F.3d at 1459 (emphasis in original); *See also*, *United States v. Associated Milk Producers, Inc.*, 534 F.2d 113, 117-18 (8th Cir. 1976), *cert. denied*, 429 U.S. 940 (1976).

Similarly, the government has wide discretion within the reaches of the public interest to resolve potential litigation. *E.g.*, *United States v. Western Elec. Co.*, 993 F.2d 1572 (D.C. Cir.), *cert. denied*, 114 S. Ct. 487 (1993); *United States v. American Tel. & Tel. Co.*, 552 F. Supp. 131, 151 (D.D.C. 1982), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983) (Mem.). The Supreme Court has recognized that a government antitrust consent decree is a contract between the parties to settle their disputes and differences, *United States v. ITT Continental Baking Co.*, 420 U.S. 223, 235-38 (1975), *United*

*States v. Armour & Co.*, 402 U.S. 673, 681-82 (1971), and "normally embodies a compromise; in exchange for the saving of cost and elimination of risk, the parties each give up something they might have won had they proceeded with the litigation." *Armour*, 402 U.S. at 681.

The ancillary services provision (Section VII(B)(1)) in the proposed Final Judgment is a preventive measure to protect against the possibility that Heartland could abuse its market position in inpatient hospital services to restrict competition in the market for ancillary services by deterring managed care plans or other health care consumers from contracting with alternative ancillary services providers.<sup>23</sup> This Judgment has the virtue of bringing the public certain benefits and protection without the uncertainty and expense of protracted litigation. *Armour*, 402 U.S. at 681; *Microsoft*, 56 F.3d at 1459.

#### IV

#### Conclusion

After careful consideration of these comments, the United States concludes that entry of the proposed Final Judgment will provide an effective and appropriate remedy for the antitrust violation alleged in the Complaint and is in the public interest. The United States will therefore move the Court to enter the proposed Final Judgment once, as 15 U.S.C. § 16(d) requires, the public comments and this Response have been published in the Federal Register.

Dated: May 17, 1996.

Respectfully submitted,

<sup>21</sup> The Tunney Act does not give a court authority to impose different terms on the parties. *See, e.g.*, *United States v. American Tel. & Tel. Co.*, 552 F. Supp. 131, 153 n. 95 (D.D.C. 1982), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983) (Mem.); *accord* H.R. Rep. No. 1463, 93d Cong., 2d Sess. 8 (1974). A court, of course, can condition entry of a decree on the parties' agreement to a different bargain, *see, e.g.*, *AT&T*, 552 F. Supp. at 225, but if the parties do not agree to such terms, the court's only choices are to enter and decree the parties proposed or to leave the parties to litigate.

<sup>22</sup> Citing *United States v. Central Contracting Co.*, 537 F. Supp. 571 (E.D.Va. 1982), the Coalition wrote the government in November 1995 and requested all "determinative" materials and documents called for by 15 U.S.C. § 16(b) (Comment 19). The United States replied that there are no such materials or documents. The Coalition suggests in Comment 82 that this response shows that "the DOJ has not been forthcoming with disclosure of the underlying factual materials supporting the proposed policy." Memorandum In Opposition To Proposed Final Judgment at 5. The Coalition suggests, apparently because of *Associated Milk Producers*, that the government's response requires the Court to make a more careful review in this instance than might otherwise be the case. This approach is unwarranted in the present matter even if the Coalition's reading of *Associated Milk Producers* is correct. Here there simply are no documents which, either along or as a group, have such singular or particularized significance as to be "determinative" under 15 U.S.C. § 16(b). The Coalition is incorrect in suggesting that the Department never produces determinative documents. The Department has done so in 19 cases since the *Central Contracting* decision.

<sup>23</sup> Managed care plans in general are making greater use of competition among ancillary services providers to reduce premium costs and to reduce the number and duration of hospitalizations. *See, e.g.*, K. O'Donnell & E. Sampson, "Home Health Care: The Pivotal Link In The Creation Of A New Health Care Delivery System," *Journal of Health Care Finance*, Volume 21, No. 2, pages 74-86 (1994); and G. Leavenworth, "The Fastest Growing Segment Of The Health Care Industry Combines Cost-Effective, High-Quality Care With The Comforts Of Home," *Business & Health*, vol. 13, special issue, p. 51 (Jan. 1995).

Allen S. Vanbebber,  
Deputy United States Attorney, Western  
District of Missouri, Suite 2300, 1201 Walnut  
Street, Kansas City, Missouri 64106-2149, Tel:  
(816) 426-3122.

Edward D. Eliasberg, Jr.,  
Gregory S. Ascioffa,  
Attorneys, Antitrust Division, U.S. Dept. of  
Justice, Room 414, 325 7th Street, N.W.,  
Washington, DC 20530, Tel: (202) 307-0808.

#### Certificate of Service

I, Edward D. Eliasberg, Jr., hereby  
certify that copies of the Response to  
Public Comments in *U.S. v. Health  
Choice of Northwest Missouri, Inc., et  
al.*, was served on the 17th day of May  
1996 by first class mail to counsel as  
follows:

Thomas D. Watkins, Esquire, Watkins,  
Boulware, Lucas, Miner, Murphy &  
Taylor, 3101 Frederick Avenue, St.  
Joseph, Missouri 64506-0217  
George E. Leonard, Esquire, Shugart,  
Thomson & Kilroy, 12 Wyandotte  
Plaza, 120 West 12th Street, Kansas  
City, Missouri 64105-0509  
Richard D. Raksin, Esquire, Sidley &  
Austin, One First National Plaza,  
Chicago, Illinois 60603  
Jack Briggs, Health Choice of Northwest  
Missouri, Inc., 510 Francis Street, St.  
Joseph, Missouri 64501  
Brian B. Myers, Esquire, Lathrop &  
Norquist, 2345 Grand Avenue, Suite  
2600, Kansas City, Missouri 64108  
Thomas M. Bradshaw, Esquire, Dianne  
M. Hansen, Esquire, Armstrong,  
Teasdale, Schlafly & Davis, Suite  
2000, 2345 Grand Boulevard, Kansas  
City, Missouri 64108  
Glenn E. Davis, Esquire, Diane E. Felix,  
Esquire, Armstrong, Teasdale,  
Schlafly & Davis, One Metropolitan  
Square, Suite 2600, St. Louis,  
Missouri 63102-2704

Edward D. Eliasberg, Jr.

#### Hospital Inpatient—Ancillary Services Referral Policy

##### I. General Statement

After a patient or other appropriate  
person (collectively, "patient") has been  
identified (via screening, assessment,  
discharge planning, staff, family,  
physician, or other means) as being in  
need of appropriate home health,  
hospice, DME, or outpatient  
rehabilitation services (referred to  
collectively as "Ancillary Service"),  
and, if necessary, a physician's order  
has been obtained, the following  
procedures will be used by a non-  
physician referring person when  
connecting patients to the appropriate

Ancillary Service. Our focus is on  
patient choice.

##### II. Service Referrals

A. If a physician orders an Ancillary  
Service and specifies the provider to be  
used (whether specifically written in the  
chart or other written notification), then  
a referring person shall contact the  
patient indicating that the physician has  
ordered an Ancillary Service and has  
ordered that a particular provider be  
used. If necessary, the patient should be  
informed of any financial considerations  
(i.e., managed care). The patient should  
then be asked whether the particular  
provider is acceptable, and if so,  
referred to that provider. (If the patient  
does not wish that provider, see  
subsection B below).

B. If a physician orders an Ancillary  
Service, but does not specify the  
provider to use, then the patient shall be  
contacted and informed that his  
physician has ordered an Ancillary  
Service; if necessary, the patient should  
be informed of any financial  
considerations (i.e., managed care); and  
the patient shall be asked if he has a  
preference as to which provider to use:

1. If the patient has a preference, that  
preference shall be honored.
2. If the patient has no preference, a  
referring person shall indicate that  
Heartland has an excellent, full  
accredited Ancillary Service that is  
available to the patient, and the  
appropriate Heartland brochure may be  
given. If the patient accepts, then the  
referral shall be made to Heartland's  
Ancillary Service.

3. If the patient has not accepted  
Heartland's Ancillary Service (see  
subsection B(2) above), or asks what  
other providers are available, a referring  
person shall state that there are other  
providers in the community that may  
offer the Ancillary Service, and provide  
the patient with the list of providers  
attached. If appropriate, this list may be  
provided verbally. [PATIENT SHALL  
BE GIVEN A REASONABLE AMOUNT  
OF TIME TO INVESTIGATE OTHER  
OPTIONS.] If the patient at this point  
chooses a provider, that choice shall be  
noted on the patient's chart and the  
referral made to the provider chosen.

Copies of the Comments and the  
United States' Response to Public  
Comments, with all omitted  
attachments, are available for inspection  
in Room 200, Liberty Place, (202/514-  
2481), United States Department of  
Justice, Washington, DC and at the  
Office of the Clerk of the United States  
District Court for the District of Western  
Missouri, Kansas City, Missouri.

#### Lodging of Public Comments Regarding Proposed Final Judgment

United States of America, Plaintiff, vs.  
Health Choice of Northwest Missouri, Inc.,  
Heartland Health System, Inc., and St. Joseph  
Physicians, Inc., Defendants. Case No. 95-  
6171-CV-SJ-6.

Pursuant to the Antitrust Procedures  
and Penalties Act, 15 U.S.C. §§ 16 (b)-  
(h) ("Tunney Act"), Plaintiff United  
States of America hereby lodges with  
the Court the comments the government  
has received to date from the public  
regarding the Proposed Final Judgment  
in this case.

Attached to this pleading is a log  
listing for each comment the date the  
government received the comment, the  
date of the comment, the name and  
address, if available, of the commenter,  
the number of pages, and a brief  
description of the comment.

As the log indicates, the government  
received six comments in which the  
commenter requested anonymity. While  
those comments have been described in  
the log, five of those comments have  
been returned to their authors. The  
government has explained to those  
authors by means of accompanying  
transmittal letters that comments in  
Tunney Act proceedings become part of  
the public record. The government has  
invited each of these authors either  
promptly to submit a revised comment  
not disclosing the author's identity or to  
resubmit the original comment if the  
author no longer objects to public  
disclosure of the author's identity.

The sixth comment is an anonymous  
handwritten letter without return  
address in which the author's  
supervisor at Defendant Heartland  
Health System, Inc. is specifically  
named and claimed to be the primary  
cause of the problems in this matter.  
That comment will not be made  
available to the public unless the Court  
desires the government to do so.

The government anticipates that it  
soon will be filing its response to all the  
comments, as required by the Tunney  
Act, 15 U.S.C. § 16(d).

Dated: January 19, 1996.

Respectfully submitted,

Alleen S. Vanbebber,  
Deputy United States Attorney, Western  
District of Missouri, Suite 2300, 1201 Walnut  
Street, Kansas City, Missouri 64106-2149, Tel:  
(816) 426-3122.

Edward D. Eliasberg, Jr.,  
Gregory S. Ascioffa,  
Attorneys, Antitrust Division, U.S. Dept. of  
Justice, Room 9422, 600 E Street, NW.,  
Washington, DC 20530, Tel: (202) 307-0808.

#### Certificate of Service

I, Edward D. Eliasberg Jr., hereby  
certify that a copy of the foregoing  
document was served on the 19th day  
of January 1996 by first class mail to  
counsel as follows:

Thomas D. Watkins, Esquire, Watkins,  
Boulware, Lucas, Miner, Murphy &  
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City, Missouri 64105-0509

Richard D. Raskin, Esquire, Sidley &  
Austin, One First National Plaza,  
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Jack Briggs, Health Choice of Northwest  
Missouri Inc., 510 Francis Street, St.  
Joseph, Missouri 64501

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2345 Grand Avenue, Suite 2600,  
Kansas City, Missouri 64108

Thomas M. Bradshaw, Esquire, Dianne  
M. Hansen, Esquire, Armstrong,  
Teasdale, Schlafly & Davis, 1700 City  
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Kansas City, Missouri 64105

Glenn E. Davis, Esquire, Dianne E. Felix,  
Esquire, Armstrong, Teasdale,  
Schlafly & Davis, One Metropolitan  
Square, Suite 2600, St. Louis,  
Missouri 63102-2704

Edward D. Eliasberg Jr.

Note: The following list indicates where  
tables, newspaper articles and attachments  
have been taken out, you can obtain copies  
of these complete documents in our  
Department of Justice, Premerger Office,  
Liberty Place Building, ATR Division, Room  
215, 325 Seventh Street, NW., Washington,  
DC 20530.

1. Sept. 26, 1995 letter from Robert S.  
Keller, O.D.
2. Letter from the Administrator of St.  
Joseph Nursing Home
3. Anonymous note (had newspaper  
articles)
4. Mark L. Wyble, Coordinator, Patient  
& Community Relations from Total  
Home Health Care
5. Oct. 3, 1995 from Citadel Health Care,  
written by Lowell Fox,  
Administrator

6. Nov. 4, 1995 letter from Richard C.  
Bosworth, R.Ph., Coalition of  
Quality Health Care
7. Nov. 20, 1995 letter, Hill Country  
Health Services, Inc., from Ron  
Julian, Administrator.
8. Nov. 19, 1995 letter, from Dennis O.  
Davidson, M.D.
9. Nov. 23, 1995, Home Health Insights,  
Inc., from Ross Feezer
10. Nov. 27, 1995, Shepard's Crook  
Nursing Agency, Inc., from Suzanne  
Wilkinson, Administrator/Owner
11. Nov. 27, 1995, Metro Home Health  
Care Services, Inc., from Richard A.  
Porter, President/Administrator
12. Nov. 29, 1995, Kevin Miller, RRT,  
RCP
13. Dec. 4, 1995, Gibson Health  
Services, from Patricia A. Gibson,  
RN, MPH
14. Dec. 4, 1995, Heritage Home Health  
Inc., from Matthew F. Komac
15. Nov. 21, 1995, Metro Home Health  
Care Services, Inc. from Richard A.  
Porter
16. Anonymous letter (had clippings)
17. Feb 28, 1996, Missouri Alliance for  
Home Care, from Dale E. Smith

September 26, 1995.

Gail Kursh,  
Chief, Prof. & Intellectual Prop. Section/  
Health Care Task Force

Dear Ms. Kursh: I am grateful for the  
opportunity of writing to you regarding my  
concerns with reference to Heartland Health  
Systems here in St. Joseph.

I am a retired Senior Citizen and a patient  
of a Dr. in the group aligned with the  
hospital. I like my Dr. but don't approve of  
the monopoly the hospital has over the Dr.'s  
services as well as options given to the  
patients in several areas. Also, I understand  
the referral to specialists is down-sized. The  
Pres. of the hospital was quoted as saying "he  
was not being paid to be stupid," but he is  
being paid to have integrity and high  
standard of morals.

Yours truly,

Helen Kadera

P.S. I with so many, many others are  
grateful that this situation is being  
investigated.

Optometry

Dr. Joyce Keller Stroud

Dr. Robert S. Keller

3605 Faraon Street, St. Joseph, Missouri  
64506, Telephone (816) 364-2000

26 September 1995.

Gail Kursh,  
Chief, Intellectual Prop. Section, Health Care  
Antitrust, U.S. Dept. of Justice, 600 E. St.  
N.W., Room 9300, Washington, D.C.  
20530

Dear Ms. Kursh: It is my hope that you  
have received a copy of the St. Joseph News  
Press of 24 September 1995.

I want to point out that the Heartland  
Hospital new HMO, called Community

Health Plan, is excluding Optometry in  
providing eye health care to its members.

I refer to total eye health, with the  
exception of surgery. Optometrists can treat  
most eye health conditions and recently in  
Missouri, that included glaucoma.

Since 28 August 1995, I have sought an  
opportunity to appear before the Board of  
Community Health Plan to point out that  
Medicare and Medicaid utilize the services of  
Optometry to the fullest extent of their  
licensure.

Enclosed is a copy of the regulations  
defining the scope of the various professions.  
Heartland is in the process of being the  
gatekeeper for Medicaid in our area of  
Missouri, and they cannot be allowed to  
usurp Federal Regulations or any patients  
right to choose.

Very truly yours,  
Robert S. Keller, O.D.

Gail Kursh,  
U.S. Dept Justice, 600 E St. N.W. Rm. 9300,  
Washington, D.C. 20530

Dear Ms. Kursh: First, we don't want to  
talk against our Hospital as it is good to have  
a hospital in our city. But we expect the  
Hospital to be a Hospital, and not in  
competition with nearly every business in  
our town. Other businesses such as  
pharmacies, medical supplies Insurances,  
Nursing homes, all other nursing needs, such  
as Home health care programs, laboratories,  
rehab programs, and so on, it goes on and on.

We in the nursing home and convalescent  
business have to go through the state of  
Missouri to apply for Licenses and permits to  
start a convalescent center, we are inspected  
at least twice a year, more if they see fit. We  
have many rules to go by. We have to be  
approved by the State to operate. We don't  
think the same rules apply. Now Heartland  
Health systems has taken over so many of the  
services we had for years here in St. Joseph—  
without any permission from the State of  
Missouri without going through the processes  
required for nursing facilities. They have  
opened a skilled and intermediate care  
nursing home without contacting the State or  
going through the process. I have talked with  
a Regional Manager for the Division of Social  
Services and told him out plight, He said we  
can't do anything as Hospitals can do things  
and we can't say anything to them. There  
surely is some regulations for them as well  
as anyone else.

As of now in St. Joseph, MO. if the doctors  
don't belong to Heartland Health Systems,  
they can't take their patients there, which is  
double expense. A Doctor used to be in his  
office and the patient went there first, then  
if they needed hospitalization, fine,  
otherwise the Doctors office was cheaper.  
Also now if you need medications, the  
Doctors goes through Heartlands Pharmacy  
which cuts our own Hometown pharmacies.  
Our St. Joseph Surgical Supply is having a  
rough time, our suppliers of Health Care are  
all suffering and all nursing Homes are really  
hurting. Our facility alone is over 40 patients  
down and if we call a Doctor about anyone  
who is sick, they immediately say send them  
to the Hospital, we'll check them out here,  
which is very expensive. The ambulance  
service here is terribly expensive and is

owned by Heartland Health systems. This is another reason the Medicare program is suffering and Doctors could come to the Nursing facilities to see their patients as in the past but they seldom do that now.

Mr. Kruse not only has bought up the Drs. offices and buildings and clinics around St. Joseph and areas outside of St. Joseph, the Doctors had to join Heartland in order to use the hospital. An official of our State, said it would be good for the government to look into other hospitals he has worked for.

If all our nursing homes are forced to close, it would be a big loss to our city businesses, where we buy our supplies, also the employees would be out of work and we as business owners would be hurt. The banks that loaned us money to build and operate.

I understand the money Heartland's loans come from outside the St. Joseph area.

The min trouble we have with Heartland is the when we send our patients to them as have for years, instead of returning them to us for their rehab, and care, they are transferring them to their skilled and intermediate care units, until there Medicare days are used.

Two of our employees have met and talked with Heartlands Social Service Dept. they made the remark, "we have to send them to our nursing home, we don't have a choice.

Their Social Service Dept. call daily to check on vacancies, of which we have 40. However referrals are few and far between. In the past the majority of our patients came from the hospital.

We in the health care business in St. Joseph are all hurting, we appreciate any effort to stop Heartlands monopoly.

Sincerely;  
Administrator St. Joseph Nursing Home.

Dear Sir: We are all so very upset—We owe thousands of dollars on our nursing home—It's rather new & the bank didn't want to loan money to a nursing home they didn't feel secure because of something that happened years ago—Finally they did—Now this we are down over 40 beds & no hope. If we call & doctor he tells us to send them out to the hospital & he'll see them. Ambulance is \$400.00 just for that. Then they keep the patient & put the patient in their nursing home. This is in all nursing homes in St. Joseph—All pharmacies are suffering, all supply companies are suffering. Will you please help us in St. Joseph. Please, please.

Beltone Knapp Hearing Aid Center  
1150 South Belt Highway, St. Joseph, MO  
64507, (816) 232-3386, FAX: (816) 232-4362  
Sept. 29, 1995.

Gail Kursh,  
Chief, Professions & Intellectual Property  
Section/Health Care Task Force, Anti-  
trust Division, U.S. Dept. of Justice, 600  
E. Street, N.W., Room 9300, Washington,  
D.C. 20530

Re: Heartland Hospital Comments

Dear Gentlemen: On Sept. 24th, 1995 the St. Joseph News-press ran an article on the Heartland Hospital's problem and potential problems with both the federal and state governments.

In this geographical area we have only one hospital, and one physicians office that

specializes in problems of the ear. At least one other ear specialist was purported to have been forced out.

It is our understanding that any patient who has any questions of possible hearing problems is tested and if over 65 is billed to medicare. If there is a loss, they are sold hearing aids by the hospital. To our knowledge they are not given a choice or advised of the many immediate and long term benefits of being fitted by a dispenser other than the hospital.

If there is to be true competition than this system needs some changes.

Sincerely,  
Roger E. Knapp,  
President.

October 4, 1995.

Gail Kursh,  
Health Care Task Force, Department of  
Justice, Antitrust Division, 600 E Street,  
N.W., Room 9300, Washington, D.C.  
20530

Dear Ms. Kursh: As an 18 year employee of a Nursing Facility in St. Joseph Mo., I am writing in regard to the Anti Trust Suit against Heartland Health Systems in St. Joseph.

In the 18 years that I have been at this facility we have more vacancies as this time than we have ever had. We feel it is still the monopolization of Heartland. If we send a patient to the hospital they are treated in the acute hospital, transferred to extended care for rehab, until their Medicare days are used. Sometimes they are then transferred to the Medicaid unit. The nursing homes in St. Joseph all have rehab available and there really isn't any reason for patients to remain in the Hospital for the length of time they are kept. I believe it is abusing Medicare and Medicaid as well as private insurance. This did not happen in the past, only under the present management.

They have bought the Drs. groups, this has caused a trickle down effect in our city. It has affected everyone in the Health Care Industry. Heartland now has a 210 bed nursing facility, when there are many vacancies in the nursing homes in this area. If you use the Doctors they have bought, you use Heartlands Pharmacy, Laboratory, xray, and supplies. This has even gone so far as to hurt office supply businesses, as the Doctors in the past have bought their office supplies from the local businesses, now they buy through Heartland.

As far as Nursing Homes go, we all have vacancies and can't see there was a need for 210 beds at Heartland. I understand they will be adding an Alzhiemers Unit. There is a total of 500 beds available, when these are utilized, how many vacancies will we have and how many homes will be forced to close.

We were of the opinion it was against the law to have a monopoly. Heartland definitely has a monopoly in St. Joseph.

We have written the Justice Department in the past, as of this date we can see no difference in Heartlands attempts to monopolize the Health Care providers in Buchanan County and Northwest Mo. Finally the summary I read does not rectify the monopoly Heartland already has. Doctors,

laboratories, pharmacies, long term care, suppliers, and home health.

We remain optimistic that the anti-trust department can help the providers in and around our area.

Sincerely,  
Dee Frye,  
P.O. Box 1308, St. Joseph, MO 64502.

I am writing in reference to a newspaper article concerning Heartland Health System of St. Joseph, MO.

I have had quite a few bad dealings with the doctors in St. Joseph and Heartland Health System and Physician's acute care services—which are affiliated with Heartland.

Our insurance provider is Health Net, which my husband carries through his employer.

I have seen numerous instances of poor patient care, medical negligence, misdiagnosis and probable medical malpractice. Over-billing of patient accounts and trying to get more money out of the patient, than the insurance says we have to pay.

Another area you may want to check into is the med-clinic which is a doctor-owned clinic in St. Joseph.

Patients who have went to the clinic for a problem are given inaccurate lab results and inaccurate diagnosis and told to come back to be rechecked again, and when these patients go to their regular doctor there is nothing wrong with them.

I live 25 miles north of St. Joseph, and my family drives 70+ miles to use a hospital in Kansas City. The care is so bad at Heartland, I wouldn't take a dog there. I hope we never have a life threatening emergency—they probably wouldn't make it to Kansas City, but they would be better off, than going to Heartland.

Sincerely,  
Alona S. Miller,  
20421 County Road 223, Union Star, MO  
64494.

October 3, 1995.

Professions and Intellectual Property Section,  
Health Care, Task Force,  
Anti Trust Division, U.S. Department of  
Justice, 600 E Street N.W., Room 9300,  
Washington, D.C. 20530

Attention: Gail Kursh, Chief

Dear Ms. Kursh: Recently in the St. Joseph Newspress the article on HEARTLAND HOSPITAL, St. Joseph, Missouri pertaining to the anti-trust suit that is pending against them.

You might find it very interesting to the treatment that a local doctor \* \* \* Dr. Charles Willman received from them. He filed law suits again the hospital and some doctors but was unable to get by the Judge Bartlett in Kansas City and also unable to be heard in Jefferson City, Missouri. Dr. Willman was a very fine surgeon and was my person doctor. They refused him practice at the hospital and you might find it very helpful if you investigated this case.

Dr. Willman gave up his practice and now lives in Springfield, Missouri due to financial reasons.

Sincerely yours,  
Joy Schiesl,  
Five Lindenwood Lane, St. Joseph, Missouri  
64505.

Bender's Total Home Health Care  
3829 Frederick Avenue, St. Joseph, Missouri  
64506, 816/279-1668, 800/633-9781, Fax  
816/279-6425

Gail Kursch,  
Dept. of Justice, Antitrust Division, 600 E  
Street NW, Room 9300, Washington, DC  
20530

This is to make you aware of a grave concern we and others (providers and patients) have regarding the new Referral Policy of Heartland Health Systems. That policy, as stated in the proposed Final Judgment against Heartland Health Systems, HealthChoice of Northwest Missouri and St. Joseph Physicians Inc. by the U.S. Justice Dept., has clearly been developed to serve the best interests of Heartland and its subsidiaries, and certainly *not* the best interests of patients. Not only are patients unlikely to be given an equal, unbiased choice of providers, the new policy *guarantees* that patients *will not* be given unbiased information or assistance with which to make necessary decisions.

There are several reputable providers of home health care, hospice, home medical equipment, oxygen and outpatient rehabilitation services serving St. Joseph and the surrounding area. In an effort to achieve total vertical integration, Heartland has created subsidiaries to fill each of these ancillary services. In doing so, *Heartland has become a direct competitor with each of the independent providers for whom Heartland is the primary referral source.* To further control referrals, Heartland also now "owns" an HMO, an managed care agency and several physicians' practices.

While being ripe for abuse, this situation is not of itself necessarily harmful to independent providers nor to patients. Actually, we contend that fair competition encourages providers to improve the service they render and to hold down costs, which ultimately benefits consumers. However, the procedures which Heartland's discharge planners have been ordered to follow are harmful to the ultimate consumer good by preventing fair competition.

The previous referral policy was that every patient for whom ancillary services were ordered would be made aware of all area providers of the required service(s) in an unbiased way. Should a patient have questions about any of these, the discharge planner, working on the patient's behalf, would seek accurate information. This policy, if followed, would foster fair competition; would encourage providers to compete based on merit, not artificial barriers or deal-making; and most importantly, would benefit patients.

The new policy states that if a patient does not express a preference of provider, the discharge planner shall make a sales pitch for Heartland's own service. If the patient does not accept Heartland's Ancillary Service or asks what other providers are available, they shall be told to look in the telephone book.

Only if the patient asks again for information on other providers are the referring personnel to verbally (not in writing) identify the independent providers that can serve the patient's needs. At no time is the discharge planner to act on the patient's behalf by providing impartial information that would facilitate the patient choosing one of Heartland's competitors.

Obviously, this new policy blatantly prevents free, informed patient choice by denying equal access to information. Discharge planners who should be impartial patient advocates are turned into agents for heartland's ancillary services. No other provider is allowed to put literature into the hands of patients. No other provider is allowed access to patient charts. No other provider's capabilities can even be outlined to patients and families who could benefit from their service.

We do not expect each independent provider to be allowed to walk the halls "fishing" for patients or to give an aggressive sales pitch to every patient that is admitted. What *is* expected is fairness. Equal access to accurate information by patients and impartial efforts by those who are supposed to be assigned (and allowed) to serve the best interests of the patient—not those of Heartland. Heartland's Ancillary Services should be treated no better or worse than any other provider, but should compete for the opportunity to serve the needs of the patient based upon merit. Give the patients equal, unbiased information and impartial assistance and let them choose.

We have no complaint against hospital personnel, in fact most with whom we have had dealings over recent years (as patients and as a provider of products/services) have been extremely efficient and helpful. Our concern is with the new policy which, not only threatens the viability of independent businesses, but betrays the trust of unsuspecting patients who assume that their interests are being handled by impartial sources.

Mark L. Wyble,  
Coordinator, Patient & Community Relations.

October 9, 1995.

Gail Kursh,  
Chief, Professions & Intellectual Property  
Section, Health Care Task Force, Anti-  
trust Division, U.S. Department of  
Justice, 600 E Street, N.W., Room 9300,  
Washington, D.C 20530

Dear Gail Kursh: I recently saw an article in the St. Joseph newspaper indicating that the Justice Department was accepting written comments on the proposed consent decree concerning Heartland, Health Choice and St. Joseph Physicians, Inc.

What I cannot understand is how Heartland Health Systems, the parent of all these organizations, and supposedly a non-profit organization, can contribute over three million dollars to the purchase and development of land for an industrial park in St. Joseph.

If Heartland Health Systems has that much extra money to throw around then whatever they are doing must be a real serious violation of the anti-trust laws and should require more serious penalties than the slap

on the wrist they are receiving in the consent decree.

A concerned citizen of St. Joseph, Missouri  
Coalition for Quality Healthcare  
October 10, 1995.

To all who have been affected by Heartland's business practices, both providers and patients:

We are a group of business professionals and citizens concerned about the fairness in the healthcare market in St. Joseph.

We Want Our Voice To Be Heard

The Justice Department recently filed in district court a "Final Judgment", which, according to the competitive impact statement filed with it " \* \* \* will restore the benefits of free and open competition in St. Joseph and will provide consumers with a broader selection of competitive health care plans."

The Coalition for Quality Healthcare, and other concerned citizens, want you to become familiar with the "proposed Final Judgment." The United States District Court for the Western District of Missouri has filed this civil action suit against Heartland Health Systems, Health Choice of Northwest Missouri, Inc., and Physicians, Inc., on September 13, 1995. After 60 days, (November 13, 1995) this Final Judgment will be entered into court. Once finalized, no changes will be allowed into the decree for a 5-year period. We believe that the proposed final judgment should be modified and clarified before it has been filed and entered by the court.

Appropriate steps are needed to ensure equal access and to foster patient care. In order to ensure equal access to available services provided by many sources other than Heartland, as well as adequate patient choice in obtaining those services, we believe that certain restrictions need to apply to Heartland Health Systems. These restrictions would serve to foster and support cost reduction through total market competition, and should include the following:

- Strengthen limitations on the hospital's ability to refer its patients to its own hospital-based components.
- Require the hospital to use a rotation system, which assures equitable referrals to all providers in the area. A legislated rotation system would guarantee that hospital staff could not unfairly influence hospitalized patients in the selection of necessary providers and would provide a means of accountability.
- Require the hospital to permit (on their premises, during normal working hours) representatives of freestanding providers—other than their own hospital-based components—to visit their patients who have been admitted for hospitalization; and to expose the patient population to the availability of outside services as well.
- In order to ensure compliance with the above, make the hospital post, for public examination, their daily referrals to both their hospital-based component and to other providers in the community.

Situation

It is time we made the hospital accountable for their actions! They say they have a

referral policy, and they follow it \* \* \* let's make them abide by it. Hospitals who exceed 30% of referrals to their own components, should be subject to a fine.

#### Recommendation

We recommend that violators be fined \$50,000 per day.

#### What We Would Like To See

First and foremost, we would like to see the patients offered informed consent and the right to choose. We feel that all people need to be educated on this fact.

As a provider, your business may be adversely affected by Heartland's use of its monopoly power. As a patient at Heartland, you may have been "coerced" into using a Heartland based component, disregarding "Your Right to Choose".

Please join us for an informative meeting:  
Who: The Coalition for Quality Healthcare  
When: Tuesday, October 17 &/or Thursday, October 19

Where: Stan's Golden Grill  
Time: 6:30

It is only necessary to attend one of these meetings. We wanted to create an option in an effort to accommodate everyone's busy schedule. We will make every attempt to contain these meetings to approximately 1½ hours.

RSVP your attendance today to: 279-5393.  
Our goal is to submit to the United States District Court for the Western District of Missouri our recommendations to amend the "Final Judgment". We as a group of professional healthcare providers and concerned citizens, *must* take this stand now, or abide by the decree that will be enforced as of November 13, 1995. Together, we CAN make a difference.

Questions? Call 279-5393.

Sincerely,  
The Coalition for Quality Healthcare  
Citadel Health Care

5026 Faraon Street, St. Joseph, MO 64506,  
(816) 279-1591, Fax (816) 232-3775

October 3, 1995.

Gail Kursh,  
Chief, Professions & Intellectual Property  
Section, Health Care Task Force,  
Department of Justice, Antitrust Division,  
600 E Street, Room 9300, Washington,  
D.C. 20530

Dear Ms. Kursh: We are a small 100-bed skilled nursing home sitting in the shadows of Heartland Hospital of St. Joseph, Missouri. By doing a good job in all respects, we have been able to survive. But being a neighbor to an octopus, when the octopus is trying to eat you every day, is no fun.

The "Final Judgment" filed with the district court falls far short of creating a level playing field. Heartland conducted an elaborate building campaign and vastly expanded it's new "campus", then had it's older facility left mostly vacant. Being good business persons, they chose to convert that hospital structure into a skilled nursing home, directly affecting 400 other long term care beds operated by private entities. Heartland's intrusion into the market added a 50% increase in nursing home beds in a

state where a certificate of need is/was required, except that they used political influence to circumvent the certificate of need laws to be our monster competitor.

Does Heartland refer persons to our nursing home? Fat chance! They raid our census every time we have someone that becomes ill enough to need hospital or rehabilitation treatments. If those residents leave us, and they either have Medicare available coverage, or have private insurance, or are lucky enough to be financially secure, they never come back to us. They or their families are "sold the Heartland philosophy" (that Heartland can do more than any other nursing home, and do it so much better that nobody should ever leave Heartland's sphere of care). We have four such cases just in the month of September 1995, and know that those people will not be back until they are indigent, at which time Heartland will dump them like the next load of garbage, back to a nursing home.

Or if the person makes significant recovery, Heartland refers everyone possible to it's wholly owned "Heartland Home Health Care", which looks like it is just about to force all three other home-care businesses out of business. This seems grossly unfair, considering that again Heartland is the "new kid on the block". The other home care agencies were in business long before Heartland entered that market.

Is it coincidence that Heartland is thriving and all other health care businesses in the area are struggling for survival? Not hardly. Heartland has already bought approximately 80% of all the available physician services in the area. And if the doctor wants to keep his job (not his practice—just his job), he will do as Heartland directs.

In the long term care industry, survival depends upon a facility's relationship between local physicians and the hospital. Where does that leave every long term care provider in St. Joseph? Answer: 1) Competing for patients with the hospital; 2) Depending upon referrals by doctors that are employees of Heartland, operating medical practices that are owned by Heartland. If a potential nursing home admission is first seen at the hospital, if there is room in Heartland's facility and there is a way to induce the family to stay there, that is what happens. If the potential admission is seen in one of Heartland's medical practices (and they own approx. 80% of all the providers in the area), the Heartland provider is certainly referring potential clients to Heartland's nursing center.

If when the managed care capitation occurs, Heartland will now be in a position to absolutely bankrupt all the other nursing facilities in the area because they have a large, former hospital to expand into. They can bid services below their competitor's cost of staying in business because of their competitive advantage \* \* \* an advantage based upon monopolistic principles of eliminating competition.

It is relevant to note that Heartland's per diem rate is approximately 25% higher than other competitive nursing homes here, they are 95% filled with private paying residents, and the composite private pay census of all other homes in this area is approximately

25%. Heartland has staff persons whose responsibility is to recruit from the hospital to fill their nursing home with private paying persons. Nobody else in this area has access to walk the halls of the hospitals to recruit persons in need, and have the "closed market" already captured.

We know that Heartland has spent huge sums of money defending its right to acquire and operate all of the health care industry in a large area of northwest Missouri. Unless something is done in the near term future, they will squeeze their smaller counterparts like a huge python kills its prey. And when there is no life left, Heartland will swallow the remains.

When the competition is gone, so will be all ability to make independent health care choices, and so will go the availability of services to the masses. Heartland is flourishing because it already has captured the private pay market that can and does pay market rates. The rest of us must accept public assistance patients, or not accept any at all. Heartland gets all the private pay clientele, not because they necessarily provide better product, but because it's hospital has first access to those folks. If they were not sold a "bill of goods", why else would someone opt to pay 25% premium for services in a hospital-converted nursing home when they could have a much homier accommodation in some of this city's nursing facilities? Unfair competitive advantage!

Please do not turn your backs on the providers that took care of this community before Heartland became a megopolis. Those providers all survived and provided good service until the hospital pushed them aside. Given any kind of equal opportunity access patients, those facilities can still compete. It is the lack of access, due to Heartland's vertical integration, that threatens the livelihood of the other health care businesses in this area.

Thanking you in advance for any assistance you may provide, I remain.

Sincerely,  
Lowel Fox,  
Administrator.

October 11, 1995.

Ms. Gail Kirsh  
Health Care Task Force, U.S. Dept. of Justice,  
600 E St., NW., Room 9300, Washington,  
DC 20530

Dear Ms. Kirsh: Regarding Heartland Health System and St. Joseph Physicians Inc. in St. Joseph, MO. I prefer to go the a *doctor of my choice* and a *hospital of my choice*. I have gone out of St. Joseph for years and hope to continue to do so.

Heartland Health, under Lowell Kruse, has been attempting to "keep everyone in the area" for years. There needs to be a full scale investigation.

Sincerely,  
Evelyn W. Nask,  
2720 Francis, St. Joseph, MO 64501.

October 8, 1995.

Dear Ms. Kursch, Chief, Professions & Intellectual Health Care Task Force: I wish to comment on your proposed consent decree concerning Heartland, Health Choice and St. Joseph Physicians Inc. in St. Joseph.

It is *not* my desire to have *my* choice of doctor(s) and hospital eliminated. If I choose to go outside Heartland Health System for medical treatment I want that to be a viable option for me.

It appears Mr. Lowell Kruse and Heartland Health System are attempting to create a monopoly in N.W. Missouri, thereby running competitors out of business.

There needs to be a large scale investigation (without warning) of this entire system. I also think the doctor should be in charge of the patient, not the administrator on the insurance company.

Sincerely,

Ruth Serrells,  
2730 Felix St., St. Joseph, MO 64501.

cc:

State of Missouri, Attorney General's  
Office, Attn: Mr. Gary Kraus, Superior  
Court, Box 899, Jefferson City, MO 65102

November 4, 1995.

Gail Kursh,  
Chief, Professions and Intellectual Property  
Section Health Care Task Force,  
Department of Justice, Antitrust Division,  
600 E Street NW., Rm. 9300, Washington,  
DC 20530

Dear Ms. Kursh: This is an explanation of how I feel Heartland's policy and competition has affected my business over the last few years and how it will affect me in the future if strict guidelines are not put into place.

Heartland is competing with me directly for my nursing home patients and for my regular customers as though they were a standard business competing for profits. Competition is good and will always be the best system to keep all of the business community on the leading edge of giving the patients the best quality care they can possibly receive. As a "for profit" business, I must pay taxes and incur expenses in the day-to-day activities that control how I do business. Heartland, on the other hand, is competing directly for my patients and other laboratory, home health, and hospice care, etc. that they want to control, on a non-profit basis \* \* \* How is that possible? Their desires and efforts are towards controlling all aspects of healthcare in the entire Northwest Missouri area.

My business has decreased two-fold in the nursing home area. One is in direct competition for my customers in the homes and secondly through Heartland's in-house referral policy. When a patient is admitted into Heartland Hospital from a nursing home, they are "captured" into Heartland's system. When these patients are discharged, they are, on many occasions, discharged into Heartland's skilled or intermediate care facility and are then serviced by Heartland's own pharmacy. As you research past history you will see Heartland has already been in trouble for not giving their patients a real choice in their Heartland Centre facility. As a matter of fact, Heartland used to make their long-term care center patients sign a statement that they would only get their pharmaceuticals through the Heartland pharmacy. It has only been recently, (within the last two or three years) that Heartland

was forced by Medicare to allow other pharmacies into their nursing home setting. At that time, Heartland officials sent a letter to their patients which lead the patient and families to believe that if they didn't use Heartland's own pharmacy, Heartland could not guarantee the quality of service they would receive. This is a very scary thought to these elderly patients and their families. It is also a statement that could not be further from the truth. Given this "threat", does the patient really have a choice in pharmacy?

My total prescription volume, down by 20% in the last two years, is partially due to Heartland's policy to discount their prescription "copy" to all their employees for the purpose of increasing the volume of their new pharmacy. Even if we could afford to do this (reimbursement for our services by the Heartland HMO does not leave room for any more discounts) our contract with the claims processor makes discounts an unfair business practice. It should also be noted that Heartland, because of their position as a hospital and now an HMO, receive deep discounts on prescription drugs. Sometimes Heartland may pay as much as 80% less for the same pharmaceuticals that I buy at wholesale prices. This constitutes another aspect of unfair competition. There is no way I can cut my prices to adequately compete when I have to pay so much more for the same items. Several years ago Heartland had another pharmacy which tried to compete with existing pharmacies and could not make it on standard competition. Needless to say, Heartland has found this "unfair" competition much more lucrative.

Jake's also does not receive any referrals of patients as they leave the hospital and have needs for walkers, canes, crutches, wheelchairs, commodes and numerous other healthcare necessities for recuperation at home. This is an area I know all too well. I used to own a business that worked exclusively in home care supplies and fell to Heartland's unfair and unprofessional business practices. After building a quality business, having a past, non-exclusive, service contract with Heartland, and a letter of intent for continuation of this contract along with increased equipment needs forcing a large expenditure on my part, Heartland began doing business with another company without notice. This forced me into a sale situation which was less than desirable.

My major concern is for the patient's overall healthcare. Competition is what keeps hospitals, pharmacies, hospices, and other healthcare services accountable to the general public and each individual consumer. Competition encourages business to be the best that it can be. St. Joseph has only one hospital. The public is not able to compare Heartland's services to another hospital and choose the one which best provides for their specific needs. The new Heartland HMO seals the fate of true competition, not allowing for any choice what-so-ever in hospital services. If competition is further impeded, if Heartland is allowed to go forward with their plans without strict checks and balances, who benefits except the pocketbook of Heartland? If these other services, represented by many companies, are

allowed to fall by the wayside, who will be able to hold Heartland accountable? What guarantees will be in place that will make sure the patient's welfare and comfort are the driving force of healthcare decisions? I am deeply concerned that without the variety of businesses now involved in the many areas of healthcare in the St. Joseph community, Heartland will have a "captive audience". It will not make decisions based on what is best for the patient, but will judge a patient's healthcare treatment by money saved \* \* \* by profit generated.

You have the power to ensure that fair competition exists in the St. Joseph community. It is within your power to ensure that Heartland's domain is not allowed to continue to snowball and over-run its competitors. Unfortunately, if nothing is done to strictly control Heartland, by the time it is realized that lack of competition breeds apathy and poor service, the competitors will be gone.

In closing, I want to thank you for the opportunity to speak to these issues. I hope you are able to see the crisis faced by myself and my colleagues. If I can be of further assistance, please feel free to contact me at the address and phone number listed below.

Sincerely,

Richard C. Bosworth,  
Coalition of Quality Health Care, 2318 N Belt  
Hwy., St. Joseph, MO 64506.

Armstrong, Teasdale, Schlafly & Davis  
Attorneys and Counselors

1700 City Center Square, 1100 Main Street,  
Kansas City, Missouri 64105, (816) 221-3420,  
Fax (816) 221-0786

November 13, 1995.

Edward D. Eliasberg, Jr.,  
Antitrust Division, U.S. Dept. of Justice, 600  
E. Street, N.W., Room 9420, BICN Bldg.,  
Washington, D.C. 20530

Re: U.S. v. Health Choice of Northwest  
Missouri, et al., Civil Action No. 95-  
6171-CV-SJ-6, Pending in U.S. District  
Court, Western District of Missouri

Dear Mr. Eliasberg: This office represents The Coalition for Quality Healthcare, a Missouri non-profit corporation made up of businesses in the St. Joseph and northwest Missouri area who provide ancillary healthcare services to the public. In connection with our representation, we are preparing to respond to the proposed Final Judgment in the above matter.

We obtained a copy of the proposed Final Judgment (consent decree), Stipulation, Complaint and Competitive Impact Statement from the district court. We were informed by the district court that no "determinative" materials or documents called for by § 16(d) of the Tunney Act were filed with the court. We also called your Department to request those documents or materials and were told that none exist in this case.

Section VII of the filed Competitive Impact Statement recites that "No materials and documents of the type described in Section 2(b) of the APPA, 15 U.S.C. § 16(b), were considered in formulating the proposed Final Judgment." In light of the fact that this suit

resulted from a multi-year investigation by your Department, during which administrative depositions were taken and documents produced by defendants, it seems improbable under the circumstances that no documents exist which your office considered determinative in drafting the proposed consent decree.

This very issue was taken up by the district court in *United States v. Central Contracting Co., Inc.*, 537 F.Supp. 571 (1982). In *Central Contracting*, in response to a request for materials called for by the Tunney Act, the Department of Justice asserted that "there were simply no documents or materials \* \* \* that contributed materially to the formulation of the proposed relief." *Id.* at 573. The Court found the government's assertion disingenuous in light of the government's similar claims in 172 out of 188 prior cases that it considered neither documents nor any materials determinative. *Id.* at 577. The Court refused to blandly (and blindly) accept the government's certification that no documents or materials led to the government's determination that it should enter into a consent decree. *Id.* at 575. Rather, the Tunney Act required a "good faith review of all pertinent documents and materials and a disclosure" of those materials called for by the Act. *Id.* at 577.

We hereby request on behalf of The Coalition for Quality Healthcare that the United States produce to this office and file with the U.S. District Court for the Western District of Missouri a list of any materials and documents which the United States considered "determinative" in formulating the proposed Final Judgment, so that we or any members of the public may request copies of specific documents from your Department.

I look forward to your prompt response to this request.

Very truly yours,

Thomas M. Bradshaw, P.C.

TMB:kag

cc: Ms. Kristin Helsel, President, Coalition for Quality Healthcare  
Glenn Davis, Esq.

Heritage Home Health

Central Office: 169 Daniel Webster Hwy.,  
Suite 7, Meredith, NH 03253, 603-279-4700,  
Fax 279-1370

Branch Office: 500 Commercial St., Unit  
302B, Manchester, NH 03101, 603-669-5700,  
Fax 669-5755

November 14, 1995.

Gail Kursh,

*Chief, Professions & Intellectual Property  
Section/Health Care Task Force,  
Department of Justice, Antitrust Division,  
600 E Street, NW, Room 9300,  
Washington, DC 20530*

Re: DOJ's recommended home health, DME and hospice referral policy for Heartland Hospital

Dear Chief Kursh: I read with interest an article that appeared in . . . *home health line*, November 13, 1995, Vol. XX, No. 43, that referenced the above mentioned policy. Please take a moment to consider the following:

(1) The main source of referrals for home health services come from hospitals. The vast majority of consumers of home health services are patients discharged from hospitals in need of follow-up care.

(2) Free standing home health agencies can not reasonably duplicate such a facility (hospital).

(3) Free standing Medicare certified home health agencies are inspected according to the same federal regulations as hospital based home health agencies. There are no requirements or need for further "independent review or evaluation" by the hospital.

(4) Vertical integration and monopolizing of referrals can and will not serve long term cost containment.

(5) Medicare beneficiaries should be offered a list of all participating Medicare providers when they are in need of services.

(6) Hospitals should have discharge planners that are not affiliated with any home health agency, including the hospital based home health agency. Referrals could then be made to the best provider for the given circumstances. Often times, even though the hospital based agency can not properly service a patient, the referral is given to them, only to have the patient left without service entirely or on their own to locate another provider. Hospitals are reimbursed for offering discharge planning to their patients to locate the best possible scenario of services for that patient and to ensure that persons' discharge is a safe and successful one. In the current environment, however, discharge planners are fast becoming "casefinders" for Hospital based home health agencies.

(7) Hospital discharge planners often refer patients to other types of Ancillary services, that they are not affiliated with, when the hospital does not own facilities or agencies offering that type of service without doing an independent review or evaluation. For example, a referral to a skilled nursing, sub acute of rehabilitation facility.

(8) Hospitals are no longer the community providers they once were. They take the homes of people who owe them money. They employ attorneys, accountants, MBA's, image consultants and more. They advertise. Health care is a business. Hospitals are profiting from that business. They should not be allowed to continue unchecked.

Thank you for your consideration.

Sincerely,

Carolyn A. Virtue,

*Administrator.*

MS&R—Medical Sales & Rentals

1411 Memorial, Bryan, Texas 77802, (409)  
776-5555

November 14, 1995.

Gail Kursh,

*Chief, Professions & Intellectual Property  
Section/Health Care Task Force,  
Department of Justice, Antitrust Division,  
600 E. Street, N.W. Room 9300,  
Washington, DC 20530*

Re: United States v. Health Choice of  
Northwest Missouri, Inc., et al., Case No.  
95-6171-CV-SJ-6

The Coalition for Quality Healthcare is correct. Heartland Hospital is taking away a person's freedom of choice. Allowing the hospital to eliminate competition will eventually lead to poor service and poor quality of care. The independent businessman is the backbone of this country and that will be eliminated if the hospital is allowed to keep referring their patients to themselves.

Your recommended referral policy for Heartland Hospital is not correct. It is "big business" orientated and does not consider the patient or the independent businessman.

A local hospital opened their own DME company last year. Since that time two independent companies have had to change their day to day business strategies because they no longer get referrals from the area's major hospital. We are fighting to stay in business.

Please call me at 409-776-5555 if you would like more opinions or viewpoints.

Sincerely,

Nathan L. Cook,

*Owner/President.*

HealthCare Personnel

Moorings Professional Building, Suite 407,  
2335 Tamiami Trail No., Naples, FL 33940,  
(941) 261-8700 FAX (941) 261-7206

November 15, 1995.

Gail Kursh,

*Chief, Professions & Intellectual Property  
Section, Health Care Task Force,  
Department of Justice, AntiTrust  
Division, 600 E St., N.W. Room 9300,  
Washington, D.C. 20530*

Re: United States v. Health Choice of  
Northwest Missouri, Inc., et al. Case No.  
95-6171-CV-SJ-6

Dear Ms. Kursh: The proposed final judgment for U.S. v. Health Choice is a death knell for quality care in the home health care setting. Competition supports and promotes a high quality of care, evidenced by clinical outcomes, cost-effective clinical guidelines, patient satisfaction and appropriate utilization of community resources. Your proposed judgment creates a monopoly for hospital-based home health care agencies and the end of competition in home health care.

Hospitals have a "captured audience" of vulnerable patients who feel dependent upon the hospital staff. Patients are not likely to defy a discharge planner's referral to the hospital home health agency for fear that their defiance would create an environment where the patient's continuing needs (in-patient needs and paperwork for reimbursement needs) may not be met or may be delayed.

Additionally, hospitals exert their influence over physicians (with hospital privileges) to refer only to the hospital-based agency in order to support the hospital. Some hospitals have even moved their home health agency from being a separate entity to a hospital department, so that self-referrals are not subject to GAO investigations instituted by Rep. Pete Stark (D-Calif.). A second reason may be to shift administrative costs.

I have been in home health agency administration for twenty years. In the past two years I have seen hospitals discontinue

a referral rotation system, discontinue hospital access to patients by agencies who serve them, refer only to their own agency, call physicians to ask why a hospital patient was referred to an outside agency, and hide all referral data and percentage of referrals to hospital based or outside agencies. All these practices reinforce a hospital-based home health care monopoly.

Hospital arguments for promoting their own agency at the exclusion of outside agencies include continuum of care, referrals to other agencies would require hospital credentialing of outside agencies, and hospitals always give the patient a choice. It is easy to refute these claims.

The traditional continuum of care has always been from organization to organization, be it a hospital or other community resource agency, with patient information transferred between professionals who are trained to focus on continuity and coordination of care. Just because a home health agency has the same name or is affiliated with a hospital does not, in itself, assure quality, continuity or coordination of care. Continuum of care actually is a reimbursement train for the hospital, in the absence of their desired hospital-based reimbursement bundling.

The responsibility of a discharge planner includes knowledge and judgment regarding all home health care community resources that would benefit the patient. Traditionally, in cities as large as Cleveland, Ohio and as small as Naples, Florida, discharge planners have always known resources available, and have received feedback regarding the quality of care from those agencies. Besides, state home health agency licensure laws establish standards that agencies must meet, so hospitals should know that standards are met and don't need to "credential" them.

Finally, hospitals ALWAYS state they give the patient a choice, yet many outside agency patients have told outside agencies that during their hospitalization, hospital representatives have almost insisted they use the hospital-based agency and demand to know why the patient would NOT want to use an affiliated agency. Also, physicians who refer to outside agencies tell outside agencies that as soon as the patient is admitted, before the physician even discusses discharge with the patient (to advise them of the physician's choice of agency), the hospital-based agency has already been in to talk with the patient and already has them signed up as a referral for their agency. The physician does not even have a choice.

Thank you for the opportunity to send you my comments on your proposed final judgment for the above mentioned case. Please don't be persuaded by big hospital corporations and hospital lobbyists to pass a judgment that abolishes competition in home health care and effectively gives patients no choice and no recourse when a complete monopoly occurs.

Sincerely,  
Greg Eggland,  
*Director.*

Health Personnel Incorporated  
1110 Chartiers Avenue, McKees Rocks, PA  
15136-3642, (412) 331-1042, FAX: (412)  
331-2774

November 16, 1995.

Gail Kursh,  
*Chief, Professions & Intellectual Property  
Section/Health Care Task Force,  
Department of Justice, Antitrust Division,  
600 E. St., N.W., Room 9300,  
Washington, D.C. 20530*

Dear Chief Kursh: After reading the article that appeared in the 11/13/95 edition of *Home Health Line* I feel it is necessary as a free standing home health care agency to comment on the Department of Justice's proposed referral policy for Heartland Hospital. This policy will be precedent setting for all hospitals across the nation and fails to take into consideration a number of things such as:

The main source of home health referrals is hospitals and hospitals have a captive referral source which cannot be duplicated in any other way. Yet, they are a very expensive source of home health care and often provide a poorer quality of care. Hospitals pass through some of their administrative and general costs to their home health agencies and get away with this "double dipping". The cost of a visit is increased by passing through costs of the hospital and this does not help cost containment efforts.

Also, at least in this area of the country, hospitals do not individualize their care. They discharge patients from homecare before they stabilize which sends them back to the hospital and increases health care cost.

One way to stop this is to enforce regulations: Freestanding agencies must meet the same certification and/or licensure standards as hospital agencies. Therefore, hospitals should have a rotating list which assures equitable referrals to all qualified providers (one that meet Medicare certification (licensure) standards and have the necessary services). The hospital should have to make their percentage of referrals public knowledge to each agency.

The discharge planner should offer a list of all participating Medicare providers in the service area and the discharge planner should have no affiliation with any agency. By the way, hospitals often cannot service the patient adequately and so the patient is left without care, i.e. a physical therapist is not available to see the patient in a timely manner (four weeks later a physical therapist is starting to see the patient). No home health aide is available so the hospital agency tells the patient that they do not qualify for a home health aide. (For example, the patient has a fractured arm and myocardial infarction but, does not qualify for an aide?)

Although, your policy puts the physician back in control, it fails to take into consideration the fact that here in Pittsburgh, if doctors refer to another entity outside the hospital, the hospital can revoke their privileges. (This is happening in Pittsburgh.) You need to write the settlement so that

hospitals cannot retaliate or put pressure on the doctor to refer to their agency.

Referring the patient to the phone book is inappropriate as the patient cannot tell which providers can give the kind of care they need or who is Medicare certified. Also, the list of other providers needs to be written as sick or well people, cannot remember many, if any, names and they need the phone numbers.

This issue covers more than the antitrust issue you seem to be addressing. The settlement fails to address the Anti-kickback Law which prohibits hospital doctors (doctors paid by the hospital) from referring to a hospital owned agency and the Stark II Law. According to these laws, no agency can receive referrals from any physician who has been paid more than \$24,999.00 by that agency. If a hospital or doctor owns more than a 5% financial interest in an agency, they cannot self refer.

Health Personnel, Inc. has tried to address these issues with HCFA since 1986 and no one has been able to resolve these problems. In addition, the American Federation of Home Health Agencies has had discussions with Mr. Thomas Hoyer at HCFA in Baltimore regarding the patient choice issue. I hope you will resolve these problems and legal questions.

Sincerely,  
Phyllis W. Fredland,  
*Director of Nursing.*

Home Health Specialists

November 16, 1995.

Gail Kursh,  
*Chief, Professions & Intellectual Property  
Section, Health Care Task Force, Dept. of  
Justice, Antitrust Div., Washington, D.C.  
20530*

Dear Ms. Kursh: I have recently read the D.O.J., proposed referral policy for home health, DME and hospice for Heartland Hospital. I personally find this totally absurd. If this proposal passes it not only will affect the freestanding home health industry, but will also affect a patient's right to choose, even though the bill offers some small reference to freedom of choice. The government reports that Medicare will be broke by the year 2007, and then a bill such as this is recommended for hospital based agencies. Evidently there has been no investigation of the cost of hospital based agencies versus freestanding agencies for patient care and supply reimbursement. To allow a hospital to elaborate on their agency and state that they know nothing of the other agencies in town is absurd, when we all know that being a discharge planner, they have had some dealings with the other agencies in their area. Freestanding agencies have received a bad deal, since the beginning of hospital agencies when it comes to referrals and this will only make it worse. We provide the same quality and conservative care that they state they provide and at a lower cost. As it stands right now in our area, we are not allowed to place brochures in our hospital, visit our former patients, because that is considered solicitation by the hospital, and we are not allowed to view the admittance and discharge rooster. This only

started when they opened their own agency. A rotation of referrals would give everyone a fair chance to provide the care for the patients that we should all strive for. This would stop the hospitals attempting to monopolize the health care industry and could possibly reduce the legal and judicial fees that are being used due to law suits over the monopolizing of care. The posting of referrals would then allow the freestanding agencies to view how referrals are given and provide some insight into the qualifications and professionalism of the discharge planners, who in some instances are placed in the hospitals by competing home health agencies. If the bill is passed as the D.O.J. recommends, you will see slowly the fading away of freestanding home health companies that provide a large number of jobs to people in our area. I hope that the people reviewing this proposed policy really know the impact that this will have on the health care industry and take into consideration that it is hard enough now for freestanding agencies to receive referrals from hospitals, knowing fully well the discharge planners are not playing by the regulations that are in existence now, and this would make it easier to violate regulations, while at the same time allowing an industry of freestanding agencies to die away. Please, for all the freestanding agencies that are in existence please review this referral policy closely and make discharge planners to rotate referrals as well as make available to home health agencies the list of the referral list.

Sincerely,

Donna Isabell,

*Administrator/President, Home Health Specialists, Inc.*

November 6, 1995.

Dear Gail: My name is Kathy Smith. I read an article in the St. Joe newspaper on Sept. 24, '95 concerning Heartland Health System. This article really hit home with me. This hospital, or so called hospital, has ruined my life. Let me tell you my story.

I broke my ankle on April 12th of this year. I was taken to the hospital by some friends. (My husband works the late shift so he met us at the hospital later.) I waited in the emergency room for one hour and 45 minutes. In that time, no one came out to check on me. I finally had my husband go ask a nurse for a blanket. My body was beginning to shake. I imagine shock was starting to set in.

Finally I get back to E.R. and am taken on to X-ray and I wait some more for a doctor to come and set my foot. I find out I need surgery. They will do it tomorrow (April 13). I leave E.R., its after 2:00 in the morning.

Surgery is done the next afternoon. All went well, or so I am told. I get released on the 14th & I go home.

Now, you have to understand, I'm 33 years old, and am married and have two small boys, ages 3 and 5. I'm walking or hopping around with a walker, can't fix supper, can't do all the chores around the house, that I used to. This hurts, I've never had to depend on other people. But I figured, I'll be up and around in 6 to 8 weeks, just like the doctor had stated. End of story? I wish, it's only the beginning!

One week after the 1st surgery in April, I came down with a high fever of 103 degrees, then the chills, and nausea. I called my doctor, he wasn't in. I told the nurse, or the secretary or whoever, and they said they would get a hold of him and have him call me. He did, about 45 minutes later. I told him all the symptoms, and do you know what he said, I must be coming down with a cold or maybe the flu. Take some Tylenol.

I went back to the doctor, every week for the next month, then every 2 weeks for awhile. I had a place on my ankle that wasn't healing. He (the doctor) would squeeze on my leg and say that was fat draining out. He even brought in a colleague, and they both agreed that was what it was. (No not once in his office did he wear rubber gloves when he touched my ankle (leg).)

Finally after about a month, he decided to put me on antibiotics (actually he gave me a choice, go in the hospital or take antibiotics.) Now, when you have a family that depends on you, what choice if any would you have taken? So I took antibiotics. Even when I went back to see this doctor (on antibiotics) he'd continue to squeeze on my leg, and it (pus) would just ooze out and one time he mentioned, maybe it is a blood clot.

We are in June now, the 5th. He decides he'd better go in and take the plate and screws out. It's June 7th, he took the hardware out. The infection had eaten my flesh away, and some bone along with it. Actually it had spread into my bone. Now I have osteomyelitis (a bone disease). I thought I was going to lose my whole foot & part of my leg! Where did they get this doctor from? I had a lot of unanswered questions? I was worried, I was in pain and I was scared.

Two days later, I got another visit from another doctor he wants to put a groshong catheter in my chest. Why? I ask. I needed to be on vancomycin (one of the strongest antibiotics used to control osteomyelitis.) I have that surgery on June 9th. The doctor assured me I wouldn't feel a thing. I was to be given a local to deaden my chest area. Well, the local didn't work. I was awake through 3/4 of the operation talking with the doctor & the nurses. Have you ever heard of a doctor going through with an operation when the patient was awake? I could feel those tubes running down to my heart. It did hurt but I tried to be strong & not let the pain get to me too bad.

The first doctor, he called in a plastic surgeon. He was to try to fill in this hole in my leg (that hole was left by the first doctor after he took plate & screws out, where the flesh had rotted away.) So the plastic surgeon, cut a flap in the back of my leg to fill in the original hole. It was done on June 13th. Then I laid in the hospital bed for a week and couldn't move. The 3rd doctor said let's keep our fingers crossed to make sure this takes (skin graft).

Also the 3rd doctor said to me "if I were in your shoes, or one of my family members, I wouldn't be real upset with doctor #1." Can you believe what he told me? I came so close to losing my foot and he had the nerve to say something so foolish!

On June 20th, the gal from the Heartland Home Health Care came in and said, "We've got you all signed up for H.H.C." I wanted

to know why and she said "because you'll have a nurse come over & make sure you get the vancomycin twice daily." The nurse from H.H.C. told me it was kinda expensive. They had contacted my insurance co. and they agreed to pay 80%. We had to pick up the 20%. I thought it (the price) couldn't be real bad. But I was wrong. Each bag of medicine was \$65.00. That's \$130.00 a day. I was on this medicine from June 21st to August 24th. The nurse came out almost weekly to draw blood for tests. The 1st doctor told me I wouldn't be on it (vanco) for long. He was wrong. I was dismissed from hospital June 21st.

There was no mention I could have gotten another Home Health Care Provider, in fact I was shocked to learn, other ones were out there, & that they may have been cheaper. I guess you could call me stupid, but after this nightmare, I have really opened my eyes. Each visit with a nurse was over \$100.00.

These people must think we are made of money. My husband is a welder, at a plant here in town, and he doesn't make a lot of money for 4 people to live on. We rent the house we live & our fortunate to have 2nd hand vehicles to drive. Our kids get hand me down clothes.

So you see we don't have a lot of money, and Heartland doesn't help when they have such high prices for their services, and they need to stop monopolizing the St. Joe area.

By the way, my 1st doctor told me after I asked him a few times. ("I had picked up the stupid infection from the hospital from the surgery.") Isn't that a kick in the ass? Now, we have all these hospital bills & doctor bills to pay. And I have a scarred up leg to show for it. And the doctors & hospital are getting richer for their mistakes. If you know anyone that could help me I would appreciate it!

Sincerely,

Kathy S. Smith.

October 17, 1995.

Gail Kursh,

*Chief, Professions and Intellectual Property Section/Health Care Task Force, Anti-Trust Division, U.S. Department of Justice, 600 E St., NW., Room 9300, Washington, DC 20530*

Re: Heartland Referral Policy—consent decree page 13B-1

As a prior patient of Heartland Hospital, choices in health care providers were not given at the time of discharge.

I believe upon being admitted to the hospital, information on all agencies should be provided to all patients.

Being advised to check the phone directory is not a logical solution.

Kathy S. Smith.

VIP Home Nursing & Rehabilitation Service, Inc.

51 Century Boulevard, Suite 308, Nashville, Tennessee 37214, (615) 883-9816, (800) 826-8998

November 17, 1995.

Gail Kursh,

Chief, Professions & Intellectual Property Section/Health Care Task, Dept. of Justice, Antitrust Division, 600 E. Street, N.W., Room 9300, Washington, DC 20503

Re: United States vs Health Care of Northwest Missouri, Inc. Case No.: 95-6171-CV-SJ-6

Chief Kursh: In response to the above case/proposal, I would like to put some light on this proposal as far as freestanding providers are concerned.

Here in Middle Tennessee we feel like the unwanted step-child as far as hospitals are concerned.

Approximately ninety percent of the hospitals, large and small, now have their own in-house home care service.

We are told by the discharge planners:

1. We rotate our patients to assure equitable referrals to all providers in the area.

This is hogwash! We have called on some hospitals in the Middle Tennessee area for over a year and still do not get patients from a good portion of them. Or, if we do get a patient, it is because the patient has requested VIP (which has been overridden before), or the patient may live in an outlying area where the hospital home health cannot service due to distance. (VIP has six offices covering 22 counties.)

2. We have been told point blank that unless the patient requests a certain home-health agency, they will automatically be placed with the hospital home health service.

3. We have seen instances where the hospitals are referring patients to their home health, without any input from the patient's physician. Sometimes the physicians get upset over this issue, because in some cases the hospital home health apparently doesn't provide the level of care that the physician would like to see.

4. Some of the smaller hospitals in the area have been in very poor financial condition. These have been bought out by another hospital that has an in-house home nursing service. The physicians in the area were so appreciative to be able to keep a hospital open in their area, that we have been told by the physicians that they will *only* use the hospital's in-house service because they feel so indebted to the new hospital.

5. Another hospital in this area was in the "red" and due to close in three to six months. A freestanding home nursing service contracted with them to run a home health service for them. The home nursing service, to my understanding, paid the hospital \$3,000 a month to rent space (this is a very small town). The home nursing service has one of their own employees making rounds to the patients up for discharge, to check with them about their home health needs. The home nursing service is signing up patients left and right for their service. This is considered fraud under Medicare rules. Freestanding services are restricted by Medicare of direct solicitation of patients!

Do you see where our frustrations are coming from?

These in-house hospital home health services do not need to be given any additional power on referrals. They already have a captive patient population.

Passing this proposal would be a true slap-in-the-face for all freestanding providers of home nursing. Instead of a few crumbs, the step-children need a whole piece of the cake for a change!

Please help us!

Best regards,

Kay Smith,  
Director of Patient Services.

November 17, 1995.

Ms. Gail Kursh,  
Professions & Intellectual Property Section/  
Health Task Force, Dept. of Justice,  
Antitrust Division, 600 E. St., N.W.,  
Room 9300, Washington, D.C. 20530

Re: United States v. Health Choice of Northwest Missouri, Inc., et al., Case No. 95-6171-CV-SJ-6

Dear Gail: My comments on the above case for hospital discharge planners are that the hospital should provide the patient with a list of area providers who handle that patient's needed service. The hospital should have the right to have their own service listed first, and give to the patient any material the hospital has prepared for that service organization.

The balance of the list should include, in alphabetical order, all other service providers who request to the hospital to be included on the list. The list should not encompass an area of more than 50 miles from the hospital. The hospital should be allowed to print a disclaimer that they cannot speak to the quality of care the other listed providers provide.

Thank you,

Michael W. Thomas,  
4518 Forestwood Drive, Parma, Ohio 44134.

Our Lady of Mercy Medical Center  
600 East 233rd Street, Bronx, New York  
10466-2697, Phone: (718) 920-9000

November 16, 1995.

Gail Kursh,  
Chief, Professions and Intellectual Property Section/Health Care Task Force,  
Department of Justice, Antitrust Division,  
600 East Street, N.W., Room 9300,  
Washington, DC 20530

Re: Case # 95-6171-CV-SJ-6, United States v. Health Choice of North West Missouri, Inc. et al.

Dear Chief Kursh: I want to applaud your recommended Home Health, DME, and hospital referral policy for Heartland Hospital. It is appropriate that a hospital with their own home health agency refer patients to their own excellent, fully accredited agency.

Our agency does not keep statistics but we get frequent calls from patients when other agencies do not visit them within 24 hours of discharge from the Medical Center. It is hard to recommend other agencies!

Thank you for your support of the hospitals and their home health agencies.

Sincerely,

Rose M. Rosenberg,  
DPS/Administrator, Home Health Agency,  
(718) 920-9030.

Hill Country Health Services, Inc., dba Hill Country Home Health

P.O. Box 909, Lampasas, Texas 76650, 512-556-8293, Fax 512-556-3591

November 20, 1995.

Gail Kursh,  
Chief, Professions and Intellectual Property Section, Health Care Task Force, Dept. of Justice, Antitrust Division, 600 E. St. N.W., Room 9300, Washington, D.C. 20530

Re: United States vs Health Choice, Northwest Missouri, Inc., et al, Case No. 95-6171-CV-SJ-6, U.S. District Court, Western Division of Missouri

Dear Ms. Kursh: I would like to comment on the above case involving home health referrals from hospitals. As the owner/administrator of a free-standing home health agency in Central Texas, we deal with numerous hospitals and home health patients.

In our service areas, we have encountered hospital discharge planners participating in self dealing by referring predominately to hospital based home health agencies. The patients are told "your doctor has ordered home health and we will have a nurse out to see you tomorrow." These patients are not given a choice of available agencies.

Many times, our former patients have requested our agency because of particular caregivers. They have been told by the discharge planner that these care givers do not work for us anymore, when in fact they do still work for us.

I believe in competition but it is really hard to compete against a monopoly.

In accordance to published Fraud Alerts (see attached), it is against the law to offer anything of value to induce a referral. If a hospital supervisor tells a discharge planner "if you want to keep your job, you WILL refer patients to our (hospital based) home health agency", then I feel this violates the intent and the letter of the law.

Your proposals in the aforementioned case falls far short of "leveling the playing field". I would like you to consider forcing hospitals to do the following:

a. Allow patients to exercise their right of freedom to choose their beneficiaries.

b. Allow non-hospital based providers to visit their former patients in the hospital.

c. Where no provider is specified by the physician or the patient, provide a list of eligible providers in the area so that a patient can exercise their right to choose their provider.

d. Make sure that discharge planners are not coerced by supervisors to violate Medicare Antitrust, and the Federal Trade Commission's laws by doing self referrals in order to keep their jobs.

Thank you for your attention to this matter and I trust that the Justice Department will rule in favor of all; the patients and those of us that compete on the currently unlevel playing field.

Sincerely,

Ron Julian,  
Administrator.

Dennis O. Davidson, M.D.

*A Member of Arkansas Family Care Network,  
Arkansas Physician Management, Inc.*

2000 Harrison St., Suite D, Batesville, AR  
72501

Mailing Address: P.O. Drawer G, Batesville,  
AR 72503

November 19, 1995.

Gail Kursh,  
Chief, Professional & Intellectual Property  
Section/Health Care Task Force,  
Department of Justice, Antitrust Division,  
600 E. St., N.W., Room 9300,  
Washington, D.C. 20530

Re: U.S. vs Health Choice of Northwest  
Missouri, Inc., et al. Case No. 95-6171-  
CV-SJ-6 in the U.S. District Court for the  
Western District of Missouri.

Dear Ms. Kursh: I am enclosing a copy of  
an article from Home Health Line dated 11-  
13-95 pursuant to the above captioned case.  
Please know at first that I own no interest in  
a Home Health Care Agency. The DOJ has  
made an error. In short, you have given the  
hospital the monopolistic power to slant  
probably near 100% of their referrals to their  
home health agencies. Discharge planners in  
the hospital are people hired by the hospital.  
Who but the hospital will they recommend  
referral to. You are not giving any equal  
accessibility to the patient's to other home  
health agencies. Hospitals also work out  
various deals with physicians and these  
physicians are eager to send all of their  
patient's to the hospital home health agencies  
anyway.

This decision is so unreasonable and stinks  
so badly that I am sending copies of this  
letter and article to all my senators and  
congressmen. I hope that they have the good  
insight to bring up some sort of law that puts  
a stop to a decision of this caliber. I cannot  
for the life of me understand that you can feel  
that there is any equity or justice in this  
decision.

Thank you for the opportunity for  
presenting my written comment.

Sincerely yours,

Dennis O. Davidson,  
DOD/bjr.

cc:  
Senator Dale Bumpers  
Senator David Pryor  
Senator Steve Bell  
Congresswoman Blanche Lambert

Alternacare Home Health Services, Inc.

414 E. Main St., P.O. Box 2591, Lancaster,  
OH 43130-5591, (614) 653-2224, (614) 653-  
1333 FAX

November 21, 1995.

Gail Kursh,  
Chief, Professions & Intellectual Property  
Section/Health Care Task Force,  
Department of Justice, Antitrust Division,  
600 E. St. NW, Room 9300, Washington,  
D.C. 20530

Dear Ms. Kursh: I would like take the  
opportunity to share my viewpoint regarding  
the case United States vs. Health Choice of  
Northwest Missouri, Inc., et al. It has been  
my experience that hospitals do not present  
the home health choice available to patients  
who are being discharged from a hospital.  
The discharge planners at our local hospital  
inconsistently provide the written list of  
choices—but rather verbally inform the  
patient of a select few. (The local hospital has  
a home health agency.)

It is not the responsibility of the hospital  
to "credential" or endorse any agency.  
Rather, it is the patient's right to be made  
aware of choices and have those choices  
honored. The hospital can simply provide  
the facts, via a brochure from each agency,  
and allow the patient to make their selection.

This same unfair practice of referring to  
hospital-owned agencies/companies is also  
occurring in the Durable Medical Equipment  
area of services and providers.

The referral policy of Heartland Health  
Systems, Inc. (St. Joseph, MO) is unfair and  
should not be acceptable. In the  
recommended referral policy, the choice is  
made for the patient, unless they choose  
another option. Certainly it is clear that this  
is not in accordance with the regulations  
requiring patient choice. Instead, the patient  
should be provided with available services  
(again with printed brochure), then permitted  
to make a choice. If the patient than has no  
preference, then a system of rotating the  
referrals to the local agencies may be  
considered as equitable.

Please consider carefully before approving  
any policy for referrals as proposed by  
Heartland Hospital.

Sincerely,

Diane Flowers-Stuckey,  
Director.

The Lee Visiting Nurse Association, Inc.  
P.O. Box 415, Lee, Massachusetts 01238,  
Telephone (413) 243-1212, FAX (413) 243-  
4215

November 20, 1995.

Gail Kursh,  
Chief, Professions & Intellectual Property  
Section/Health Care Task Force,  
Department of Justice, Antitrust Division,  
600 E. St., Room 9300, Washington, D.C.  
20530

Re: U.S. v. Health Choice of Northwest  
Missouri, Inc., et al., Case No. 95-6171-  
CV-SJ-6 in the U.S. District Court for the  
Western District of Missouri

Dear Ms. Kursh: The referral policy  
recommended by the DOJ for Heartland  
Hospital is highly prejudicial. "Choice" is  
most certainly diluted and may be seen as a  
very subjective term when used by a hospital  
discharge planner with affiliation to a  
specific home care agency.

Having experience in this area, I can  
imagine a patient being given a "choice" of  
a particular agency which is in fact more of  
a recommendation, a directive, or a  
preference depending upon the approach of  
the discharge planner. Most patients lack  
knowledge in this area and tend to rely upon  
the advice of the discharge planner: It is  
unusual for a patient to state a specific

choice. However, if a patient expresses  
uncertainty and then is directed to a  
phonebook to "choose", this seems less than  
supportive or helpful in any way. Hence,  
choice is not a "choice," and is, instead, a  
sort of punitive arrangement whereby the  
discharge planner essentially denies the  
patient assistance in "choosing."

How perverse! Choice is a word loosely  
interpreted these days, but since when is self-  
referral considered a "choice?" Only the  
most savvy, assertive patient could navigate  
such a system. Antitrust is dead if this is how  
the courts elect to interpret the patient's right  
to choose.

Sincerely,

Paula Schutzmann,  
Executive Director, Certified Case Manager.

Sun Management Services

61 Duke Street, PO Box 232,  
Northumberland, PA 17857, 99 South  
Cameron Street, Harrisburg, PA 17101, 1-  
800-577-5514

November 20, 1995.

Ms. Gail Kursh,  
Chief, Professions and Intellectual Property  
Services, Health Care Task Force,  
Department of Justice, Antitrust Division,  
600 E. Street, NW., Room 9300,  
Washington DC 20530

Re: United States Health Choice of Northwest  
Missouri, Inc., et al., Case Number: 95-  
6171-CV-SJ-6

Dear Ms. Kursh: It is with great concern  
that I read the proposed settlement as it  
related to the recommended home health,  
DME, and Hospice referral policy for  
Heartland Hospital.

The policy repeatedly stated that "if the  
patient has a preference, that preference shall  
be honored." We believe, however, that the  
policy does nothing to ensure even a minimal  
level of knowledge by the patient.

This policy is the equivalent of asking a  
patient's permission for major surgery  
without providing any information regarding  
risks or outcomes.

Patients at a minimum should be informed  
of other providers and be provided  
equivalent marketing materials that are used  
by the hospital. Patients should be offered  
access to other provider's staff for the  
purpose of evaluating options.

The argument by Heartland's Attorney,  
Thomas Watkins, that "there is no hospital  
in the world that is going to want to bless  
somebody else's home health agency when  
they cannot be responsible for care. We  
cannot be in the position of educating the  
patient—we don't have the information" is  
ridiculous.

Other providers are more than happy to  
provide the hospital and the patient the  
information required to make an informed  
decision. Hospital Social Service  
Departments routinely provide information  
about community resources. To allow them  
to act differently in areas where the hospital  
has a vested financial interest is questionable  
ethics at best.

The recommended referral policy not only  
provides inadequate access to information  
ensuring a patient's ability to make an  
informed choice but also provides the

hospital opportunity to be discriminate in terms of what patient it chooses to serve.

It is common today for patients simply to say yes to home health referrals; allowing the hospital to self refer desirable patients and to farm out to other provides those they wish not to serve.

We believe that the recommend policy protects the hospital's vested investments at the expense of an informed patient choice and suggest appropriate revisions be required.

Sincerely,  
Steven Richard,  
Senior Advisor.

Armstrong, Teasdale, Schlafly & Davis  
A Partnership Including Professional  
Corporations

Attorneys and Counselors

1700 City Center Square, 1100 Main Street,  
Kansas City, Missouri 64105, (816) 221-3420,  
Fax (816) 221-0786

November 21, 1995.

Via Federal Express

Ms. Gail Kursh, Esq.,  
Chief, Professions and Intellectual Property  
Section, Health Care Task Force,  
Department of Justice, 600 E Street, NW.,  
Room 9300, Washington, DC 20530

Re: Objections and Comments of the  
Coalition for Quality Healthcare to the  
Proposed Final Judgment pending in  
*United States v. Health Choice of  
Northwest Missouri, Inc., et al.*, Civil  
Action No. 95-6171-CV-SJ-6, Western  
District of Missouri, as published in the  
Federal Register, Tuesday, October 3,  
1995

Dear Ms. Kursh: This law firm represents the Coalition for Quality Healthcare (the "Coalition"), a nonprofit Missouri corporation organized to assure consumer access to timely and relevant information and to promote competitiveness in the healthcare field. This letter constitutes the formal Comment and objections of the Coalition to the proposed Final Judgment pending in the above-referenced matter.

By way of background, the Coalition is comprised of concerned citizens and providers of ancillary healthcare services in Northwest Missouri, including St. Joseph, Missouri and its surrounding areas. Members of the Coalition include owners of long-term care facilities, home health care agencies, pharmacies, medical equipment companies, and other service oriented businesses operating in the healthcare field.

The Coalition members firmly believe that the proposed Final Judgment is not in the best interest of the public primarily because the proposed Final Judgment contains a provision requiring Heartland Health System, Inc. ("Heartland") physicians to follow the Heartland "Referral Policy" if a Patient needs ancillary services upon discharge from acute care. Comparison of the provisions of the proposed Final Judgment to the Complaint reveals the anomaly that the Complaint focuses exclusively on defendants' efforts to foreclose competition from other managed care plans in Buchanan County. Heartland's

Referral Policy is not mentioned in the Complaint and seems to have been inadvertently added to the proposed Final Judgment.

The proposed Heartland Referral Policy denies patients the right to make an informed choice among ancillary service providers in the Northwest Missouri area. Specifically, the Coalition urges the Department of Justice to remove the Heartland Referral Policy from the proposed Final Judgment for the following reasons:

A. The Referral Policy is not in the Public's interest because it prevents patients from making an informed choice regarding Ancillary Services:

\* The proposed policy would allow the doctor to initially order that a particular ancillary service provider be used, rather than allow the patient to choose freely among any of the ancillary service providers in the Northwest Missouri area. Because Heartland employs or is otherwise associated with the majority of physicians with staff privileges at Heartland's hospital, doctors will routinely order Heartland ancillary service providers for the patient. Hospital patients requiring ancillary services are frequently elderly, in ill health and are unlikely to question, let alone contest, a doctor's order, or understand the basis for the recommendation.

\* Even if the doctor does not designate a certain ancillary service provider, the patient is nonetheless steered to Heartland. Under the proposed policy, the patient is only informed that Heartland has excellent, fully accredited ancillary services available and then the patient is given a Heartland brochure. The patient is *not* informed about the availability of any competing ancillary service providers in the Northwest Missouri area.

\* If the patient rejects Heartland's ancillary service providers, or specifically asks what other providers are available, the patient is *not* given the names of or any information about non-Heartland providers. Rather, the patient is told that Heartland cannot provide any information about or recommend any of the other ancillary service providers and the patient is then merely referred to the telephone book to look for other providers.

\* As a result of the foregoing, the Consumer is denied timely and equal access to sufficient information on ancillary service options and quality to make an informed choice.

B. Heartland, through its Referral Policy, effectively monopolizes the ancillary services market within Heartland's geographic service region, resulting in antitrust injury to other ancillary service providers:

\* Heartland, located in St. Joseph, Missouri, is the only acute care facility in Buchanan County. The closest comparable facility is North Kansas City Hospital, located in Clay County, Missouri, 60 miles south of St. Joseph.

\* Patients from private (non-Heartland) long-term care facilities who are transferred to Heartland's hospital for acute care are not returned to the private facility upon discharge, even if the patient had been a long term resident of the private facility. Rather, the patients are transferred to either

Heartland's skilled nursing facility, which charges a higher daily rate than comparable facilities in the community, or to Heartland's rehabilitation center. The patients are then kept in these Heartland care facilities until medicare days are exhausted. The patients are only returned to their former private facility if Heartland does not want them or if the patient's funds are depleted.

\* Patients of private Home Health Care agencies experience similar exclusion from their prior provider. Patients who have been cared for by a non-Heartland home health care agency prior to being admitted to Heartland's hospital are not returned to that agency upon discharge. Instead, patients are being directed to Heartland's home health care unless the patient objects to the doctor's order or recommendation to use Heartland. Because patients are often elderly, infirm and forgetful, they do not know that they can object to a change in home health care providers and insist that their former agency resume care upon the patient's discharge.

\* Heartland hospital staff do not give notice to a patient's prior ancillary service provider when that patient is to be discharged from the hospital. In some instances, prior providers report that their patients have been home for two to four days with no follow-up care by their home health care agency because the hospital failed to notify the former provider of the patient's discharge. This is grossly harmful to the patient and greatly affects the quality of the patient's care.

\* Failure to give notice of a patient's discharge also prevents the prior ancillary service providers from taking part in discharge planning for their patients, thus preventing the providers from competing in the marketplace for the patient's business. Providers report having been specifically denied the opportunity to participate in discharge planning meetings for their patients.

\* Owners of private long-term care facilities and home health care agencies uniformly report a significant loss in revenue and patient census since Heartland began its Referral Policy which effectively eliminates a patient's choice.

\* An institutional pharmacy which serves 60 nursing homes in St. Joseph and the surrounding area has lost significant amounts of business due to the overall loss of private nursing home patients to the Heartland system. Heartland's own pharmacy services the needs of patients using Heartland's ancillary services.

C. The Heartland Referral Policy and the proposed Final Decree have no accountability provisions to ensure that Heartland Hospital patients, and patients of Heartland's physicians, are being given sufficient, unbiased information to allow the patient to make an informed choice among all available ancillary service providers.

D. Taken together, the foregoing considerations concerning the Heartland Referral Policy, Heartland's physician practice and recruitment efforts, and Heartland's other conduct create conditions that facilitate unlawful maintenance of monopoly power by Heartland through anticompetitive and coercive means,

conditions conducive to a successful attempt by Heartland to monopolize the ancillary services markets in Northwest Missouri and Northeastern Kansas, and conditions that permit Heartland to channel or steer patients in need of ancillary services only to providers it owns, controls, or in which it maintains a significant economic interest.

The antitrust concerns in this situation are clear, the most significant of which is foreclosure from referrals. The proposed Referral Policy will only exacerbate this situation and ultimately will result in an insufficient number of referrals for Heartland's competitors in ancillary services to remain viable. This, in turn, will increase Heartland's market power substantially and create the risk of enabling Heartland to raise and sustain prices above those which would otherwise prevail in a competitive marketplace, or lower the quality of care. Whether analyzed in terms of Heartland's efforts to engage in exclusive dealing agreements, tying arrangements, reciprocal dealing agreements or monopolization and attempted monopolization, via predatory refusals to deal, abuse of essential facilities, or monopoly leveraging, the anticompetitive effects, which are contrary to the public interest, are apparent.

The Coalition is currently drafting a model Referral Policy which allows patients to make an informed choice among all ancillary service providers in the St. Joseph and surrounding regions. We will provide the Department of Justice and the District Court with a copy of the model Referral Policy, along with arguments and authorities in support of its adoption, within the next 10 days.

While the ancillary services Referral Policy is of paramount importance to the Coalition, other terms and conditions of the Final Judgment give unfair competitive advantage to Heartland in the primary care physician market. The Coalition specifically objects to the following provisions in the Final Judgment:

#### A. Part VIII: Heartland Permitted Activities

\* Subpart (B)—Allows Heartland, without preapproval from the DOJ, to employ or acquire an unlimited number of physicians who are not currently located in Buchanan County, so long as less than 20% of the physician's income was derived from patients living in Buchanan County;

\* Subpart (C)—Puts no limit on the number of new doctors that Heartland can bring into Buchanan County to work for Heartland (as employees or through acquiring their practice), so long as Heartland incurs substantial costs in recruiting the doctors, or gives them substantial financial support or income guarantees. Even though the acquisitions require prior notice to the DOJ, approval is given if the financial criteria are met.

\* Subpart (D)—Allows Heartland, with prior DOJ approval, to acquire the practice or employ any physician who finds he or she cannot practice in Buchanan County *unless* hired by Heartland. This provision underscores the real effect of Heartland's monopoly power, i.e. if independent physicians cannot compete successfully with

doctors owned by Heartland, they have to join Heartland to survive.

\* The practical effect of the foregoing provisions is that Heartland's physician base will continue to grow and monopolize the market for GACP physicians in Northwest Missouri and Northeast Kansas, leaving sole practitioners with little choice but to join Heartland or move their practices elsewhere.

#### B. Part X-XI: Compliance Program / Certifications

\* Requires only self-reporting of Heartland's proposed acquisitions or other actions covered by the Final Judgment and an annual certification by the defendants that the Final Judgment terms are being adhered to.

\* Although the DOJ is to be given "access" to defendant's records and personnel and the right to obtain written reports from any defendants, there is no requirement that written reports be made to the DOJ by any of the defendants, and no requirement that the DOJ will conduct annual, or better yet, semi-annual inspection of books and records and interview of personnel.

\* Without an affirmative requirement of regular, periodic written reports or DOJ inspections to determine compliance, it will be virtually impossible to determine whether violations of the Final Judgment have occurred.

\* The proposed Final Judgment should give the Court broader powers to monitor and enforce the final judgment. For comparison, see Judge Oliver's opinion in *United States v. Associated Milk Producers, Inc.*, 394 F.Supp. 29, 46 (W.D. Mo. 1975), entering a Supplemental Order establishing the manner in which alleged violations of a final judgment entered upon a proposed consent decree should be brought before the Court for appropriate judicial enforcement proceedings.

The Coalition welcomes the opportunity to engage in meaningful discussions with the Department of Justice to clarify and supplement the foregoing arguments and to assist in any manner possible to assure that the Final Judgment in this case is truly in the public's interest.

The Coalition looks forward to a response from the Department of Justice to this Comment.

Very truly yours,

Glenn E. Davis, Esq.

Thomas M. Bradshaw, Esq.

Dianne M. Hansen, Esq.

DMH/kag

cc: Coalition for Quality Healthcare

The Hon. Howard F. Sachs, Sr. District Judge

Clerk of the District Court, Western District of Missouri

Bennett C. Rushkoff, Esq., Assistant

Attorney General for the State of Missouri

Ozarks Medical Center

1100 Kentucky Avenue, P.O. Box 1100, West Plains, Missouri 65775, (417) 256-9111, FAX (417) 257-6770

November 17, 1995.

Gail Kursh,

Chief, Professions & Intellectual Property Section, Health Care Task Force, Department of Justice, Antitrust Division, 699 E Street, N.W., Room 9300, Washington, DC 20530

Re: United States v. Health Choice of Northwest Missouri, Inc., et al., Case No. 95-6171-CV-SJ-6, U.S. District Court for the Western District of Missouri

Dear Ms. Kursh: I am writing *in support* of the proposed final judgement for the above mentioned case, specifically related to the discharge process and referrals to hospital-based HHA, DME and hospital affiliates.

As a hospital vice president, I repeatedly see the discharged process interrupted and made complex by demands that every ambulatory care provider within an hour's drive to our hospital be given access to and, in some cases a guaranteed referral to, patients being sent home for recuperation. OMC demands that discharge workers recite a carefully crafted script that does not mention our many years of quality service and coordination with inpatient services just so that external firms will not claim that we are hoarding referrals to ourselves.

I am especially in opposition to the guidelines suggested by the Coalition for Quality Healthcare. These guidelines, as I understand them, would further drive a wedge between hospital inpatient and outpatient businesses. They would also require hospitals to use a rotational system for referrals among all area providers. This is, in effect, stating that just by starting a new business someone is automatically guaranteed a proportional share of business, irrespective of quality, service or their commitment to the community. The guidelines would also require hospitals to permit freestanding providers a large degree of visitation access to inpatients on hospital property. This would be especially onerous to patients and families during times of illness and crisis. External sales personnel could not be kept from repeated unwanted intrusions into the patient's care setting.

I urge the Department of Justice to stand behind its initial HHA/DME guidelines. This would permit better coordination of patient care without fostering undue intrusion into the care environment.

Yours truly,

Jeffrey B. Johnston,

Vice President for Operations.

Idaho Home Health, Inc.

800 Yellowstone Ave., Pocatello, ID 83201, (208) 232-1122, (800) 491-2224, fax (208) 232-7941

November 16, 1995.

Gail Kursh,

Department of Justice, Antitrust Division, 600 E St. N.W. Room 9300, Washington, D.C. 20530

Re: Home Health Referral Protocol

Dear Ms. Kursh: We understand the Department of Justice will receive input regarding the recommendations for home health referrals proposed in the *United States v. Health Choice of Northwest Missouri* case. Enclosed are several instances of hospital channeling we uncovered in Idaho. If the DOJ

intends the recommendations only apply for Antitrust issues this distinction should be clearly and expressly stated so entities will not apply it to non anti trust matters. If that is the intent, however, we suggest the recommendations be broadened to include 42 USC 1395a issues. Hospital patient channeling and violation of patient choice are the top issues facing proprietary agencies today.

For your information, in Idaho during 1993 if proprietary home health agencies rather than hospital based agencies had provided the Medicare home health visits the Medicare program would have saved millions of dollars. It goes without saying historically Hospital based home health visits are significantly more expensive than proprietary agencies. If the Government was really serious about saving Medicare money it would discontinue facilitating a situation that lends itself to inefficient use of taxpayer dollars. You must be aware the primary motivation behind hospitals entering the home health market is to "cost shift" hospital overhead to the home health agency to increase the visit cost up to Medicare program limits. By doing this hospitals can "cost shift" millions of hospital dollars into the home health agency thereby improving the bottom line of the hospital.

We suggest a protocol of first asking the patient if they have a preference of home health agencies. If the answer is affirmative then refer the patient to that agency. If the answer is negative the patient is then provided a list of agencies and the patient is advised to call each agency and inquire regarding charges and quality of service. Since none of the other agencies can solicit the patient while in the hospital it is unfair to allow the patient to be solicited by the hospital discharge planner on behalf of the hospital agency. Alternatively, allow the other agencies access to the patient at the time of discharge to also recommend their services similar to what the DOJ is allowing the hospital employees to do. To allow the hospital discharge planner, who is not an employee of the hospital agency, to say the hospital's agency provides quality care and it cannot comment on the quality of care at other agencies is the same as channeling the patient. To assume otherwise reflects a lack of understanding of the market place.

Medicare law prohibits rebates or kickbacks for patient referrals. If the hospital is cost shifting part of its administrative overhead to the home health agency and the discharge planners salary is part of that overhead allocation then the DOJ is condoning violation of Medicare law. The DOJ recommendation also fails to indicate what sanction will take place if the recommendations are violated.

This issue is most difficult and complex and affects thousands of home health agencies. It may also cost our Government billions of unnecessary taxpayer dollars. Please consider the above.

Sincerely,  
William F. Bacon,  
*Vice President & General Counsel.*

Health Data Services, Incorporated  
November 22, 1995.

Gail Kursh,  
*Chief, Professions & Intellectual Property Section/Health Care Task Force, Department of Justice, Antitrust Division, 600 E Street, NW., Room 9300, Washington, DC 20530*

Re: U.S. vs. Health Choice of Northwest Missouri, Inc. et al., Case Number 95-6171-CV-SJ-6, U.S. District Court, Western District of Missouri

Dear Ms. Kursh: Our business is in Home Health Care; Infusion, Durable Medical Equipment and Home Health. The referrals come from sources within the hospital walls. As we continue to see more hospitals get involved in the Home Health side of the business, outside the confinement of the hospital, our referrals continue to dry up. The staff is instructed to provide minimal amount of information about alternative sources, furthermore, many of the physicians are pressured ever so slightly to use the Hospital Services. The patient's benefits are not looked after, only the financial concerns of the hospital. As we continue to see the dramatic changes in the hospital, they will attack the most vulnerable, the independent providers of Home Health Services, gobble them up and provide less choices for the patients. If our justice system continues to allow the monopolizing of services by the hospitals, the smaller communities will end up with the hospital as the only choice.

Sincerely,  
Glen H. Beussink,  
*Executive Director of HDS.*

Gentle Homecare, Inc.  
505 Laurel Avenue, Suite 203, Highland Park, IL 60035, Tel: 708/432-9100 or 312/764-5920, Fax: 708/432-9221.

November 22, 1995.

Gail Kursh,  
*Chief, Professions & Intellectual Property Section/Health Care Task Force, Dept. of Justice, Antitrust Division, 600 E Street, NW., Room 9300, Washington DC 20530*

Re: U.S. v. Health Choice of Northwest Missouri, Inc., et al., Case No. 95-6171-CV-SJ-6, In the U.S. District Court for the Western District of Missouri

Dear Ms. Kursh: We vehemently oppose the referral policy currently blessed by the Dept. of Justice in an agreed-upon proposed settlement between the Dept. of Justice and Heartland Health System Inc., St. Joseph, MO.

If this court decision becomes final, it will effectively create regional monopolies. Free-standing home health agencies will be put out of business, because you have now cut us off from out patients, and given us no means to compete.

Please reconsider—there have to be stronger limitations on the hospital's ability to refer its patients to its own hospital-based components.

We would appreciate a reply.

Very truly yours,  
Susan Siegal,  
*Administrator.*

Home Health Insights, Inc.  
111 East Florence Blvd., Suite 1-B, Casa Grande, Arizona 85222-4047, (602) 421-2239, FAX (602) 421-2503

November 23, 1995.

Gail Kursh,  
*Chief, Professions & Intellectual Property Section/Health Care Task Force, Department of Justice, Antitrust Division, 600 E Street., N.W., Room 9300, Washington, DC 20530*

Dear Ms Kursh: I am writing to join my voice with the Coalition for Quality Healthcare in recommending their modifications to your proposed settlement with Heartland Health System of St. Joseph, MO (Case #95-6171-CV-SJ-6). Our community hospital, which does not operate its own home health agency, currently uses a rotation system for spreading referrals among the area HHAs.

Sincerely,  
Ross Feezer,  
*Administrator.*

Gail Kursh,  
*Chief, Professions and Intellectual Property Section, Health Care Task Force, Dept. of Justice, Antitrust Division, 600 E. St., N.W., Room 9300, Washington, D.C. 20530*

To Whom It May Concern: This is in response to the Dept. of Justice proposed judgement for *United States v. Health Choice of Antitrust Missouri, Inc.* Case #95-6171-CV-SJ-6.

As a health care provider (RN) and consumer, it appalls me to know that hospitals may not be required to inform patients about alternatives in the health care market. Because a hospital informs a client of any available home health agencies does not mean the hospital endorses such agencies. Healthy competition is good for the consumer and serves as a check and balance system. Hospital based agencies would usually monopolize the market if this referral policy is permitted and quality care will be compromised.

Also, economically, competition allows the consumer to get the most service for their money. Please do not permit this to change.

Sincerely,  
Julie L. Miller,  
*RD 2 Box 58, Friendens, PA 15541.*

November 15, 1995.

Gail Kursh,  
*Chief, Professionals and Intellectual Property, Health Care Task Force, Department of Justice, Anti-Trust Division, 600 E Street, NW., Ste 9300, Washington, DC 20530*

Dear Mrs. Kursh: In response to the article "Courts Use Antitrust Law to Thwart Efforts to Limit Spread of Managed Care", in the *Employee Benefit Plan Review*, I must agree with the actions of the court to limit the actions of the managed care organization

"Health Choice". The primary concern that I found when reading this article is the fact that St. Joseph Hospital is a for-profit hospital. All activities which this hospital indulges itself are done to increase the financial status of the hospital, thus causing extensive investigation to occur with every public action in which it participates. I feel that had this been a non-profit hospital no complaint would have been filed due to the fact the company is operating to provide a better care service for the community. It is possible that Health Choice is operating to provide a service to assist in the health care of the community but due to the fact that they are for-profit diminishes this idea, primarily because all surplus revenue will not only be used for the hospital's needs but it will be distributed among the staff of the hospital. So who is really benefiting from this conglomerate.

In a second observation, the restrictions set upon Health Choice do not punish or fine the institution for its practices, it just prohibits any future activity. In light of these penalties Health Choice still retains 85% of the physicians working or residing in the area, this is still a monopoly because the remaining 15% will not be able to adequately compete in the quantity of service which they provide. I believe more drastic measures should be taken or else the Health Choice Network will eventually gain 100% of the market, due to the fact that the remaining 15% join the organization or relocate their practice.

I look forward to hearing your response to these observations and thank you for the opportunity to voice my opinion.

Sincerely,

David L. Hutchinson,  
Public Administration Student, Michigan State University.

VNA HealthCare Services

1789 South Braddock Avenue, P.O. Box 82550, Pittsburgh, PA 15218, 412/256-6910, fax 412/256-6920

November 24, 1995.

Ms. Gail Kursh,

Chief, Profession & Intellectual Property Section/Health Care Task Force, Antitrust Division, U.S. Department of Justice, 600 E. Street, N.W., Room 9300, Washington, D.C. 20530

Re: *United States v. Heartland Health Systems Inc., Civil Action No. 95-6171-CV-SJ-6*

Dear Ms. Kursh: This comment is submitted to urge the Justice Department either to modify or, alternatively, to delete entirely the "Referral Policy" regarding the provision of ancillary services that is attached to the Final Consent Judgment against Heartland Health System, Inc. For reasons explained below, that "Referral Policy" would put the Justice Department's official approval on a policy that is seriously deficient from both a practical and a legal standpoint.

I am the Executive Director of VNA HealthCare Services, which has been serving the residents of Allegheny County, Pennsylvania since 1919—more than 75

years. We have enjoyed an outstanding record of high quality services to the community and, as a non-profit organization, provide services to many individuals without resources. Independent home health agencies, such as VNA HealthCare Services, are dependent in substantial part on patient referrals from hospitals and the physicians on their medical staffs. Our experience in the Pittsburgh area is similar to that across the country, in that approximately 76% of our patients come to us directly from hospitals. Reasonable access to those patients, who include persons with private and governmental insurance, is essential to our survival.

Recent changes in reimbursement methodologies have given hospitals an incentive to "steer" patients to hospital-affiliated home health care or other ancillary services. Steering of that sort typically involves: (1) Denying representatives of competing home health agencies access to hospital premises and patients, even patients who were under the care of the competing home health agency prior to their hospital admissions; (2) refusal to provide patients with brochures or other information regarding competing home health agencies; (3) subtle and not-so-subtle pressure on patients to select the hospital-affiliated agency; and (4) pressure on hospital staff physicians to make referrals to the hospital-affiliated home care provider.

It is no exaggeration to say that the spread of these practices has reached epidemic proportions.

The Heartland referral policy does nothing to address the access and informational concerns that arise in a market in which consumers (the patients) are typically uninformed about their options. Contrary to the stated goal of the Competitive Impact Statement, the referral policy does not prevent a dominant hospital such as Heartland from foreclosing competition and abusing its control over inpatient hospital services to further its position in the provision of ancillary services, such as home health care. Under the Heartland policy, the hospital's "referring person" need not even identify competing agencies of which it is aware unless a patient specifically asks twice about alternatives to the hospital's ancillary service. This is clearly not in keeping with federal regulations requiring the hospital to conduct a discharge planning process devoted to patient concerns and long-term best outcomes. Without sufficient patient input in the decision-making process, an inequitable and manipulative atmosphere will result, given that many patients are already frail, confused or distracted from their normal decisionmaking capabilities at time of discharge.

Furthermore, in the proposed policy the hospital referring person is actually encouraged to make what may well be a false statement regarding lack of knowledge about the alternative providers. A discharge planning department's reason for being is to know what the community resources are and to facilitate making them available. For the Heartland patient population, however, at no time is the hospital obligated to provide brochures or other printed information about

alternatives to the hospital's affiliate. The referring person may, however, extol the virtues of Heartland's "excellent, fully accredited," ancillary service and provide a Heartland brochure.

If the Justice Department is concerned about stopping the erosion of competition in home health care and other ancillary services, we respectfully submit that it should seek substantial modifications in the Heartland Referral Policy. The modification suggested below would help to restore competition from smaller, independent providers, but these are certainly not the only approaches.

First, Heartland should be obligated to provide patients with information about all accredited home health care agencies in its service area. Such a requirement could be modeled after that which the Commonwealth of Pennsylvania imposed earlier this year, as a condition of its approval of a merger between two hospitals in Harrisburg, Pennsylvania. (A copy of that negotiated settlement provision which has not yet been entered by the court, and the Pennsylvania Attorney General's press release announcing the settlement, are attached to this comment.) Paragraph 19 of that settlement would require the hospitals' discharge planners to provide each patient requiring home health care services or home infusion services with a list of all accredited agencies, and a "patient choice form," which is attached to the settlement agreement as Exhibit 2. That Documentation of Choice form affirmatively states that, "Basic information on each agency will be provided to assist you in your decision." It adds that "any agency which you desire will be contacted on your behalf," and emphasizes that a selection of any agency other than the hospitals' affiliate "will in no way affect your care at [the hospital] or prevent you from receiving future care at [the hospital]."

Second, the hospital's referring person should be prohibited from espousing the benefits of the hospital's affiliate unless competing agencies are given an equal opportunity to participate in a legally appropriate manner in the discharge planning process, and equal access to the patient or the patient's family.

Third, the hospital should be required to allow at least one home health coordinator from a competitor other than the hospital affiliate, to be available on site.

Fourth, the hospital's referring person should be required, before asking if the patient has a preference, to state affirmatively that alternatives to the hospital's affiliate are available, that the patient will be given a list of these alternatives (by name, address and phone number) and that the referring person will assist the patient in contacting them if the patient so desires.

Fifth, if the patient and the patient's family have no preference, and no desire for written information, then the patient's physician should make the choice of a home care provider.

Sixth, Heartland should be prohibited from directly or indirectly putting pressure on the doctors on its medical staff to refer patients to the hospital's affiliated services.

My suggestions are intended to guide dominant hospitals in complying with the

very general mandates of the Medicare "freedom of choice" provision and the Sherman Act. The former statute provides simply that "(a)ny individual entitled to insurance benefits under this title may obtain health services from any institution, agency, or person qualified to participate under this title if such institution, agency or person undertakes to provide him such services." 42 U.S.C. § 1395a. Unfortunately, courts have held that foreclosed providers have no private right of action for violation of this section. Therefore, absent more forceful action by the Government's law enforcement agencies, the patient's right to choose his provider of home care or other ancillary services will remain a largely illusory one.

As you are undoubtedly aware, a plethora of antitrust cases have recognized the Sherman Act issues that should, but evidently do not, constrain the actions of vertically integrated hospitals. These include the *Key Enterprises v. Venice Hospital* case in Florida, and the *M&M Medical Supplies* case in Virginia. Since resort to antitrust litigation remains a prohibitively expensive proposition for most home care and ancillary service providers, this threat has not deterred hospitals from engaging in exclusionary conduct.

Although the Heartland consent decree, will, of course, not have any formal precedential value, health care providers have become accustomed to careful scrutiny of consent decrees, business review letters, and informal advisory opinions for signs regarding the direction of antitrust policy. I respectfully submit that the proposed Heartland Referral Policy sends the wrong signal—a signal that hospital discharge planners and social workers must merely go through the motions of advising their patients about alternatives to the hospital's affiliated services. A much more aggressive policy is required to comply with the hospital's existing obligations to provide its patients with freedom of choice. Nothing less will overcome the access and informational gaps that permit hospitals to exploit patients at a time when they are particularly vulnerable to steering tactics.

If I can provide any further information regarding the problems that our home health agency and other VNAs have encountered in our efforts to compete with hospital-owned and hospital-based home health agencies, please do not hesitate to contact me.

Thank you in advance for your consideration of this comment.

Respectfully submitted,

Andrew R. Peacock  
ARP:eu

In the United States District Court for  
the Middle District of Pennsylvania

Commonwealth of Pennsylvania, Plaintiff,  
v. Capital Health System Services and  
Polyclinic Health System, Defendants. Civil  
Action No. \_\_\_\_\_

#### Final Judgment

Whereas the Commonwealth of Pennsylvania ("Commonwealth") filed a Complaint in this matter on \_\_\_\_\_,

as a direct purchaser of inpatient acute-care hospital services in Cumberland, Dauphin, and Perry Counties and as *parens patriae* to protect its general economy, pursuant to section 7 of the Clayton Act, 15 U.S.C. § 18;

Whereas Capital Health System Services ("CHS") and Polyclinic Health System ("PHS") agreed on September 28, 1994, to merge these two independent health-care entities (hereinafter referred to as "New Co") into an integrated community health-care delivery system for central Pennsylvania;

Whereas New Co is expected to generate a net cost savings of at least \$70 million over the first five-year period following implementation and annual savings thereafter of about \$21 million, to improve quality of health care for central Pennsylvania residents, and to increase access to health care services for central Pennsylvania residents, including the indigent and the otherwise underserved;

Whereas the Office of Attorney General of the Commonwealth ("Attorney General") is responsible for enforcement of the federal antitrust laws and is authorized to bring suit on behalf of the Commonwealth as a direct purchaser of inpatient acute-care hospital services and as *parens patriae* to protect its general economy;

Whereas CHS and PHS have cooperated fully with the Attorney General's investigation of the proposed consolidation;

Whereas the Attorney General has concluded its investigation of the proposed consolidation of the two health-care systems and believes that, without this Final Judgment, it may raise anticompetitive concerns under the federal antitrust laws;

Whereas CHS and PHS desire to assure the Attorney General and the community that they intend to operate New Co in accordance with their mission and continue their commitment of providing quality, affordable health care to the community;

Whereas CHS and PHS, desiring to resolve the Attorney General's concerns without trail or adjudication of any issue of fact or law, have consented to entry of this Final Judgment; and

Whereas this Final Judgment is not an admission of liability by CHS, PHS, or New Co as to any issue of fact or law and may not be offered or received into evidence in any action as an admission of liability; it is hereby ORDERED:

#### I. Jurisdiction

1. This Court has jurisdiction over the subject matter of this action and each of the parties consenting to this Final

Judgment. The Complaint states a claim upon which relief may be granted.

#### II. Definitions

As used in this Final Judgment:

2. "Capital Health System Services" ("CHS") means the nonprofit tax-exempt corporation organized under the laws of the Commonwealth of Pennsylvania that is the corporate parent of Harrisburg Hospital ("HH"), a nonprofit tax-exempt hospital located at 111 South Front Street, Harrisburg, Pennsylvania, and Seidle Memorial Hospital ("SMH"), a nonprofit tax-exempt hospital located at 120 South Filbert Street, Mechanicsburg, Pennsylvania.

3. "Polyclinic Health System" ("PHS") means the nonprofit tax-exempt corporation organized under the laws of the Commonwealth of Pennsylvania that is the corporate parent of the Polyclinic Medical Center ("PMC"), a nonprofit tax-exempt hospital located at 2601 North Third Street, Harrisburg, Pennsylvania.

4. "New Co" means the nonprofit corporation that CHS and PHS will create pursuant to their September 28, 1994, agreement to merge.

5. "Member Hospital" means HH, PMC or SMH.

6. "Managed-Care Plan" means a health maintenance organization, preferred provider organization, or other health-service purchasing program which uses financial or other incentives to prevent unnecessary services and includes some form of utilization review.

7. "Health Plans" means all types of organized health-service purchasing programs, including but not limited to managed-care plans, offered by third-party payors, health-care providers or any other person.

8. "Health-Care Provider" means physicians, hospitals, laboratories and physician networks.

9. "Acquire" means to purchase the whole or the majority of the assets, stock, equity, capital or other interest of a corporation or other business entity, or to receive the right or ability to designate the majority of directors or trustees or otherwise control the management of a corporation or other business entity.

10. "Net Cost Savings" means the difference between the total expenditures that CHS and PHS would have incurred absent the consolidation of the two health systems and their total expenditures actually made, minus the total expenditures incurred to implement the consolidation into New Co. As a guide to help calculate net cost savings, the parties will use the

Efficiency Study for the Consolidation of CHS and PHS, dated November 1994, as amended.

11. "Hospital" means a health care facility, licensed as a hospital, having a duly organized governing body with overall administrative and professional responsibility, and an organized professional staff that provides 24-hour inpatient care, that may also provide outpatient services, and having as a primary function the provision of inpatient services for medical diagnosis, treatment, and care of physically injured or sick persons with short term or episodic health problems or infirmities.

### III. Terms

12. *Anticipated Savings and Price Reductions.* CSH and PHS intend to merge and consolidate services into New Co, increase efficiency, and reduce the cost of delivering health-care services so that the cost to the community of those services will be lower than they would have been absent the merger.

12.1 New Co shall achieve in 199\_\_ constant dollars at least \$70 million in net cost savings by [five years after closing]. At least 80% of the net cost savings New Co achieves in each of the first five years shall be passed on to consumers or other purchasers of health-care services in the form of low-cost or no-cost health-care programs for the community or by reducing prices or limiting actual price increases for existing services. Prior to passing on any such cost savings to consumers or other purchasers of health-care services in the form of low-cost or no-cost health-care programs, New Co shall submit in writing to the Office of Attorney General their proposal(s) for passing on such cost savings, which will be automatically approved unless the Office of Attorney General objects to any specific proposal within ten (10) business days following receipt of such proposal. At a minimum, the following cumulative net cost savings shall be passed on; \$0 by [one year after closing]; \$5.6 million by [two years after closing]; \$24 million by [three years after closing]; \$40 million by [four years after closing]; and \$56 million by [five years after closing]. These savings shall be documented in the annual report described in Paragraph 23. The parties will develop a mutually-agreed upon model to measure the net cost savings on a case mix, inflation index adjusted net cost per admission basis in comparison to pre-merger costs, and the cumulative net cost savings passed on to consumers on a case mix, inflation index adjusted net revenue per admission basis. If New Co fails to meet

the targeted net cost savings in any given fiscal year, the shortfall amount shall be carried forward into subsequent fiscal year until the full net cost savings amount has been realized by New Co, including the portion to be passed on as described above. If New Co exceeds the targeted net cost savings in any given year, the excess amount shall be credited towards New Co's target for the next fiscal year.

12.2 If by [five years after closing], New Co has not achieved \$70 million in net cost savings, New Co shall pay in cash an amount equal to \$70 million less the amount of savings actually achieved into a fund established by the Attorney General. The Attorney General shall use this money to fund low-cost or no-cost health-care services to Cumberland, Dauphin and Perry County residents, such as child immunizations, mammograms, drug and alcohol abuse treatment programs, or other health-care services needed by the community for which adequate resources are not available. The Attorney General shall select, after receiving any input from New Co, a charitable organization to administer these funds. If New Co has not achieved \$70 million in net cost savings, New Co shall have an opportunity to demonstrate, to the satisfaction of the Attorney General, that circumstances beyond its control have prevented achievement of the savings.

12.3 If by [five years after closing], New Co has not achieved at least \$66.5 million of the anticipated net cost savings, the restrictions on changes in the case-mix adjusted net inpatient revenue per admission contained in Subparagraph 12.4 shall continue until [ten years after closing], regardless of whether the Final Judgment is terminated any time earlier pursuant to Paragraph 33.

12.4 New Co's case-mix adjusted net inpatient revenue per admission for all inpatients treated during the fiscal year under consideration at member hospitals (hereinafter "Revenue"), in fiscal years subsequent to 1994-95, shall not exceed the combined Revenue of the member hospitals for 1994-95, as adjusted pursuant to Subparagraph 12.5, and excluding the effects of New Services, as defined in Subparagraph 12.6, outlier cases, and externally imposed requirements, including but not limited to changes in payment methods or reimbursement methods imposed or implemented by state or federal regulations.

12.5 In determining compliance with Subparagraph 12.4, Revenue shall be adjusted (up or down) for changes in the Consumer Price Index-Urban, plus two percent.

12.6 "New Services" means either (a) services not listed on Exhibits 1-A, 1-B or 1-C (copies of which are appended hereto), which list services provided at each of the member hospitals as of entry of this Final Judgment; or (b) material changes in community need, technology, or sophistication of treatment which either (i) require a certificate of need or (ii) require a combination of new capital, personnel and supply expenditures in excess of \$100,000 in any fiscal year. Upon request by the Attorney General, New Co shall provide all information and documentation reasonably necessary to support the application of this subparagraph. If New Services are provided, they shall be described in the annual report to the Attorney General, required by Paragraph 23.

12.7 If New Co fails to comply with Subparagraph 12.4, it shall reimburse the excess by lowering its rates in the next fiscal year in an amount equal to the excess. If New Co exceeds the targeted Revenue savings in any given year, the savings amount shall be credited towards New Co's target for the next fiscal year. In the annual report described in Paragraph 23, New Co shall describe its compliance with this subparagraph.

12.8 Subparagraphs 12.3, 12.4, 12.5, 12.6, and 12.7 shall apply only during those fiscal years when the Commonwealth of Pennsylvania or the federal government does not substantially regulate hospital rates.

### 13. *Nonexclusivity.*

13.1 New Co shall not enter into any provider contract with any health plan on terms that prohibit New Co from entering into a provider contract for any services New Co offers with any other health plan.

13.2 New Co shall not require managed-care plans to contract with its employed doctors as a precondition to contracting with its member hospitals.

13.3 New Co shall not restrict an independent physician's ability to provide services or procedures outside the member hospitals, unless performance of duties outside the member hospitals would impair or interfere with the safe and effective treatment of a patient.

13.4 New Co shall not prohibit independent physicians who are members in any New Co physician-hospital network from participating in any other physician-hospital networks, health plans, or integrated delivery systems.

### 14. *Nondiscrimination.*

14.1 New Co shall not enter into any exclusive contracts with any health-care provider by which it requires that

provider to render services only at a member hospital or by which it requires only one physician or group of physicians to provide particular services at a member hospital. New Co may enter into exclusive contracts with anesthesiologists; radiologists; nuclear medicine physicians; pathologists; physiatrists; emergency-room physicians; neonatologists; perinatologists; cardiologists, cardiovascular surgeons, and neurologists for interpretive services only; radiation oncologists; and physicians providing services in New Co's low-income clinics, so long as these contracts are competitively bid at least once every three years and the bidding specifications affirmatively require the winning physician(s) not to refuse unreasonably to participate in any health plans that have provider contracts with the member hospitals. This provision, however, shall not require New Co to terminate any existing contracts, and New Co may require its employed physicians to render services only at member hospitals. New Co may also petition the Attorney General for approval to enter into exclusive contracts with physicians in specialties other than those listed above. The Attorney General shall provide New Co with a response to the petition within ninety (90) days.

14.2 Other than as provided in Paragraph 14.1, New Co shall provide an open staff, ensuring equal access to all qualified physicians in Cumberland, Dauphin, and Perry Counties according to the criteria of the Joint Commission on Accreditation of Health Care Organizations and the medical staff by-laws.

14.3 New Co shall negotiate in good faith with all health plans with a licensed service area within Cumberland, Dauphin, or Perry Counties which approach it seeking a provider contract. This provision, however, shall not be construed to require a New Co to enter into a provider contract with any particular health plan.

14.4 New Co shall not enter into provider contracts with any licensed health plan operated by New Co itself, in existence now or which may be created, on terms available to that plan solely because it is sponsored by New Co, where doing so would place other comparable licensed health plans at a competitive disadvantage, because of any market power New Co may have rather than from efficiencies resulting from its integration with its health plan.

14.5 With respect to Health Central, Inc., the new managed-care plan proposed by six south central

Pennsylvania hospitals, including CHS, New Co will participate in this plan only on nonexclusive terms. Further, New Co will not engage in any "most-favored-nation" pricing with respect to this plan vis-a-vis other competing managed-care plans in its market, and will not cross-subsidize Health Central, Inc. through the operating revenues of New Co in a manner that would facilitate predatory pricing or other anticompetitive conduct. New Co shall disclose, as part of its annual report pursuant to Paragraph 23, all funds that were provided by New Co to Health Central, Inc. during the preceding fiscal year.

14.6 New Co will not use employment, the location of a physician or group practice, or the location where patients will receive any necessary follow-up care to determine referrals from the emergency room. New Co may consider quality of care and reasonable proximity for patient convenience in determining referrals. The referral policy used to inform unassigned patients of the availability of follow-up care shall be provided to the Attorney General within thirty (30) days from entry of this Final Judgment. Should the Attorney General object to this policy, the parties shall attempt to reach a mutually satisfactory resolution. This subparagraph shall not preclude any managed-care plan operated by New Co from limiting referrals to providers with provider contracts with that plan.

14.7 Except as provided in Paragraph 14.1, if New Co establishes or sponsors its own health plan, it shall not base credentialing decisions or other decisions affecting a physician's access to, or working conditions at, a member hospital on whether that physician enters into a provider contract with either New Co's plan or with a competing plan.

#### 15. Health Plans.

15.1 New Co will not unreasonably terminate any provider contracts to which its member hospitals are parties as of the date of entry of this Final Judgment.

15.2 New Co shall attempt, in good faith, to contract with all health plans operating in its service area which offer commercially-reasonable terms on a fully-capitated basis, a percentage of premium revenue basis, or on other terms that require New Co to assume risk. New Co shall not refuse to contract with a health plan solely because such plan proposes a capitated contractual reimbursement methodology. This provision, however, does not require New Co to enter into a provider contract with any particular health plan or with all health plans.

#### 16. Employment of Physicians.

16.1 New Co shall be prohibited from employing more than 20% of the physicians in Cumberland, Dauphin and Perry Counties practicing in any of the following areas: family practice/internal medicine, pediatrics, or obstetrics/gynecology, except as provided in Subparagraph 16.2. In calculating this percentage, full-time residency faculty members employed by New Co shall be counted as one half each and physicians employed at the HH or PMC low-income clinics shall be excluded.

16.2 New Co may recruit and employ physicians from outside Cumberland, Dauphin, and Perry Counties into those counties, in any of the enumerated areas listed in Subparagraph 16.1 without regard to or in violation of the 20% limitation in that subparagraph.

16.3 In determining New Co's compliance with Subparagraph 16.1, up to 79 residents employed by New Co shall be excluded. Additional residents beyond 79 shall be counted at one half each.

16.4 New Co shall not solicit the employment of any physician or group practice within Cumberland, Dauphin, and Perry Counties if such employment would cause New Co to exceed the limitations imposed by Subparagraph 16.1.

16.5 New Co may petition the Attorney General in writing for an exception to Subparagraph 16.1 when market conditions exist for employing physicians in any of the enumerated categories above the 20% limitation level. The Attorney General will respond to the petition within thirty (30) days from the receipt of all information reasonably necessary from New Co to analyze the petition.

#### 17. Operating Room Scheduling.

Operating room scheduling shall be determined by an Operating Room Committee that includes physicians, operating room nurses, and representatives of hospital administration, according to the following criteria:

17.1 Operating room time will be assigned in blocks based on physicians' demonstrated need for access to operating rooms.

17.2 These assignments will be updated quarterly, based on actual usage of block time. If a particular slot is not reserved by the physician to which it is allocated prior to 24 hours before the time of that slot, the time will be released and will be assigned to other physicians on a first-come first-served basis. If a physician is not utilizing a sufficient amount of reserved time, that physician's block time will be

reassigned at the time of the quarterly update.

18. *"Most-Favored-Nation" Provisions in Contracts With Health Plans.* New Co shall not enter into any provider contract with any health plan on terms which include a most-favored-nation clause to the benefit of New Co or any health-care plan. A most-favored-nation clause is any term in a provider contract that allows the buyer to receive the benefit of any better payment rate, term or condition that the seller gives another provider for the same service. In the case of any existing most-favored-nation clause to the benefit of New Co or any health-care plan in current provider contracts, New Co agrees not to renew or extend such contracts without deleting that term. New Co shall inform the Attorney General of the presence of a most-favored-nation clause in any existing provider contracts by providing a list of such contracts to the Attorney General not more than thirty (30) days from entry of this Final Judgment.

19. *Ancillary Services.* CHS shall, as soon as is practicable but in no event later than twelve (12) months of entry of this Final Judgment, divest all of its assets and interests in Capital Health Products, its durable medical equipment company, to a third-party buyer. Further, New Co shall not require any healthcare purchaser or patient to purchase home health services or home infusion therapy services from any entity affiliated with New Co. If companies not affiliated with New Co cannot provide services in a manner that would permit New Co to contain costs in the context of risk-bearing contracts, New Co may require these services to be purchased from a company affiliated with New Co. In all other circumstances, New Co shall affirmatively inform patients and providers needing home health-care services or home infusion therapy services of the availability of such services from companies not related to New Co. In this regard, New Co's discharge planners must provide each patient requiring home health-care services or home infusion therapy services with a patient choice form, which is appended as Exhibit 2, and with a list of all home health-care and home infusion therapy agencies accredited by the Joint Commission on Accreditation of Health Care Organizations serving Cumberland, Dauphin, and Perry Counties. This provider list must be updated at least quarterly if New Co is requested to do so by a qualified agency; and, if a home health-care or home infusion therapy agency that is not affiliated with New Co is selected by the patient, that agency

must be given reasonable access to the patient's records and to the member hospital's premises so that it may begin providing needed services to that patient. The provisions of this paragraph will also be applicable to CHS's durable medical equipment company until the sale of that company is completed.

20. *Certificates of Need.* New Co shall not oppose certificates-of-need applications filed by other hospitals or other health-care providers with the Pennsylvania Department of Health unless it notifies the Attorney General in writing, as soon as practicable but at least seven (7) days prior to filing any opposition, and provides a copy of any opposition to the Attorney General when it is filed with the Department.

21. *Future Sales and Acquisitions of Hospital Assets.* New Co shall not, without the prior approval of the Attorney General, acquire any indemnity plan, health maintenance organization, or hospital in Cumberland, Dauphin, or Perry Counties or permit any indemnity plan, health maintenance organization, or hospital in these counties to acquire New Co. New Co may not enter into any joint ventures with any hospital in Cumberland, Dauphin, or Perry Counties; acquire any hospital outside Cumberland, Dauphin, or Perry Counties; or permit any hospital outside Cumberland, Dauphin, or Perry Counties to acquire New Co, without first giving at least 60 days notice to the Attorney General. The preceding sentence, however, shall not apply to joint ventures to provide residency programs or to joint ventures with annual operating costs of below \$100,000.

22. *Binding on Successors and Assigns.* The terms of this Final Judgment are binding on New Co and its directors, officers, managers and employees, successors and assigns, including but not limited to any person or entity to whom New Co may be sold, leased or otherwise transferred, during the term of its duration, and all persons who are in active concert or participation with them and who have actual or constructive notice thereof. New Co shall not permit any substantial part of New Co to be acquired by any other person unless that person agrees in writing to be bound by the provisions of this Final Judgment.

23. *Reporting Mechanism.*

23.1 Within 150 days from the close of each fiscal year during which this Final Judgment is in effect, New Co shall submit to the Attorney General an annual report accompanied by an officer's compliance certificate describing its compliance with this

Final Judgment. This report shall include a discussion of the steps taken by New Co to comply with the efficiencies and services reconfiguration plans and the estimated savings from these steps. The Attorney General will provide notice to New Co of any concerns raised by the annual compliance report within a reasonable time after its issuance. New Co will meet with the Attorney General to attempt to resolve any concerns that the Attorney General may raise from its review of the report.

23.2 New Co will reimburse the Attorney General for expenses, including the payment of any expert fees, incurred in analyzing and verifying this report, in an amount not to exceed \$10,000 per year. Within sixty (60) days from entry of this Final Judgment, New Co will pay the Attorney General \$5,000 to establish a mutually-agreed upon model to be used to analyze compliance. This amount shall be deducted from the first year's reimbursement requirement. New Co will cooperate with any expert hired by the Attorney General, including but not limited to providing any additional requested information reasonably necessary to complete the analysis and verification of the compliance report.

24. *Publication of Efficiency Report.* New Co shall prepare, subject to the Attorney General's approval, a condensed version of its efficiency report to be released to the general public within fourteen (14) days from entry of the Final Judgment.

25. *Compliance.* To determine or secure compliance with this Final Judgment, any duly authorized representative of the Attorney General shall be permitted:

25.1 Upon reasonable notice, access during normal business hours to all non-privileged books, ledgers, accounts, correspondence, memoranda, and other records and documents, in the possession or under the control of New Co, relating to any matters contained in this Final Judgment; and

25.2 Upon reasonable notice, access during normal business hours to interview officers, managers or employees regarding any matters contained in this Final Judgment.

26. *Complaint Procedure.* Any person, including health-care providers, health plans, or consumers of medical services, who wishes to report a possible violation of this Final Judgment shall send a written description of the possible violation to the Chief Deputy Attorney General, Antitrust Section, Office of Attorney General, 14th Floor, Strawberry Square, Harrisburg, Pennsylvania 17120 and to New Co's

President, 17 South Market Square, P.O. Box 8700, Harrisburg, Pennsylvania 17105. New Co shall respond in writing to the complainant and to the Attorney General within thirty (30) days from receipt of any complaint. If the complaint is still unresolved, the Attorney General will attempt to negotiate a satisfactory resolution. If New Co believes any complaint to be frivolous, it may so advise the Attorney General, and its obligations under this paragraph will be satisfied unless it is otherwise advised by the Attorney General to respond more fully to the complaint.

**27. Reimbursement of Expenses.** Upon entry of this Final Judgment, CHS and PHS shall jointly pay \$50,000 to reimburse the Attorney General's costs incurred to conduct its investigation, which payment shall be used for future Public Protection Division enforcement purposes.

**28. Enforcement.**

**28.1** If the Attorney General believes that there has been a violation of this Final Judgment, it shall promptly notify New Co thereof. The Attorney General shall thereafter permit New Co a reasonable opportunity to cure any alleged violation without instituting legal action. If the alleged violation is not substantially cured by New Co within sixty (60) days of notification, the Attorney General may thereafter undertake any remedial action it deems appropriate. This time period shall be extended in circumstances where the sixty (60) day period is not sufficient time to cure the alleged violation.

**28.2** In any action or proceeding brought by the Attorney General to enforce this Final Judgment or otherwise arising out of or relating hereto, the Attorney General, if it is the prevailing party, shall recover its costs and expenses, including a reasonable sum for attorneys' fees.

**29. Legal Exposure.** No provision of this Final Judgment shall be interpreted or construed to require New Co to take any action, or to prohibit New Co from taking any action, if that requirement or prohibition would expose New Co to significant risk of liability for any type of negligence (including negligent credentialing or negligence in making referrals) or malpractice.

**30. Notices.** All notices required by this Final Judgment shall be sent by certified or registered mail, return receipt requested, postage prepaid, or by hand delivery, to:

If to the Attorney General:  
Chief Deputy Attorney General,  
Antitrust Section, Office of  
Attorney General, 14th Floor,

Strawberry Square, Harrisburg, PA  
17120

If to New Co:

President, New Co, 17 South Market  
Square, P.O. Box 8700, Harrisburg,  
PA 17105

**31. Averment of Truth.** New Co avers that the information it has provided to the Attorney General in connection with this Final Judgment, to the best of its knowledge, is true and represents the most recent and comprehensive data available, and that no material information has been withheld.

**32. Termination.** This Final Judgment shall expire on the tenth anniversary of its date of entry if it has not terminated prior to that time as provided in Paragraph 33. Notwithstanding the first sentence of this paragraph, enforcement of Paragraph 16 shall expire on the fifth anniversary of entry of this Final Judgment.

**33. Early Expiration.** After [five years from closing], if New Co has complied with the applicable provisions of this Final Judgment, the Attorney General shall join New Co in an application to this Court for an order terminating, in whole or in part, this Final Judgment. The Attorney General shall not unreasonably refuse to join any such application.

**34. Modification.** If either the Attorney General or New Co should believe that modification of the Final Judgment would be in the public interest because of changed or unforeseen circumstances or for other reasons, that party shall give notice to the other, and the parties shall attempt to agree on a modification. If the parties agree on a modification, they shall jointly petition the Court to modify the Final Judgment. If the parties cannot agree on a modification, the party seeking modification may petition the Court for modification and shall bear the burden of persuasion that the requested modification is in the public interest.

**35. Retention of Jurisdiction.** Unless this Final Judgment is terminated early pursuant to Paragraph 33, jurisdiction is retained by this Court for ten (10) years after entry to enable any party to apply to this Court for such further orders and directions as may be necessary and appropriate for the interpretation, modification and enforcement of this Final Judgment.

Dated this 20th day of July, 1995.

Walter W. Cohen,  
*Acting Attorney General, Commonwealth of Pennsylvania.*

Carl S. Hisiro,  
*Chief Deputy Attorney General, Antitrust Section.*

James A. Donahue, III,  
*Senior Deputy Attorney General, Antitrust Section, Office of Attorney General, 14th Floor, Strawberry Square, Harrisburg, PA 17120, (717) 787-4530, Attorneys for the Commonwealth of Pennsylvania.*

Capital Health System.

John S. Cramer,

*President and Chief Executive Officer.*

Attest: Cheryl P. Makle  
Polyclinic Health, System.

Stephen H. Franklin,

*President and Chief Executive Officer.*

Attest: M.M. Van Bly

Toby G. Singer, Esquire.

Stephen D. Kiess, Esquire,

*Jones, Day, Reavis & Pogue, Metropolitan Square, 1450 G Street, N.W., Washington, DC 20005-2088, (202) 879-3939, Attorneys for Capital Health System and Polyclinic Health System.*

So Ordered:

United States District Judge

*Exhibit 1-A—Harrisburg Hospital  
Inpatient Services*

General inpatient care for HIV/AIDS  
Birthing room/LDRP room  
Open-heart Surgery  
Cardiac intensive care unit  
Angioplasty  
Chronic obstructive pulmonary disease  
service  
Hemodialysis  
Medical surgical or other intensive care  
unit  
Histopathology laboratory  
Neonatal intensive care unit  
Obstetrics unit  
Pediatric acute inpatient unit  
Reproductive health services  
Organized social work services  
Organ/tissue transplant  
Orthopedic surgery  
Occupational therapy services  
Physical therapy services  
Respiratory therapy services  
Speech therapy services  
Oncology services  
CT Scanner  
Diagnostic radioisotope facility  
Ultrasound  
Blood bank  
Patient education

*Exhibit 1-B—Seidle Memorial Hospital  
Inpatient Services*

Skilled nursing or other long-term care  
Organized social work services  
Physical therapy services  
Recreational therapy services

Speech therapy services

*Exhibit 1-C—Polyclinic Medical Center Inpatient Services*

- General inpatient care for HIV/AIDS
- Birthing Room/LDRP room
- Cardiac catheterization laboratory
- Open-Heart Surgery
- Cardiac Intensive Care Unit
- Angioplasty
- Chronic obstructive pulmonary disease service
- Emergency Department
- Medical surgical or other intensive care units
- Neonatal Intensive Care Unit
- Obstetrics Unit
- Pediatric Acute Inpatient Unit
- Psychiatric Inpatient Service
- Extracorporeal Shock-Wave Lithotripter
- Alzheimer's diagnostic/Assessment Services
- Comprehensive Geriatric Assessment
- Emergency Response (Geriatric)
- Geriatric Clinics
- Respite Care
- Senior Membership program
- Patient Education
- Community Health Promotion
- Worsite Health Promotion
- Hemodialysis
- Histopathology Laboratory
- Blood Bank
- Occupational Health Services
- Psychiatric Consultation/Liasion Services
- Psychiatric Geriatric Services
- Megavoltage Radiation Therapy
- Rehabilitation Inpatient Unit
- Skilled Nursing or Other Long-Term Care Unit
- Orthopedic Surgery
- Magnetic Resonance Imaging (MRI)
- Therapeutic Radioisotope therapy
- CT scanner
- Reproductive health services
- Single photon emission computerized tomography
- Organized social work services
- Patient representative services
- Occupational therapy services
- Physical therapy services
- Recreational therapy services
- Respiratory therapy services
- Speech therapy services
- Health sciences library
- Cardiac rehabilitation program
- Non-invasive cardiac assessment services
- Mammography Screening Services
- Mammography diagnostic services
- Oncology services

*Exhibit 2—[New CO] Referrals for Home Health and/or Home Health Equipment—Documentation of Choice*

PATIENT: \_\_\_\_\_  
 D.O.B. \_\_\_\_\_

Your physician(s) \_\_\_\_\_, has recommended that you receive visiting

nurse or other home health services after you are discharged from the hospital. A listing of agencies offering visiting nursing and/or home health care services in the region is available for your review. A representative from [New Co] will contact any of these agencies, or any other agency not listed, upon your request. Selection of this agency is your responsibility or that of your family, unless your insurance company, health plan, HMO, or physician (because of special needs) require you to use a particular agency. Basic information on each agency will be provided to assist you in your decision.

*Choice of Provider:* Include Agency Name, Address and Phone Number

1. Home Health Agency: \_\_\_\_\_
2. Equipment Provider: \_\_\_\_\_
3. Other: \_\_\_\_\_

*Reason for Choice:* Check all that apply

- Previous Relationship with Home Health Company
- Patient/Family Preference
- Insurance Provider Directive
- Doctor Recommendation/Directive
- Explain: \_\_\_\_\_
- Hospital Recommendation/Directive
- Explain: \_\_\_\_\_
- Other Explain: \_\_\_\_\_
- Patient/Family No Preference (see below)

In the event that you or your family do not have a preference from the attached list of available agencies, [New Co] can provide this service if you so desire. However, you should be assured that no such referral is required and that any agency which you desire will be contacted on your behalf. Your selection of an agency other than [New Co] will in no way affect your care at [New Co] or prevent you from receiving future care at [New Co].

I have had the opportunity to review information related to home health care services and have had my questions answered to my satisfaction. My selection is as indicated above.

\_\_\_\_\_  
 Signature

\_\_\_\_\_  
 Date

\_\_\_\_\_  
 Relationship (if not patient)

Comments: \_\_\_\_\_  
 (If unable to obtain signature)

Person Completing This Form: \_\_\_\_\_

Commonwealth of Pennsylvania, Office of Attorney General, Harrisburg, PA 17120

For Immediate Release—Thursday, July 20, 1995.

Contact: Jack J. Lewis, Assistant Press Secretary, 717-787-5211 (home: 657-9840).

(Also released via RP Newswire in Central PA.)

HARRISBURG—The Office of Attorney General has approved the Harrisburg Hospital-Polyclinic Medical Center merger “because we have it guaranteed—in writing—that at least \$56 million in savings will be passed on to consumers,” Acting Attorney General Walter W. Cohen announced today.

Cohen said a proposed settlement negotiated by the Attorney General’s office addresses antitrust concerns sparked by the planned merger of Capital Health System (CHS), corporate parent of both Harrisburg Hospital and Seidle Memorial Hospital, with Polyclinic Health System (PHS), corporate parent of Polyclinic Medical Center.

Both Harrisburg Hospital and Polyclinic Medical Center are in Harrisburg; Seidle Memorial Hospital is in Mechanicsburg.

We have negotiated a carefully structured plan that mandates cost savings and—most importantly—guarantees that those savings will be passed on to consumers,” Cohen said.

“We’ve also ensured that the new system to be created by this merger will not use its market power to create an unfair advantage over others in the marketplace, health care providers and health plans.

“Without the safeguards included in this agreement, the proposed consolidation of these two health-care systems would have raised significant concerns about the effects on health-care competition in the Capitol area. With these safeguards, we are convinced that this merger will benefit not only the hospitals but also—and this is our bottom line—the people who live in the Harrisburg area.”

Cohen announced the settlement at a news conference also attended by John S. Cramer, CHS president and chief executive officer, and Stephen H. Franklin, PHS president and chief executive officer.

The proposal will be submitted to the Federal Trade Commission for its review, Cohen said. If the FTC agrees to defer jurisdiction to the state, the agreement will be filed in U.S. District Court for the Middle District of Pennsylvania for court approval.

Cohen said the proposed settlement requires the new health-care system to achieve at least \$70 million in net cost savings within the first five years after implementation of the merger.

Of that amount, he said, \$56 million in savings must be passed on to consumers in the form of free or reduced-cost health-care programs or through adjustments of prices charged for existing services. He noted that cost variables will be monitored by the Attorney General’s office.

If the targeted \$70 million cost-savings figure is not reached five years after implementation of the merger, the settlement requires the new health system to pay \$70 million minus the actual achieved savings to a fund established by the Attorney General’s office, Cohen said.

“The fund would be used to supply free or low-cost services such as child immunizations, mammograms, and drug and alcohol abuse treatment programs to residents of Cumberland, Dauphin and Perry counties,” he said.

Chief Deputy Attorney General Carl S. Hisiro, who heads the Attorney General’s

Antitrust Section, said the section interviewed dozens of doctors, health-care insurers, ancillary care providers, personnel from other hospitals, and others in the community during the investigation.

"This agreement responds to many of the anticompetitive concerns raised by those individuals," Hisiro said.

The proposed settlement requires the new system to hold overall price increases to changes in the Consumer Price Index-Urban, plus 2 percent, for at least five years. "This guarantees that there will be no drastic price increases for consumers in the wake of the merger," Hisiro said.

The proposal also requires CHS to sell Capital Health Products, its durable medical equipment company, to a third-party buyer within one year.

The new system can't require patients to buy home health-care services from any company affiliated with the new system, and it must provide patients with information about all accredited home health-care agencies in the area, according to the agreement.

Cohen said other provisions included in the settlement which are designed to protect consumers against possible anticompetitive effects of the merger include:

- During its first five years, the new system is prohibited—with certain defined exceptions—from employing more than 20 percent of the physicians in Cumberland, Dauphin and Perry counties practicing in family medicine/internal medicine, pediatrics, and obstetrics/gynecology.
- The new system cannot bar independent physicians who are members of any physician-hospital network established by the new system from participating in other physician-hospital networks or health plans.
- The new system is prohibited from entering into an exclusive contract or providing special benefits to any single health plan. The system must negotiate in good faith with all health plans serving the Capitol area.
- The new system is barred in most cases from entering into exclusive contracts with health-care providers.

Cohen said that if the new system participates in Health Central Inc., a managed-care plan proposed by six south central Pennsylvania hospitals including CHS, the settlement requires that the system participate only on nonexclusive terms.

"The new system is barred from giving this plan any price breaks not offered to other plans, and the system cannot subsidize Health Central through its own revenues in any anticompetitive manner," Cohen said.

Under terms of the settlement, the new system cannot—without prior approval of the Attorney General's office—acquire or be acquired by "any indemnity plan, health maintenance organization, or hospital in Cumberland, Dauphin or Perry counties."

Cohen said that for five years after the merger takes place, the new system must submit annual reports to the Attorney General's office describing the system's compliance with the eventual final judgment of the court.

Cohen said the term of the settlement is 10 years, although the parties can petition the

court to end it after five years if the system has complied with the terms at that time.

In concluding the investigation, Cohen stressed that officials of both CHS and PHS cooperated fully with the investigation. He commended Hisiro and Senior Deputy Attorney General James A. Donahue III for their roles in negotiating the proposed settlement.

Shepard's Crook Nursing Agency, Inc.

P.O. Box 2234, Pampa, Texas 79066, Phone 806/665-0356

November 27, 1995.

Gail Kursh,

Chief, Professions and Intellectual Property Section, Health Care Task Force, Department of Justice, Antitrust Division, 600 E. St., N.W., Room 9300, Washington, D.C. 20530

Regarding: United States v. Healthchoice of Northwest Missouri, Inc.

The main objective in managed health care and the referral system is providing good care for the patient. Variations in agencies are most evident in quality of care and skills of the staff.

Any regulation that restricts patients choices lowers the quality of care the patient receives for the dollar spent.

The Columbia hospital administrator in Pampa, Texas told Shepard's Agency he did not intend to refer to anyone and wanted all the other agencies in town gone. He *wanted* all the business. Many of our patients were forced by the hospital to use the hospital home health while requesting another agency. Many hospitals are now practicing the regulation proposed. The result is evident in patient dissatisfaction and reduced quality of care.

The patient should be treated as a customer of services and not a captive of the discharge planner.

A great majority of patients requiring home health are the elderly. This is a group which has difficulty making demands for a choice. Their rights are usually the ones most abused.

A system which is based on self-referral to the hospital based agency is set up for fraud and abuse. This will result in accelerated utilization, and high cost to Medicare. Hospitals have a great need to shift Medicare money to hospital expenses and increase hospital profit. Due to this practice, free-standing agencies can provide home health cheaper than hospital based agencies.

Hospitals should be required by law to offer patient choices. Agencies should be allowed to visit their patients at the hospital to arrange plans on discharge. If the patient has no preference, referrals should be rotated.

This is a critical time in Health Care. Caution must prevail to lower cost. Giving the hospitals more control over care after leaving the hospital is step in the wrong direction. Protecting patients rights' will help lower medical cost.

The patient should be asked if they have been served by a home health agency. If the patient says at this point yes, they should be asked if they wish to remain. Only if the patient states they do not choose to stay with the same agencies should other agencies be

offered. Switching a patient to another agency increases cost in repetitive health care teachings. This should be done only at the *patient's* choice. The patient should have the right to control his own health care. Please find enclosed documented complaints from patients and Shepard's Nursing Home Health on the Columbia Hospital referral system to their home health agency.

Further information is available.

Sincerely,

Suzanne Wilkinson,

Administrator/Owner, Shepard's Crook Nursing Agency, Inc.

Fayette County Health Department

P.O. Box 340, South Fifth and Edwards St., Vandalia, IL 62471, (618) 283-1044

December 1, 1995.

Gail Kursh,

Chief, Professions & Intellectual Property Section/Health Care Task Force, Department of Justice, Antitrust Division, 600 E St. NW., Room 9300, Washington, DC 20530

Re: Proposed final judgment for United States v. Health Choice of Northwest Missouri, Inc., et al., Case No. 95-6171-CV-SJ-6 in the U.S. District Court for the Western District of Missouri

Dear Ms. Kursh: As a freestanding Home Health Agency we are very concerned about the referral policy which is open for comment at this time.

While technically the patient is being given a choice of which agency receives the referral, we do not feel it is an informed choice. When a patient/family is under the stress of hospitalization, they are very susceptible to nuances and recommendations of the discharge planner. The following situation illustrates my point.

*Where Will They Eat?*

Characters: Innkeeper, Mr. Miles, traveler, Companion.

Scene: Hotel lobby check-out desk.

Time: 12:00 noon.

Situation: Traveler and companion are checking out of the hotel and anxious to get on their way, but are hungry.

Innkeeper: Thank you so much for staying with us, Mr. Miles. I hope every thing was satisfactory. It is noon and you will be needing lunch soon. Do you have a preference for where you eat?

Traveler: No, but we are hungry and unfamiliar with the area. Pizza sounds good.

Innkeeper: We have an excellent eatery across the lobby. Our chef is Italian and the pizza is superb. We were recently evaluated by Tasters Delight and received a 10 (*Smile*). You can't get better than that! (*Hands traveler a menu.*)

Traveler: Oh, that pizza looks wonderful, but I don't know. We thought we might go down the road a bit. Are there any other places?

Innkeeper: Oh yes, but I can't make a recommendation. You can check the telephone book.

Traveler: Well . . . gee . . . I don't have my reading glasses . . .

(*Innkeeper stands there saying nothing*)

Traveler: Can you just tell me the names of other pizza places?

Innkeeper: Yes, I can, but be sure you understand that I have never eaten at these places and really don't know anything about them, but they are The Pizza Place, Papa's Pizza, and All You Can Eat Family Pizza Place. Now remember, I can't speak about the quality of their food like I can about our restaurant, but you certainly don't have to eat here. The choice is yours.

Traveler: (*Turning to companion*) What do you think?

Companion: Oh, I don't know. It's been a long trip and I'm anxious to get to our destination. I wonder if it really matters.

Innkeeper: Let me reassure you that our restaurant is top quality. I hear lots of great comments from the patrons as they leave. Look on the wall. There is a newspaper article written up just last month.

Traveler: Well, we were certainly pleased with our room so if you say your food is good I guess we better have lunch here.

Scene closes with traveler and companion walking across lobby into the hotel restaurant.

Curtain.

Were the travelers given enough information to make an informed decision? Where would you eat?

I urge you to find these referral policies unacceptable.

Thank you.

Very truly yours,

Cara Kelly,  
Administrator.

Metro Home Health Care Services, Inc.

"THE HELPING HANDS OF CARING  
PROFESSIONALS"

November 27, 1995,

Ms. Gail Kursh,

Chief, *Professionals & Intellectual Property, Section/Health Care Task Force, Department of Justice, Antitrust Division, 600 E Street NW, Room 9300, Washington, DC 20530*

RE: "United States v. Health Choice of Northwest Missouri, Inc., et al., Case Number 95-6171-CV-SJ-6"

Dear Ms. Kursh: Per the attached:

1. Referring to II B(2): How does the DOJ know that Heartland is an excellent home care agency? A hospital near us opened an agency. We were the best, VNA the second best and theirs was third best. The hospital CEO said all referrals go to the third best agency, their own.

2. Heartland's agency may be the most expensive. PROPAC stated hospitals cost an average of \$15.00 more per visit. Should patients be referred to cost effective agencies and not just the one owned by the hospital?

3. Hospitals have been referring to agencies for thirty years. When they start their own agency, do they all of a sudden become deaf and dumb as to what agencies are good and which aren't in their community? Discharge planners' jobs should be to refer patients to quality services regardless of ownership and NOT in regard to how much money the referring entity can make off the referral.

4. Doesn't it seem a bit harsh for the DOJ to suggest that hospitals tell 85 year old sick

patients who are quickly being discharged home without support to go to the phone book to find a provider if they don't take the hospital program? Is that giving the patient a choice?

Sick, elderly patients depend on others to give non-biased advice for their care. Please allow that to continue.

Thank you.

Sincerely,

Richard A. Porter,

President/Administrator, Metro Home Health Care Services.

James F. Wayne

Account Executive, Quantum Health Resources, 350 Cordelia Way, Walnut Creek, CA. 94596, (510) 942-0747

November 25, 1995

Ms. Gail Kursh,

Chief, *Professionals & Intellectual Property Section/Health Care Task Force, Dept. of Justice, Antitrust Division, 600 E St., N.W., Room 9300, Washington, D.C. 20530*

Subject: United States v. Health Choice of Northwest Missouri Inc., et al. Case No. 95-6171-CV-SJ-6 (U.S. District Court, Western District of Missouri)

Invited Comments regarding the above case from the D.O.J. on the proposed final judgment (Ref: Home Health line 11300 Rockville Pike #1100 Rockville MD 20852-3030):

#### Ancillary Service Referrals

If a patient *does not* accept the provider recommended by their personal physician then the patient shall be referred back to his or her physician to discuss alternatives to make a joint/collaborative decision.

A patient needs to direct his or her concerns about a physician's choice of ancillary service provider and resolve the matter with the physician prior to next step in process. Additional service providers can be discussed and the appropriateness of the additional alternatives can be weighed.

Should the physician and patient disagree with the initial selection, and mutually determine that the chosen provider does not meet the needs of the patient, an alternative provider shall be chosen. The patient shall be redirected to the hospital social worker/discharge planner with the new recommendation.

#### Timely Ancillary Provider Selection

The physician must enable a patient the opportunity to make a timely and appropriate selection to meet his or her specific needs *prior* to discharge. Should ancillary provider selection be a part of the post-hospitalization treatment strategy then early decisions (e.g. prior to hospitalization) should be considered. This diligence will be mutually beneficial to both physician and patient. Physician/Patient Collaboration in Provider Selection

A patient with a high-risk chronic disease, for example, one whose needs are unique and potentially multi-system in nature, may require an ancillary service provider with specialized expertise, experience and understanding to meet the highest

expectations of quality and safety in caring for that specific disorder. Therefore, *physician/patient collaboration* must take place as a first step in selecting an appropriate provider. Collaboration encourages proactive planning jointly by both hospital based utilization review personnel and families affected by the illness.

#### Provider Selection Process: Suggested Criteria

1. Clinical specialization in patient's medical condition: The agency rendering the ancillary service shall be recognized by the local medical community as a specialty service with experience and business resources appropriate to the needs of the patient(s) being referred.

2. Accreditation by a joint commission authority: The agency rendering the ancillary service be approved and licensed by a State or Federal agency, i.e., Joint Commission on Accreditation of Home Health Agencies.

3. Physician's ancillary provider selection must be based on "plan of care" established to treat and monitor patient's therapy: The referring physician should have a knowledge of the company servicing the patient, including quality of service and abilities of the company to meet all plan of care requirements. A necessary requirement is that the ancillary provider must have *experience and understanding* of the disease state. The selection goal is focussed to match the patient's condition to the service provider's specialty and clinical ability to execute the "plan of care".

4. Current ancillary provider shall be notified on admission of their patient by hospital utilization department. Current service providers having relationship with patient shall be given notification that patient has been admitted. Immediate steps can be taken to proactively revise plan of care at expected date of discharge. Home provider will have opportunity to discuss any changed orders with physician and follow the progress of the patient (i.e. concurrent review) until discharge orders are rendered.

Thank you for this opportunity to make comments,

James Wayne

Family Nurse Care

9880 E. Grand River, Suite 110, Brighton, MI 48116, (810) 229-0300

November 21, 1995.

Ms. Gail Kursh,

Chief, *Professionals and Intellectual Property Section/Health Care Task Force, Dept. of Justice, Antitrust Division, 600 E. St., NW., Room 9300, Washington DC 20530*

Dear Ms. Kursh: I am writing to you as the owner of a Medicare certified home care agency and delegate to the White House Conference on Small Business. My agency has serviced Livingston County since 1987, receiving referrals from hospitals in four surrounding counties as well as Livingston County.

In April of this year, the only hospital in the county became affiliated with a multi-hospital organization and our referrals decreased 30%. The Medical Director of this

hospital states that they are mandated to refer to their own hospital-based home health agency. The discharge planners state that they must refer to their own agency. One of our patients asked for our services, presenting a magnet with our telephone number on it and she was refused access to return to our agency. The patient states that she was too sick to argue.

The law is very clear: "Any individual entitled to insurance benefits under this title (42 USCS 1395 et seq.) may obtain health services from any institution, agency, or person qualified to participate under this title (42 USCS 1395 et seq.) if such institution, agency, or person undertakes to provide him such services"; yet hospitals across the United States are engaged in this practice.

Because hospitals have traditionally lost money over the years, they have targeted home care as an area where they can shift hospital costs and keep the client in a closed system. There are plenty of sick, elderly people in this country and the small, nurse-owned agencies that offer community-based care are being threatened out of existence because of this practice.

I urge you to consider the fact that small businesses are the engine that drives the U.S. economy, and consider the following in your final judgement:

- \* Bigger is not always better where health care is concerned.

- \* Set limitations on hospital's ability to refer to clients to their own hospital-based components.

- \* Require the hospital to use a rotation system, which assures equitable referrals to all providers in the area.

- \* Require the hospital to permit (on their premises, during normal working hours) representatives of freestanding providers—other than their own hospital-based components—to visit their patients who have been admitted for hospitalization; and to expose the patient population to the availability of outside services as well.

- \* Make the hospital publicly post its daily referrals to both its hospital-based entities and to other providers in the community.

Sincerely,

Marilyn LeVasseur, M.S., R.N.,  
Administrator.

Infusion Management Systems, Inc. dba  
Concepts of Care

December 1, 1995

Gail Kursh,

*Chief, Professions & Intellectual Property  
Section, Health Care Task Force,  
Department of Justice, 600 E St. N.W.,  
Room 9300, Washington, D.C. 20530*

Re: United States v. Health Choice of  
Northwest Missouri, Inc., et al. Case No.  
95-6171-DV-SJ-6

Dear Ms. Gail Kursh: My name is Sandra Smith Jackson and I am employed as Vice President of the Continuous Quality Improvement Department for a Home and Community Support Agency which has 30 Medicare certified agencies across Texas. Our locations are freestanding and we have been providing care for 27 years.

Our Agency will be adversely affected by the proposed final judgment for United States

v. Health Choice of Northwest Missouri, Inc., et al. This decision does not encourage fair competition or patient choice. The hospital would be able to monopolize all the ancillary services. Heartland would present information regarding its service without making any mention of other providers in the community unless the patient specifically asked. If the patient asked they would be told to look in the telephone book. I'm not aware of a lot of hospitalized clients that would look for a listing of providers in the telephone book. It would be difficult for a patient who had no preference to make an informed choice if the discharge planner only gives them a brochure for the hospital.

I believe as well as our state association (Texas Association of Home Care) that agencies shall not engage in coercive or unreasonably restrictive exclusionary behavior which would restrict or impede consumer choice of provider agencies. An agency or related entity that provides a screen to clients for home care referrals shall not use that position to influence a client's choice and to direct referrals to itself, and shall inform clients of the availability of home care providers and advise clients that they have the right to choose the provider they prefer. I also believe that agencies should cooperate to see that patient gets the best comprehensive service.

Thank you for allowing me the opportunity to give comments in this matter. I have enclosed a business card if you have any questions.

Sincerely,

Sandra Smith Jackson,  
*Vice President, CQI/Licensure and  
Certification.*

Visiting Nurse Associations of Pennsylvania  
1789 S. Braddock Avenue, P.O. Box 82550,  
Pittsburgh, PA 15218, (412) 256-6927

November 29, 1995

Ms. Gail Kursh,

*Chief, Professions & Intellectual Property  
Section/Health Care Task Force,  
Antitrust Division, U.S. Department of  
Justice, 600 E. Street, N.W., Room 9300,  
Washington, D.C. 20530*

Re: United States v. Heartland Health  
Systems Inc., Civil Action No. 95-6171-CV-  
SJ-6

Dear Ms. Kursh: We are writing in support of the letter which you received from VNA HealthCare Services dated November 24, 1995. Visiting Nurse Associations of Pennsylvania is a membership organization which includes 33 community-based, non-profit home health agencies serving the entire state of Pennsylvania.

Our members believe that the "Referral Policy" contained in the Final Consent Judgement against Heartland Health Systems Inc. will be used by hospitals to deny patients "freedom of choice" of a home health care provider. It is our experience that hospitals steer patients to their affiliated home care agency. This tied relationship restrains our members from competing on a "level playing field."

The "Referral Policy" in question should be modified to send a strong message to hospitals that they must abide by both

Medicare and Medicaid laws and federal antitrust statutes.

Thank you for your consideration of our concerns.

Respectfully yours,

Mahlon Fiscel,

*President.*

Visiting Nurse Association of Greater  
Philadelphia

December 1, 1995

Ms. Gail Kursh,

*Chief, Professions & Intellectual Property  
Section/Health Care Task Force  
Antitrust Division, U.S. Department of  
Justice, 600 E. Street, NW., Room 9300,  
Washington, DC 20530*

Re: United States v. Heartland Health  
Systems Inc. Civil Action No. 95-6171-  
CV-SJ-6

Dear Ms. Kursh: I am writing to urge that the Justice Department not consent to the proposed final judgment in the above-referenced case, because the "Referral Policy" regarding provision of home health care does not adequately protect patient choice and fair competition.

The VNA of Greater Philadelphia is the largest home health agency in Pennsylvania. We are a non-profit, community-based agency which has served communities in southeastern Pennsylvania, including the City of Philadelphia, for 110 years. We provide home health services to approximately 2,000 patients a day, many of whom are Medicare and/or Medicaid patients referred for care directly following an episode of hospitalization.

Patient choice and fair competition are protected by both Medicare and Medicaid law and by antitrust provisions. The proposed Heartland referral policy undermines these protections. Heartland would have no obligation to provide reasonable information about other home health providers in the community for patients who have expressed no provider preference. Telling a hospitalized patient that there are other providers listed in the telephone book and then giving the patient "time to investigate", all in the context of the Heartland representative extolling the virtues of its home health service, clearly encourages steering patients to the hospital-owned agency. Further, a policy of stonewalling patient's requests for information about other providers, places the discharge planning staff in the position of denying knowledge that they actually have about alternate providers. This clearly undermines continuity of care for patients.

Although the Heartland consent decree may have no formal precedential impact, in practice this decree could have far-reaching, negative impact on patients and on independent providers, including visiting nurse associations, because it would send a clear signal that anti-trust and patient choice protections are no longer to be taken seriously.

We urge that you require a more aggressive policy to assure that vulnerable, hospitalized patients truly have access to the information they need to make an informed choice of their home health provider.

Sincerely,  
Stephen W. Holt.

Gardner, Carton & Douglas

1301 K Street, N.W., Suite 900, East Tower,  
Washington, D.C. 20005, (202) 408-7100,  
Facsimile: (202) 289-1504

December 1, 1995.

Gail Kursh,

*Chief, Professions & Intellectual Property  
Section, Health Care Task Force, U.S.  
Department of Justice, Antitrust Division,  
600 E Street, N.W., Room 9300,  
Washington, D.C. 20530*

Re: Comments—United States v. Health  
Choice of Northwest Missouri, Inc., et  
al., Case No.: 95-6171-CV-SJ-6

Dear Ms. Kursh: The law firm of Gardner,  
Carton & Douglas is pleased to submit  
comments in response to the proposed final  
judgment in the above-captioned case  
published in the October 3, 1995, Federal  
Register (60 F.R. 51808). These comments are  
filed on behalf of an independent home  
health care company (the "Company")  
located in the Southeast. The Company  
furnishes over 100,000 home health visits per  
year and has been in operation since 1985.  
The Company has four locations and  
employs over 120 individuals.

During the last three years, the Company  
has seen many of the hospitals within the  
Company's service areas promulgate various  
exclusionary policies favoring referrals of  
hospital inpatient to hospital-based or  
hospital-owned home health agencies and  
other hospital affiliated ancillary providers.  
Such policies typically prohibit outside  
agency personnel from hospital floors and  
encourage discharge planners' referral of  
hospital patients to hospital providers. The  
proposed final judgment appears to endorse  
and encourage such exclusionary practices  
and, therefore, fails to protect the public  
interest and should be revised to adequately  
protect patient freedom of choice and fair  
competition. The Company comments more  
specifically as follows:

#### 1. The Proposed Policy Is Contrary to the Public Interest Because It Is Anti-Competitive

While the Company appreciates that the  
main focus of the underlying litigation in  
*Health Choice* was not the hospital's referral  
policies, implementation of the ancillary  
service referral policy set forth in the  
proposed final judgment would limit outside  
providers' and suppliers' access to hospital  
patients in favor of a hospital's own ancillary  
providers. That is, the policy, as drafted,  
would permit and encourage use of the  
hospital's market power in an exclusionary  
manner to the detriment of smaller ancillary  
providers and patients.

Hence, the Company's first concern is that  
the proposed policy is inconsistent with  
federal antitrust policy in that it excludes  
competing ancillary providers from hospital  
patients. (See, e.g., *Key Enterprises Of  
Delaware, Inc. v. Venice Hospital*, 919 F.2d  
1550 (11th Cir. 1990)).

Under Section II(B)(2) of the proposed  
policy, the hospital may in effect steer  
patients to its own ancillary providers  
because it must only inform a patient of

alternative providers when hospital services  
are first denied by the patient. Then, the  
hospital must only direct the patient to a  
phone book (Section II(B)(3)) to identify  
alternate ancillary providers. This system  
ignores the realities of the hospital-patient  
relationship, and will unreasonably restrict  
competition by limiting patient choice. The  
*Venice* Court noted that "patients know very  
little about ancillary providers," described a  
patient's freedom of choice under similar  
circumstances as "illusory," and concluded  
that "[i]t therefore becomes very easy to  
channel patient choice by limiting the  
patient's exposure to competition." 919 F.2d  
at 1557. Because the proposed policy grants  
a privileged status to the hospital's providers,  
it interferes with fair competition among the  
range of ancillary providers available to the  
patients. For this reason, the policy, as  
drafted, is contrary to the public interest.

#### 2. The Proposed Policy Is Contrary to the Public Interest Because It Violates Patient Freedom of Choice

The proposed policy also is contrary to the  
public interest in that it violates the freedom  
of choice provisions of the Medicare statute.  
Pursuant to section 1802 of the Social  
Security Act, "[a]ny individual entitled to  
insurance benefits under this title may obtain  
health services from any institution,  
agencies, or person qualified to participate  
under this title if such institution, agencies,  
or person undertakes to provide him such  
services." 42 U.S.C. § 1395a. A parallel  
provision applies to Medicaid recipients. 42  
U.S.C. § 1396a(23).

While this federal "right to choose" inures  
to the benefit of patients (i.e., Medicare  
beneficiaries and Medicaid recipients) rather  
than providers, patients denied the option of  
securing home health and other ancillary  
care services from any entities other than the  
hospital's agencies are materially harmed.

The draft ancillary provider referral policy  
deprives patients of information necessary  
for a patient to choose among providers and  
to actively participate in his or her own  
health care. It also substantially hinders  
providers' ability to compete for patients  
based on cost, quality of care, and other  
objective criteria relevant to a patient's  
choice. Moreover, as this "right to choose" is  
a fundamental principle underlying the  
administration of the Medicare and Medicaid  
programs, denial of such rights by a hospital  
in accordance with the proposed policy  
could jeopardize the hospital's status as a  
Medicare or Medicaid provider.

The Company also notes that the Inspector  
General ("IG") of the U.S. Department of  
Health and Human Services recently deemed  
hospital self-referral policies as "suspect." As  
a result, as part of the IG's 1996 Operation  
Restore Trust Workplan, she will review  
hospital discharge planning to determine the  
extent to which financial conflicts of interest,  
such as hospital ownership of ancillary  
providers, negatively affects effective  
hospital discharge planning and patient  
choice. The Company urges the Department  
of Justice to coordinate with the IG to  
develop one consistent policy.

#### 3. Recommendations

Our client agrees that where the patient's  
physician specifies a particular ancillary

provider in the treatment order, that order  
should be honored, where consistent with  
the patient's wishes. Also, where a patient  
expresses a clear preference for a particular  
ancillary provider, based on reputation,  
previous experience, health insurance  
coverage, or other competitive factors, that  
preference should be honored. However,  
where neither the physician nor the patient  
expresses such a choice, the hospital  
ancillary provider should not enjoy a  
preferred status over all other ancillary  
providers. The Company therefore suggests  
the following revisions to bring the proposed  
policy within the public interest:

A. Prior to patient discharge, the hospital  
should be required to furnish to its patients  
a current list of all certified or otherwise  
licensed ancillary providers within its  
service area. Such a list should include the  
hospital's providers. The hospital need not  
be charged with responsibility of verifying or  
guaranteeing the services of listed providers,  
and appropriate disclosure language may  
appear on the list.

B. Hospital personnel should not  
influence, steer or otherwise interfere with  
patient freedom of choice by directing a  
patient's referral to (or away from) any  
particular provider on the list. Independent  
ancillary providers should be treated the  
same as the hospital's providers under the  
policy to prevent the hospital from  
channeling patients.

C. The policy should clarify that the  
hospital should continue to permit  
representatives of nonhospital ancillary  
providers on its floors, to the extent  
consistent with patient health and safety, to  
coordinate the continuing care of referred  
patients, and to educate physicians and  
patients of available nonhospital services.  
The hospital should not block outside  
ancillary providers' access to physicians,  
discharge planners, and patients.

D. Last, because the draft policy is largely  
self-enforcing, the hospital should maintain  
and make available for public review and  
verification its records of referrals to  
ancillary providers.

We are grateful for your consideration of  
these issues and are pleased to participate in  
the development of the final judgment.  
Please do not hesitate to contact me if you  
have any questions or require additional  
information.

Very truly yours,  
Christopher L. White.

Illinois Homecare Council  
Nation's First Homecare Association  
November 28, 1995

Gail Kursh,

*Chief, Professions and Intellectual Property  
Section/Health Care Task Force, United  
States Department of Justice, Antitrust  
Division, 600 E Street, N.W., Room 9300,  
Washington, D.C. 20530*

Dear Ms. Kursh: The Illinois Home Care  
Council is a state-wide trade organization  
serving the needs of home care providers and  
suppliers in Illinois. IHCC represents 350  
members, including over 250 providers  
serving more than 125,000 Illinois citizens in  
their homes. We believe that one of our most

important roles is to speak for the consumers of our services, individuals who, for reasons of age or infirmity, are often unable to speak for themselves.

We are writing to you to express concerns about the proposed consent decree in *United States v. Health Choice of Northwest Missouri, Inc.*, et al., with our attention fixed firmly on the consumers of our services. As a trade organization, our membership includes home health providers of every type: from not-for-profit visiting nurses associations to proprietary chains. We also count among our members many hospital-based home health agencies. Competition is stiff in our state, and sometimes disputes arise among local providers trying to get access to patient referral sources. From that standpoint, we welcome the efforts of the Justice Department to clarify the role of the hospital discharge planner in a facility which offers ancillary services. We also strongly support the need for Medicare recipients, and indeed every home care consumer, to exercise free choice in selecting a home care or other ancillary service provider.

It is our focus on patients that raises concerns about some of the provisions included in your proposed consent decree, specifically about the Referral Policy presented on page 51812 of the October 3, 1995 Federal Register. We fear that the Justice Department may not fully recognize the speed with which today's patient is admitted to, treated in and discharged from the hospital. Many of these patients are elderly, and are sent home before they and their families have fully grasped what has happened to them and what they will need on returning home. We believe that the process outlined in Part II (3) of the proposed Referral Policy will only serve to increase the anxiety experienced by patients undergoing a hospitalization, and potentially force them into a bad decision. We also doubt whether today's average hospitalization provides sufficient time for the patient to independently examine all of his options and arrive at a conclusion in time for the discharge planner to plan a discharge. In short, we believe that the proposed policy places an unfair burden on vulnerable, sick people. We are unable to see how it protects patient choice or promotes quality care.

IHCC would like to recommend that Part II (3) of the proposed Referral Policy be eliminated and that Part II (2) be amended with a requirement that hospital discharge planning departments maintain a reasonably up-to-date list of licensed ancillary service providers, noting those that are Medicare certified, and that these lists be provided to every patient requiring post-discharge ancillary services. We agree that hospital discharge planners should not be forced into evaluating each provider for the patient; however, they should be aware of the specialties of the various providers, and be willing and able to inform the patients of these specialties. Imparting information about choices is central to the concept of hospital discharge planning. We believe that a focus on the patient and his or her needs will make clear the best policy in this matter.

Thank you for this opportunity to comment on the proposed consent decree. We

understand that the proposed settlement technically applies only to the parties involved. However, we also recognize the precedent-setting nature of the acceptance of such an interpretation of the Medicare freedom of choice requirements by the United States Department of Justice. We believe that acceptance of the Referral Policy language currently included in the proposed consent decree will do a grave injustice to hospitalized patients nationwide, and urge you to revise the policy as described above.

Sincerely,

Monica Brahler,

President.

cc: Michael Kulczycki,

Pamela Steinbach,

Rebecca Friedman Zuber

November 3, 1995

Mrs. Marian Wilson,

Tiffany Square Convalescent Center, 3002 N.  
18th Street, St. Joseph, Missouri 64505

Dear Mrs. Wilson: Although we have not formally met, I have heard so many good things about you that it seems as though I know you. I know that David Cathcart has talked to you about our interest in acquiring other nursing facilities in St. Joseph, and that you are going to take your time before making any major decision. I have been talking to David about this for nearly a year, and the "state of the industry" in St. Joseph has been in a downward spiral during all that time.

Seeing you at the "Coalition" meeting tells me that you too are concerned about the future of our businesses. I believe we are at the crossroads of survival today, and suspect that either a facility will close, or an owner will pump large amounts of cash into the business to make it survive \* \* \* for a little longer.

Attached is a copy of a letter to David Cathcart that briefly outlines our thoughts and objectives. I believe it affords you an opportunity to convert your interest into cash, and it affords the new entity an opportunity to make management decisions for the good not only of the nursing homes, but also for the good of the entire community. I cannot imagine the amount of good you have done in this community \* \* \* it has been tremendous. But things in this industry are changing so fast that unless we are changing at the same time, we are falling further behind. The requirement for electronic transfer of MDS data to Jefferson City by next July 1 is one major example. Maybe you are already at that point too, but it took us over a year to become able to do that computer transfer of data. And the new survey process is no cake-walk.

I sincerely hope you will not be offended, and that you will give serious consideration to the content of this mailing. I will be happy to meet with you at any time.

Sincerely,

Lowell Fox,

5051 Faraon 64506, 233-1212 (home), 279-1591 (office).

Central Health Services, Inc.

6600 Powers Ferry Road, Atlanta, Georgia  
30339, 404/644-6500

November 28, 1995

Gail Kursh,

Chief, Professions & Intellectual Property  
Section/Health Care Task Force, U.S.  
Department of Justice, Antitrust Division,  
600 E Street, N.W., Room 9300,  
Washington, D.C. 20530

Re: *Comments on Proposed Final  
Judgement: United States v. Health Choice of  
Northwest Missouri, Inc., et al., Case No. 95-  
6171-CV-SJ-6 in the U.S. District Court for  
the Western District of Missouri*

Dear Ms. Kursh: As a home health care provider I have first-hand knowledge of the subject matter the Department of Justice is dealing with in the above referenced matter. I also understand the influence a hospital can exert in a patient's selection of post-hospital ancillary services, including the selection of a home health care provider. For these reasons I have reviewed and studied the DOJ's recommended home health, DME and hospice referral policy for Heartland Hospital.

In the interest of protecting patient choice (which is guaranteed by both Federal and State laws) as well as maintaining fair competition consistent with the antitrust laws and FTC regulations, I respectfully submit that the final proposed judgement (recommended policy) be modified as such:

- Strengthen limitations on the hospital's ability to refer its patients to its own hospital-based components;
- Require the hospital to provide patients with an updated list of Medicare/Medicaid providers in the community;
- Require the hospital to use a rotation system, which assures equitable referrals to all providers in the area;
- Require the hospital to permit (on their premises, during normal working hours) representatives of freestanding providers—other than their own hospital-based components—to visit their patients who have been admitted for hospitalization; and to expose the patient population to the availability of outside services as well;
- Make the hospital publicly post its daily referrals to both its hospital-based entities and to other providers in the community.

On behalf of our home health agency and the patients we serve, we respectfully ask that you give these comments due consideration. These issues are of even more concern in today's era of health care and provider consolidation.

Sincerely,

Jerry Sevy,

General Counsel.

Upper Peninsula Home Nursing

1414 W. Fair, Suite 44, Marquette, MI 49855,  
906/225-4545

November 22, 1995.

Gail Kursh,

*Chief, Professions and Intellectual Property Section/Health Care Task Force, Dept. of Justice, Antitrust Division, 600 E St., NW Room 9300, Washington DC 20530*

Dear Ms. Kursh: The only word to describe the DOJ's recent decision in *United States v. Health Choice of Northwest Missouri, Inc.* et al., is: Devastating.

Private, non-hospital-based home health care agencies already struggle with the monopolistic practices of self-referring hospital programs. This decision would in effect nail the lid on the coffin of informed choice for small community based programs such as ours.

Add in a hospital's ability to divert funds to media advertising and the fact that such advertising is disallowed under Medicare cost settling and you eliminate *any* chance for a private, non-hospital-based agency to establish a level competitive field.

Asking hospital-based discharge planners to "play fair" is at best naive, and more likely is simply stupid. When a patient hears a discharge planner state they "can not speak to the quality of outside providers," they will actually hear: "therefore, the outside program is no good." That's reality. Instead, the Department of Justice should be encouraging hospitals to mention ALL agencies who are certified or accredited at the same level, or higher, in their own community.

Let me offer a very good example in our community. For almost twenty years, Marquette County, in Michigan's Upper Peninsula, was served by two private home health care agencies—U.P. Home Nursing & Hospice and Northern Home Nursing. (The area was also served by the small, county-operated health department program.) In 1992, after we refused to sell to the local hospital, Marquette General, the Hospital bought our competing agency.

Instantly, the twenty-year policy of rotating referrals was dropped. Instantly, our hospital-generated referrals went from 45% to less than 4%. Instantly, the U.P. Home Nursing & Hospice discharge planning staff were not allowed to speak to patients in the hospital. In fact, even if a hospitalized patient were already being seen by our Agency, our staff were not allowed to speak to them in the hospital without a signed release, *even if the patient and physician requested us*. Presently, the hospital is telling our patients they are no longer in our care but will have to make their home health decision all over again upon discharge from the hospital. Obviously, the hospital influences their decision toward the hospital's own program.

As a final, and ridiculous, action, the hospital imposed a form on patients that included confusing language. The form compelled them, upon admission, to disavow any non-hospital based home health providers, and this was presented as a normal part of the multi-paged admissions process.

This story is strong evidence that the Department of Justice must include language which addresses the hospital's responsibility to refer to Medicare-certified and accredited programs. U.P. Home Nursing & Hospice has been certified for twenty years through Medicare without a single deficiency. For the

past three years, we have maintained accreditation through CHAP—the Community Health Accrediting Program. This sterling accreditation offers us deemed status for participation in Medicare, and we achieved this high accreditation with an unheard of 57 commendations on our first application. For our local hospital to state they can "not vouch for the quality of this program" would be utterly unfounded and even fraudulent. They are, indeed, well aware of our high standards of quality. They are also aware of our unique billing policy: for needed home health services, we accept third-party reimbursement as payment in full. Patients are not directly billed. The hospital can not claim this policy and by limiting choice denies care to many in our community who can not afford the hospital's 18% interest rate on unpaid balances.

Your pending decision in the matter of Heartland Health System, Inc. does not include provisions which would protect the private sector. Nor does it support informed choice and anti-trust provisions in the current law. We can understand the DOJ's desire to mandate some type of informed choice for hospital-based programs. At present, it seems there are *none*. But we strongly urge you to consider the modifications proposed by the St. Joseph group, "Your Right to Choose."

fl Strengthen limitations on a hospital's ability to refer its patients to its own hospital-based components;

fl Require the hospital to use a rotation system, which assures equitable referrals to all providers *who offer the same level of certification and/or accreditation, or higher* in the area—Hospitals are well aware of the accreditation of local providers;

fl Require the hospital to permit (on their premises, during normal working hours), representatives of freestanding providers.

fl Make the hospital publicly post its daily referrals to both its hospital-based entities and to other providers in the community.

The Department of Justice *must* consider fair competitive practices in this matter. By eliminating freedom of choice, you dilute competition and, thereby, reduce quality and cost-effectiveness in this growing method of health care delivery.

Sincerely,

Cynthia A. Nyquist, R.N., B.S.N.,  
*Administrator/CEO.*

North Woods Home Nursing & Hospice  
P.O. Box 307, Manistique, MI 49854-0307,  
(906) 341-6963, 800-852-3736

November 24, 1995.

Gail Kursh,  
*Chief, Professions and Intellectual Property Section/Health Care Task Force, Dept. of Justice, Antitrust Division, 600 E. St., N.W., Room 9300, Washington, D.C. 20530*

Dear Ms. Kursh: I am writing to you as the owner/administrator of a Medicare certified home health care agency. We have been in operation since 1985. We have had tremendous success with acceptance by our local physicians. I have letters where they laud our service as excellent.

Our regional medical center entered the home health market about 3 years ago and now 2 local hospitals opened agencies in 1994. We have maintained our market share, although our growth has stopped. We looked upon this increased competition with concern, but also as a reason to do a better and better job. We feel competition is good for quality and efficiency.

The referrals from these hospitals and our local doctors has practically dried up. The doctor's office (private physicians) office gives patients a questionable choice situation. The hospital owned physicians and the referral process at the hospital prevents us from receiving referrals, even when the patient requests us. The patients call and tell us they are "too sick to fight". This more recent "bullying" of our infirm and elderly will surely hamper our continued success.

My optimism of the goodness of people and the upholding of fairness in our judicial system is at question if this present referral practice is allowed to continue. The majority of our patients are served under the Medicare system. Please review the patient rights regulations under this program and also any antitrust implications. I believe the problems here border on basic "human rights" exploitation. Referrals should be based on choice *and* a rotating system. Quality issues are assured by MDPH hotline and CHAP certifications, and in our very small town—word of mouth!

Sincerely

Susan L. Bjerne,  
*Administrator.*

Baylor Homecare  
3200 W. Hwy. 22, Corsicana, Texas 75110,  
(903) 872-5535

Lynn Gill, RN  
*Director of Operations, Baylor HomeCare,  
3510 Crutcher Street, Dallas, Texas  
75246*

Gail Kursh,  
*Health Care Task Force, Department of Justice, Antitrust Division, 600 E St, N.W., Room 9300, Washington, D.C. 20530*

Dear Ms. Kursh: This is a response to the proposed final judgement for *United States vs. Health Choice of Northwest Missouri, Inc.*, et al., Case Number 95-6171-CV-SJ-6 in the U.S. District Court for the Western District of Missouri.

We agree that the referring agency/discharge planner should not make a recommendation for another provider. The discharge planner is familiar with their own facility's home health agency, DME, etc., but not the *many* other agencies available. Many agencies have problems documented by State/Medicare surveyors. These would not be known by the discharge planner. If the patient wants to choose another agency, it is certainly their right. This transfers the liability/responsibility to the patient to research their options and make the choice. If a patient is given a list of providers by the discharge planner and an agency from the list administers poor care, the hospital ultimately could be held liable.

Patient preference should be honored. However, the *physician* also has the right to

refuse to write orders to a certain agency because of a history of poor care, over utilization, etc. Then the patient must then make a choice of either changing physicians or changing agencies.

The proposed referral procedure certainly honors patient choice and guards against liability of the referring facility.

Sincerely,

Lynn Gill, RN,

*Director of Operations, Baylor HomeCare.*

Danville Regional Medical Center

142 South Main Street, Danville VA 24541

November 28, 1995.

Gail Kursh,

*Chief, Professions & Intellectual Property Section/Health Care Task Force, Department of Justice, Antitrust Division, Room 9300, 600 E Street NW., Washington, DC 20530*

Re: United States v. Health Choice of Northwest Missouri, Inc., et al., Case No. 95-6171-CV-SJ-6

Dear Ms. Kursh: I applaud the Department of Justice on the recommended home health, DME, and hospice referral policy in the proposed settlement between the department and Heartland Health System, Inc., of St. Joseph, MO.

It is my opinion that the referral policy in the proposed final judgment is fair and equitable. A hospital should have no responsibility to, in effect, promote outside proprietary services with or without a company specific physicians order. Additionally, a hospital cannot be responsible for seeming to tacitly approve of the quality of care provided by outside ancillary companies. If proprietary ancillary service companies wish to enhance their market share, they should do this by making themselves the company of choice by providing outstanding service, not by demanding their name be mentioned immediately upon mention of a home health, DME, or hospice referral.

The policy in the proposed settlement allows for true freedom of choice for patients as it will tend to reduce reliance on company name recognition. It has been my experience that some patients and families tend to select companies with high name recognition even though services provided are unexceptional or even sub-standard.

Once again, I wholeheartedly congratulate the department on its reasonable, fair, and common sense referral policy.

Very Sincerely,

William S. Sigmon, RN,

*Director of Home Health.*

Helix Health System

November 28, 1995

Gail Kursh,

*Chief, Professions and Intellectual Property Section/Health Care Task Force, Department of Justice, Antitrust Division, 600 E Street, N.W., Room 9300, Washington, D.C. 20530*

Re: United States vs. Health Choice of Northwest Missouri, Inc., et al, Case No. 95-6171-CV-SJ-6

Dear Ms. Kursh: I recently saw a copy of the recommended home health, DME and hospice referral policy for Heartland Hospital.

I believe that your recommendation for the approval of this referral policy strikes an appropriate balance between right and obligations of a hospital in connection with its related home health and DME companies. If I had to make any change in the form, it would be to strike out the word "excellent" in subparagraph IIB2. I think that the "puffing" of its related services is questionable. The remainder of the form is both logical and sensible.

I totally agree with the concept that a hospital should not be placed in a position of having to refer to one or more outside providers. It has no ability to judge the quality or accessibility of the unrelated home health or DME agencies. It does not have the ability, and should not have the obligation, to go through a "credentialing process" for the outside agencies. I believe the formula suggested in this document is the only approach that a hospital can reasonably use.

Very truly yours,

Robert J. Ryan,

*Vice President & General Counsel.*

Center for Health Care Law

519 C Street, N.E., Stanton Park, Washington, D.C. 20002-5809, (202) 547-5262 FAX: (202) 547-7126

December 4, 1995

Gail Kursh,

*Chief Professionals and Intellectual Property Section, Health Care Task Force, Department of Justice, Antitrust Division, 600 E Street, N.W., Room 9300, Washington, D.C. 20530*

Re: United States v. Health Choice of Northwest Missouri, Inc., et al., Civil No. 95-6171-CV-SJ-6

Dear Ms. Kursh: These comments relate to the proposed Final Judgment, Stipulation, and Competitive Impact Statement that has been filed with the United States District Court for the Western District of Missouri in the above entitled matter, as published in 60 Fed. Reg. 51808 (October 3, 1995). The National Association for Home Care (NAHC), representing the interests of over 6000 home care providers and their patients, recommends several modifications in the proposed referral policy which is designed to ensure patient choice.

Under 42 U.S.C. § 1395a, Medicare patients are guaranteed free choice of a provider of services. That statutory provision provides:

"Any individual entitled to insurance benefits under this title may obtain health services from any institution, agency, or person qualified to participate under this title if such institution, agency, or person undertakes to provide him such services."

A comparable provision exist under federal Medicaid law, 42 U.S.C. § 1396a(a)(23) which states:

"Any individual eligible for medical assistance (including drugs) may obtain such assistance from any institution, agency, community, pharmacy, or person, qualified to perform the service or services required,

\* \* \* who undertakes to provide him such services."

It has long been the position of the National Association for Home Care that hospitals that participate in the Medicare and Medicaid programs must provide for an unencumbered freedom of choice for post hospital care services as part of meeting their discharge planning obligations. 42 C.F.R. § 482.21(b). In addition, NAHC believes that compliance with the federal antitrust laws requires hospitals and other parties within the health care system to honor a patient's freedom of choice for the selection of care. The proposed referral policy set forth for the above entitled matter is a clear effort to achieve those ends. However, we believe that this referral policy should be strengthened in a number of areas and clarified in others.

The most important alteration that should occur in the referral policy is an expansion of the standard for ancillary services referrals to specifically include an application of the policy to *any party* within the health system that is in the position to affect a referral for services. For example, many patients are referred to home health services from physicians, clinics, nursing facilities, rehabilitation centers, as well as hospitals. The referral policy should clearly state that it applies to all parties within the health system that are in a position to affect a referral.

In addition, the proposed referral policy is designed in a manner which offers true freedom of choice only after the health system is allowed to market its ancillary services to the patient. We would recommend that the referral policy be modified to provide that when an ancillary service has been ordered and a provider specified, the referring person be obligated to inform the patient that he or she does not have to use that provider but may choose any provider he or she wants. Moreover, the referring person should be obligated simultaneously to provide information to the patient regarding the availability of other providers in the community. Similarly, when the doctor has not specified a particular provider and the patient has no preference as to provider, the referring person should be obligated to provide information regarding the availability of other providers in the community. A patient cannot make an informed choice unless such information is provided. The referring person is in a position to provide such information. A patient should not be required to reject the doctor's specified provider or Heartland's ancillary services or ask what other providers are available before the referring person provides information regarding the availability of ancillary services in the community.

In terms of providing information, NAHC recommends that the referral policy be modified to require that the referring person offer a list of available providers which includes, but is not limited to, those providers listed in a telephone book. Specifically, with respect to home health and hospice services, NAHC would recommend that the health system secure an up-to-date listing of certified providers on a quarterly basis and make this list available to patients.

Finally, we are concerned that the referral policy allows for a marketing effort within Heartland that could result in undue influence over an individual's choice of ancillary service providers. Many patients are not aware of alternative providers that may be available in their community. Particularly in an inpatient setting, they are in a captive environment where marketing could result in inappropriate steering or coercing of patients into Heartland's own ancillary service providers. The referral policy should impose some restraints on the marketing activity. That restraint would not require that the health system open its doors to marketing efforts by competing ancillary service providers. Instead, it should focus on the degree of access to the patient by the ancillary service providers or a party within the health system acting on their behalf. Limiting the marketing efforts to an expression of the availability of an accredited ancillary service available to the patient with a brochure should provide a sufficient protection.

NAHC appreciates the opportunity to provide comment on this matter. It is anticipated that the final referral policy will be utilized by health systems and other provider facilities across the country as a basis for determining whether their activities comply with federal antitrust laws. Accordingly, it is advisable that the Department of Justice ensure that it is established in a manner which appropriately and comprehensively achieves patient freedom of choice.

Very truly yours,  
William A Dombi

Approve Home Medical Services, Inc.,  
2000 E. Harrison St., Suite E, Batesville, AR  
72501, (501) 698-1123, (800) 822-8232, Fax  
(501) 698-1044

December 2, 1995

Gail Kursh,  
Chief, Professional & Intellectual Property  
Section, Health Care Task Force,  
Department of Justice, Antitrust Division,  
600 E St., NW., Room 9300, Washington,  
DC 20530

Re: U.S. v. Health Choice of Northwest  
Missouri, Inc., et al. Case No. 95-6171-  
CV-SJ-6 in the U.S. District Court for the  
Western District of Missouri.

Dear Ms. Kursh: As I was catching up on my reading of professional journals and newsletters this past week, I happened on to an article in Home Health Line newsletter dated 11-13-95 that disturbed me greatly. I am an owner of an independent free standing home health agency that is currently fighting the unfair discharge practices of our local hospital much as must be the case in St. Joseph, Missouri with Heartland Hospital.

I was totally appalled that the Department of Justice was considering endorsing such a biased and unfair referral policy as the one described in the newsletter article. If approved, this would be a true victory for unscrupulous hospitals bent on totally monopolizing the home health care market in their areas. To think that an elderly person, so ill as to be hospitalized and then met all the criteria for home health care upon

discharge, would be in any condition to be put through this proposed maze without just giving up and saying, "Oh, go ahead and do what you want" to the discharge planner, is totally naive. No patient would be aware that they have to jump through all these hoops and I doubt seriously that any discharge planner would even bother. At best, it would be the word of a sick, feeble, elderly person against the word of the hospital's paid employees that the hospital had complied.

The only way to ensure fairness when a patient does not have a preference would be for the hospital to be required to rotate referrals among area home health agencies. If a patient wants to explore home health options, then a representative from any of the various area home health agencies should be able to visit and talk to the patient just as the hospital's representative does.

Regardless of what policy is adopted, the one proposed by Health Choice of Northwest Missouri, Inc., is incredibly self-serving and is surely the most unfair and unjust proposal I have seen to date. I beg of you to reject this proposal and take time to develop a plan that would truly insure patient freedom of choice and level the playing field for all providers of home health services.

Thank you for taking time to consider my concerns.

Sincerely,

Steve Bryant

CC: Senator Dale Bumpers,  
Senator David Pryor,  
Congresswoman Blanche Lambert Lincoln

Powers, Pyles, Sutter & Verville PC,  
Attorneys at Law

December 4, 1995

Gail Kursh,  
Chief, Professional and Intellectual Property  
Section/Health Care Task Force,  
Department of Justice, Antitrust Division,  
600 E Street, N.W., Room 9300,  
Washington, D.C. 20530

Re: Proposed Final Judgment: United States  
v. Health Choice of Northwest Missouri,  
Inc., et al. Civil No. 95-6171-CV-SJ-6  
(W.D. Mo.)

Dear Ms. Kursh: The Home Health Services and Staffing Association ("HHSSA") hereby files comments on the proposed Final Judgment, Stipulation, and Competitive Impact Statement in the above-captioned case in response to the invitation for comments published at 60 Fed. Reg. 51808 (October 3, 1995).

HHSSA represents more than 30 home care and staffing companies which have nearly 1,600 offices in virtually every state and the District of Columbia which employ more than 300,000 people and provide health care services to more than 750,000 people on any given day.

We believe the proposed Final Judgment is inadequate in that it incorporates a referral policy which is inconsistent with its stated objective of promoting "patient choice." See Referral Policy, I. and II., 60 Fed. Reg. at 51812/2-3. Further, we believe that the policy is contrary to 15 U.S.C. §§ 1 and 2 and the Medicare Act.

The portion of the policy that creates the greatest concern is the provision which states

that a hospital may promote its own home health agency or hospital-affiliated home health agency without informing the patient that he or she has a choice of other agencies and without informing the patient of the name and contact person for other agencies. The policy thereby permits the hospital to engage in "steering" patients to the hospital's affiliated home health agency regardless of the price or quality of the service.

It is this practice of steering home health patients that was condemned in a recent treatise as inconsistent with the public policy underlying the antitrust laws, as well as managed care. See *The Importance of Maintaining Competition and Antitrust Enforcement in Health Care Reform* (October 26, 1993) (copy attached). This practice results in the destruction of competition, which results in higher prices, reduced quality, and loss of innovation. *Id.* at 2.

As the treatise points out, "[s]teering can take many forms, but usually is accomplished by the hospitals not informing the patients of competitive alternatives, by not giving patients the opportunity to select another agency, by refusing to distribute the literature of other agencies, by subtly inducing or coercing staff physicians to order only from the hospital's home care company, [and] by falsely disparaging the quality or services of other agencies \* \* \*". *Id.* at 17. This steering activity has already resulted in substantial litigation under the antitrust laws. *Id.* at 20.

As the American Bar Association has stated, "[a]ntitrust enforcement, which promotes consumer choices and welfare while restricting anticompetitive conduct, will be vital to the implementation of health care reform." *Id.* at 14. The proposed Final Judgment simply does not promote consumer choice while restricting anticompetitive conduct.

Further, we believe that promotion of consumer choice among providers was one of the foundation principles of the Medicare Act. See 42 U.S.C. § 1395a, which protects the right of any beneficiary to "obtain health services from any institution, agency or person qualified to participate under this title \* \* \*". This principle has further been incorporated into an amendment to the Medicare antifraud and abuse laws at § 1128D(a)(2)(C) by § 8105 of the Medicare Preservation Act of 1995, which was passed by Congress on November 17, 1995. That amendment will require the Secretary of Health and Human Services, in establishing safe harbors under the antifraud and abuse laws, to consider the extent to which such action will result in "an increase or decrease in patient freedom of choice among health care providers."

Accordingly, we urge that the Final Judgment be revised to require a referral policy which informs all patients of their freedom of choice of providers and provides patients with a list of providers which they may use to exercise this choice.

Sincerely,  
James C. Pyles

*The Importance of Maintaining  
Competition and Antitrust Enforcement  
in Health Care Reform*

A Joint Position Paper of the American  
Federation of Home Health Agencies  
and the Home Health Services and  
Staffing Association

October 26, 1993.

*I. Executive Summary*

The Clinton Administration has released its long awaited health care reform legislative package. The Administration's plan relies upon the concept of "managed competition." States will establish health insurance purchasing cooperatives, known as "regional alliances," to purchase health care goods and services from privately operated networks of health providers and insurers that join together to provide goods and services as a group.

In anticipation of health care reform, hospitals are consolidating and diversifying as never before into larger "health care systems" that provide products far beyond traditional inpatient hospital services, including post-discharge goods and services such as home health and durable medical equipment.<sup>1</sup> In some circumstances, particularly where the hospital controls a significant percentage of referrals for a particular service and channels or "steers" its patients needing that service to its own provider, serious anticompetitive effects result. Other providers of the service are unable to compete on the merits and thus competition is decreased or destroyed.

Hospital steering of patients to their own home care companies in this situation can have profound anticompetitive effects. It can force other home care companies from the market based not on their prices or quality but rather on the hospital's market power over referrals. The arrangement between the hospital and its own home health agency is a stringent entry barrier, preventing new providers of the service from entering the market. Ultimately, the hospital provider is able to exercise substantial market power without a concomitant superiority in quality and consumers suffer. Prices for home care services increase, quality falls, patient choice is narrowed if not eliminated, and

innovation is quashed. Indeed, free-standing providers of home health services and durable medical equipment have brought several antitrust challenges to this precise situation, and studies of physician self-referrals to ventures they own confirm these likely effects.<sup>2</sup>

Providers of health care services, particularly hospitals, now argue that, to make health reform meaningful, they need an exemption, or at least "more lenient treatment," under the antitrust laws. Several bills including an antitrust exemption for hospitals have been introduced in Congress, and the Clinton health reform proposal suggests, incorrectly, that some fine-tuning of the antitrust laws might be appropriate. On the other hand, most knowledgeable and objective observers, including the Section on Antitrust Law of the American Bar Association, have concluded that health care reform will not require any type of antitrust exemption or antitrust "relief" for providers.

The recently issued Department of Justice and Federal Trade Commission *Statements of Antitrust Enforcement Policy in the Health Care Area* suggest the same. The *Statements*, while providing clearer guidance to hospitals and physicians about the analysis of particular antitrust-sensitive activities, do not relax the antitrust laws or antitrust enforcement and do not appear to support any type of relaxation. Some may misperceive, however, the timing of the *Statements'* publication and their focus on antitrust enforcement in health care as a signal that health reform legislation justifies some type of antitrust relaxation.

The American Federation of Home Health Agencies ("AFHHA") and the Home Health Services & Staffing Association ("HHSSA"), two of the leading national associations of home health providers, believe that providing an antitrust exemption or lenient antitrust treatment for hospitals or others under health reform would adversely affect consumers. Especially as hospitals increasingly diversify by providing home health and other non-hospital services, it is important to retain current antitrust constraints and strong antitrust enforcement to help ensure that markets for home health services remain competitive. With an antitrust exemption or "antitrust relief," health care systems will squeeze free-standing home health agencies out of those markets and exercise market

power to the detriment of consumers of home health services.

Accordingly, we oppose antitrust relief for health care providers in the context of health care reform or otherwise. We believe that federal health reform legislation should include affirmative provisions ensuring that home care companies and other providers of health care service are able to compete to participate in health plans providing goods and services to health alliances. We believe that for "managed competition" to exist there obviously must be *competition*, which will require a formal mechanism to prohibit some providers from exercising market power to prevent others from competing. This position statement outlines our reasons, and we welcome the opportunity to explain our position in more detail.

*II. The American Federation of Home  
Health Agencies and the Home Health  
Services & Staffing Association*

The American Federation of Home Health Agencies (AFHHA), formed in 1981, is a national association of approximately 170 Medicare certified home health agencies. It includes many different types of home care providers, such as free-standing agencies, visiting nurse associations, hospital-based agencies, chain agencies, and county agencies. State home health associations, vendors to home health agencies, consultants, and individuals also are members. AFHHA seeks to influence public policy on behalf of home health consumers and its members, and provides its members with technical advice on numerous problems and issues affecting the home health industry.

HHSSA is the only national association representing the proprietary home health and supplemental staffing industry. Founded in 1978, HHSSA now includes approximately 23 member companies with over 1,600 offices and more than 250,000 health care workers. Its purposes include encouraging and promoting greater quality, efficiency, reliability, and safety in the delivery of home health care, improving the services of home health providers to the general public and discouraging enactment of restrictive legislation, regulations, or policies that impede competition or adversely affect the public. In pursuing these objectives and based on its in depth knowledge of the industry, HHSSA frequently comments on important governmental policy issues affecting its members and consumers of home care services.

<sup>1</sup> See Facey Medical Foundation, IRS Exemption Ruling, (March 31, 1993) (Doc. 93-4212); Friendly Hills Healthcare Network, IRS Exemption Ruling (January 29, 1993) (Doc. 93-1926); "Health-Care Firms Face Checkup for Merger Potential," *The Wall Street Journal*, C1 (Oct. 12, 1993).

<sup>2</sup> See, e.g., State of Florida Health Care Cost Containment Board, *Joint Ventures Among Health Care Providers in Florida* (1991).

### III. AFHHA's and HHSSA's Concerns

#### A. Introduction

The concerns of AFHHA and HHSSA stem from four interrelated factors: (1) The increasing tendency of hospitals to diversify into home care services using anticompetitive practices, such as "steering," that exclude other home care providers based on the hospitals' power over referrals rather than quality of care considerations, and the resulting adverse effects on consumers; (2) the increasing tendency of hospitals to consolidate and thus increase both the percentage of referrals they control and their power over referrals; (3) the effect that health care reform might have in inducing providers to consolidate and integrate further and to diversify into new services using anticompetitive means; and (4) the efforts of some providers, particularly hospitals, to obtain statutory exemptions from the antitrust laws or more lenient interpretation of the antitrust laws.

Succinctly stated, health care providers need no antitrust relief or exemption. For managed *competition* to achieve its anticipated benefits of lowering costs and prices, increasing quality and services, and improving access, and promoting innovation, there must be *competition*. And for competition to exist, logic, economics, and history show that strong antitrust laws and enforcement are crucial. Accordingly, health care reform must include safeguards, at both the federal and state levels, to ensure that home health agencies, as well as other providers, retain the opportunity to compete based on their prices, quality, and patient satisfaction or choice.

#### B. The Importance of the Antitrust Laws

The purpose of the antitrust laws is to protect and promote competition as the method by which our economy allocates resources. The Supreme Court has noted that the antitrust laws "are as important to the preservation of economic freedom and our free enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms."<sup>3</sup> The Court long ago explained that the antitrust laws

rest on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic institutions.<sup>4</sup>

<sup>3</sup> *United States v. Topco Associates*, 405 U.S. 596, 610 (1972).

<sup>4</sup> *Northern Pac. Ry. v. United States*, 356 U.S. 1, 4 (1958).

For these reasons, strong antitrust laws and enforcement have enjoyed wide bipartisan support throughout their history.

Section 1 of the Sherman Antitrust Act proscribes agreements that unreasonably restrain competition. Section 2 of that statute prohibits sellers from monopolizing, attempting to monopolize, or conspiring to monopolize the provisions of goods and services. And section 7 of the Clayton Act prevents mergers and other types of integration between sellers if the likely effect will be to lessen competition substantially.

The basic concern of the antitrust laws is to prevent businesses from obtaining substantial "market power" achieved by means other than competition on the merits. Market power—the ability of sellers to raise prices and reduce quality—both transfers income from consumers to producers (a form of "economic theft") and distorts efficient resource allocation by decreasing the amount of goods and services produced.

The antitrust laws condemn the acquisition of market power when it results from conduct that excludes competitors from the market without achieving the values that competition promotes. Thus, for example, a firm cannot use its power in one market to decrease or destroy competition in another market. Yet, that is exactly what happens when hospitals providing home care services use their power over referrals to exclude competing home care services from the market. The consumer, of course, is the loser. He or she may pay inflated prices, receive substandard quality, or, in general, not be able to exercise the choice that the antitrust laws envision. Consumer access to health care services is reduced, and innovation may be stifled.

Because of the indispensable role of the antitrust laws in promoting the welfare of consumers, exemptions from antitrust coverage have always been strongly disfavored.<sup>5</sup> Given the importance of the antitrust laws to a properly functioning economy, those arguing for "special antitrust treatment" bear an especially heavy burden of persuasion.

<sup>5</sup> *E.g.*, *FTC v. Tigor Title Ins. Co.*, 112 S. Ct. 2169 (1992); see generally 1 John J. Miles, *Health Care & Antitrust Law* § 7.01 at 7-2 (1992) ("A cardinal principle of antitrust analysis \* \* \* is that immunity from the antitrust laws is disfavored, primarily because of this nation's commitment to competition as the method by which resources are to be allocated.").

#### C. Managed Competition

Although the precise form that health care reform ultimately will take remains uncertain, some form of "managed competition" seems likely. Under the Administration's managed competition proposal, standard benefits would include home care as an alternative to inpatient care,<sup>6</sup> and thus home care will be an important part of health care reform.

Under managed competition, states will establish one or more "regional alliances" that will purchase health care goods and services on behalf of individual businesses and consumers.<sup>7</sup> The theory is that regional alliances will be able to coordinate the purchase of health care services efficiently and to exert some degree of countervailing market power over sellers, resulting in lower prices than could be obtained through purchases by individual businesses. Regional alliances would accept payment from businesses and consumers and offer them an array of health plans from which to choose.

Regional alliances would purchase goods and services from "health plans." These will be integrated delivery systems of providers delivering services and insurers financing these services. All forms of health care goods and services, including hospital care, medical services, home health services, durable medical equipment, and drugs could be integrated into large networks or plans. Ideally, each geographical area would include two or more plans that would compete against one another, based on price, type of reimbursement mechanism (e.g., capitation, fee for service, and the like), quality, array of services, and convenience. Many geographical areas, however, particularly those with relatively sparse populations and perhaps inner-city areas, may be unable to support more than one plan.

Health plans could take several forms. For example, the delivery and financing functions could be completely integrated into a single entity as in a Kaiser-type system. Alternatively, the health plan might finance and coordinate the marketing and delivery of health care services, but contract for their provision with different types of providers. Single health care systems formed by hospitals probably will attempt to become the sole provider of

<sup>6</sup> See generally Dana Priest, *Clinton Health Plan Includes Broad "Standard" Benefits*, *The Washington Post*, Sept. 4, 1993, at A1, A16.

<sup>7</sup> See generally Rick Wartzman & Hilary Stout, *Clinton Health Plan: Push Competition, Be Ready to Regulate*, *The Wall Street Journal*, Sept. 13, 1993, at A1.

many types of health care services by diversifying into all areas of health care goods and services and then preventing other firms providing these goods and services from competing on the merits. Enacting an antitrust exemption or relaxing antitrust enforcement would help guarantee this result. Consumers would be the losers.

#### D. Economic Integration and Managed Competition

In forming health plans, providers, particularly hospitals, will attempt to band together to deal "more effectively" with regional alliances. Encouraging this consolidation by relaxing the antitrust laws seems especially ironic since a primary purpose for creating regional alliances is to increase the power of buyers and one goal of managed competition reform is to increase competition among providers. Permitting providers to aggregate their market power through integration would seem to defeat these goals by reducing or eliminating competition among providers and allowing provider conglomerates to neutralize the increased bargaining power of health care purchasers.

Regardless of whether a health plan is a fully integrated single entity or contracts with others for goods, services, or financing, health plan formation might result in several types of economic integration. Two are:

1. Horizontal integration among hospitals, by merger or joint venture, which might achieve efficiencies but which also raises the specter of market power—not only in markets for hospital services but in other markets, including home care, as well;

2. Non-horizontal integration (sometimes called vertical integration or diversification), by unilateral entry, merger, joint venture, or contractual arrangement, by which sellers of one good or service diversify into providing other goods or services.

Both forms of economic integration can generate procompetitive effects benefitting consumers. To that extent, we applaud them, and so do the antitrust laws. Under applicable rule-of-reason antitrust analysis, they are lawful<sup>8</sup> and need no exemption or relief from the antitrust laws. On the other hand, unrestrained integration can have significant anticompetitive effects, in which case it is and should be condemned by the antitrust laws—

<sup>8</sup> See, e.g., *National Bancard Corp. v. VISA U.S.A., Inc.*, 779 F.2d 210 (11th Cir.), cert. denied, 479 U.S. 923 (1986) (upholding procompetitive joint venture among competitors).

whether it occurs in the context of health reform or otherwise.

The arguments of some provider groups, namely that the antitrust laws and antitrust enforcement in general should be relaxed to permit what they perceive as beneficial "collaboration" and integration through mergers between, and joint ventures among, competing hospitals, are misdirected. We and others see no need for antitrust relief regardless of the form that health care reform takes.<sup>9</sup> Indeed, we believe serious damage to the health care system and consumers would result from relaxation of the antitrust laws.

In general, current antitrust principles and enforcement should permit beneficial integration among health care providers, while prohibiting that which might result in the integrating parties obtaining market power. This is particularly true since almost all types of integration will be tested under antitrust's "rule of reason," which requires a fact-specific analysis of the particular circumstances in which the integration occurs. The antitrust laws are thus "self-adjusting" to particular sets of facts and economic circumstances and are sufficiently flexible to accommodate any special characteristics or concerns that health care industries or health reform raise.<sup>10</sup> The enforcement agencies have challenged few hospital mergers,<sup>11</sup> and those they did challenge resulted in hospitals with unusually high post-merger market shares, usually over 50%.<sup>12</sup> The agencies have challenged no hospital joint ventures.

Both the Federal Trade Commission and Antitrust Division have emphasized the importance of strong antitrust enforcement if health reform is to succeed. We agree. It seems clear, for example, that alternative delivery systems, such as health maintenance organizations, could not have developed or generated the procompetitive effects they have without antitrust enforcement

<sup>9</sup> One commentator has accused the hospitals of "crying wolf" and talking out of both sides of their mouths when complaining about antitrust enforcement. David Burda, *Mergers Thrive Despite Wailing about Adversity*, *Mod. Healthcare*, Oct. 12, 1992 at 26.

<sup>10</sup> *Appalachian Coals, Inc. v. United States*, 288 U.S. 344 (1933) (noting that antitrust laws have the adaptability of constitutional provisions).

<sup>11</sup> Recent Federal Trade Commission figures indicate, for example, that from 1981 through 1992, the Commission received some 332 premerger notifications of hospital mergers. Of these, it investigated about 14 and challenged three. *FTC Watch*, Sept. 6, 1993, at 3.

<sup>12</sup> E.g., *United States v. Rockford Mem. Corp.*, 717 F. Supp. 1251, 1280 (N.D. Ill. 1989), (market share of approximately 72%), *aff'd*, 898 F.2d 1278 (7th Cir.), cert. denied, 111 S.Ct. 295 (1990)

against organized resistance to them by provider groups.

In addition, a working group of the American Bar Association, which approached the issue without bias, recently concluded that "antitrust enforcement should not be a barrier to health care reform. Antitrust enforcement, which promotes consumer choice and welfare while restricting anticompetitive conduct, will be vital to the implementation of health care reform."<sup>13</sup> Thus, the group explained that "[a] blanket exemption from the antitrust laws is, therefore, neither necessary or appropriate. The antitrust laws are not a barrier to health care reform but rather a means of promoting and protecting the more innovative and cost effective mechanisms contemplated by health care reform."<sup>14</sup> We agree with this objective assessment.

The concern of some providers that they lack antitrust guidance in planning collaborative activities is more credible but provides no basis for more lenient antitrust treatment or an exemption from antitrust coverage. Rather, the solution to this problem is antitrust guidance for the hospital industry. The Federal Trade Commission and Antitrust Division have done exactly that by issuing their *Statements of Antitrust Enforcement Policy in the Health Care Area* on September 15. The *Statements* explain in detail and in non-legalistic how the federal antitrust enforcement agencies analyze transactions such as hospital mergers and hospital joint ventures which pose a risk of violating the antitrust laws. In addition, one state attorney general has issued antitrust guidelines relating specifically to hospital mergers.<sup>15</sup>

Early indications are that the Clinton Antitrust Division will enforce the antitrust laws more aggressively than past administrations.<sup>16</sup> We hope the Clinton Administration has the courage to adhere to the convictions it expressed

<sup>13</sup> ABA Working Group on Health Care Reform, *Antitrust Implications of Health Care Reform* (May 14, 1993) at 2.

<sup>14</sup> *Id.* at 17.

<sup>15</sup> Attorney General of Massachusetts, *Antitrust Guidelines for Mergers and Similar Transactions Among Hospitals* (Aug. 19, 1993).

It is both interesting and telling that neither the Department of Justice and Federal Trade Commission *Statements*, nor the Attorney General of Massachusetts *Guidelines* contain or propose any type of relaxed antitrust rules for hospitals. Rather, both merely provide readable and understandable explanations of how those agencies analyze the potential antitrust ramifications of particular types of conduct.

<sup>16</sup> The recent rescission by the Antitrust Division of the much maligned 1985 *Vertical Restraints Guidelines* is but one example of this. Anne K. Bingaman, Assistant Attorney General, Antitrust Division, "Antitrust Enforcement: Some Initial Thoughts and Actions" (Aug. 10, 1993).

initially. It would be a shame for the Administration to back away from its commitment by establishing "special leniency rules" for one segment of the economy.<sup>17</sup>

#### E. Integration Affecting Home Health Patients

The form of integration with the most potential to affect adversely consumers of home health services is that where the hospital or health care system (or several hospitals or health systems together) diversifies into home care and then, while hiding competitive options from patients, "steers" those needing home care to its own provider. This can result in substantial anticompetitive effects. The problem is occurring already, and health reform likely will exacerbate it, especially if Congress or the antitrust enforcement agencies embrace antitrust immunity or lenient antitrust enforcement.

The competitive difficulty already faced by many consumers of home health services derives from a simple set of facts. A hospital whose inpatients constitute a significant percentage of home health referrals in an area enters the home health market, either unilaterally, by acquiring an already existing agency, forming a joint venture with an agency, or through a contractual relationship. The hospital then "steers" or "channels" its patients needing home care at discharge to "its" company. It might do this in part to escape the effect of hospital rate regulation by federal or state governments. For example, the hospital may have substantial market power in the market for hospital services that it cannot exercise by raising prices because of fixed DRG payment amounts or state rate regulation. Thus, to evade the effects of rate regulations on its bottom line, it diversifies into other markets with less or no regulation. In these, if it can obtain market power, it can exercise that power by raising prices.

Steering can take many forms, but usually is accomplished by the hospitals not informing patients of competitive alternatives, by not giving patients the opportunity to select another agency, by refusing to distribute the literature of other agencies, by subtly inducing or coercing staff physicians to order only from the hospital's home care company,

<sup>17</sup> Some states—most without careful examination—have enacted statutes intended to permit hospitals to "collaborate" by merging or entering into market allocation agreements if the arrangement is approved by the state. Hospitals will argue that these activities are protected from the federal antitrust laws by the so called "state-action exemption." Whether the state statutes are sufficient effectively to preempt the federal antitrust laws is an unanswered question at present.

by falsely disparaging the quality or services of other agencies, or by simply disregarding or refusing to honor the patient's or patient's physician's choice when he or she chooses a home care company other than the hospital's. One requirement for competition to work is that buyers and sellers be informed of their options. In this scenario, however, the hospital creates and exploits an "informational market imperfection."

Competitors of the hospital's home health service are "foreclosed" from dealing with the hospital's inpatients. If this foreclosure is significant, which is primarily a function of the hospital's importance as a referral source, competing agencies will be unable to obtain sufficient patients to remain in business regardless of the cost or quality of those services. Moreover, realizing that a major source of referrals is "tied up," new agencies will not enter the market; the hospital's conduct raises an entry barrier. Ultimately, as competing agencies are forced from the market, the hospital's agency obtains substantial market power, allowing it to raise prices and lower quality to the detriment of consumers. The freedom of patients to choose is adversely affected, and innovation is stifled. Costs also are likely to increase because the hospital home care company feels no pressure to produce its services in the most efficient manner. Depending on the circumstances, the hospital's actions can violate sections 1 or 2 of the Sherman Act or section 7 of the Clayton Act.<sup>18</sup>

We recognize that the antitrust laws are meant to protect *competition*, not *competitors*.<sup>19</sup> In other words, the concern of the antitrust laws is not with the survival of individual home health agencies but with the effect of their destruction on competition generally. The antitrust laws assume that efficient firms will force inefficient firms from the market. Thus, home health agencies offering high prices or inferior quality or services should expect to fail—both now

<sup>18</sup> The Federal Trade Commission is investigating a similar factual pattern involving physicians. Physicians who typically refer patients to another facility for particular services related to their practice (such as urologists referring to a lithotripsy center) might establish a joint venture to render the service and then refer all their patients needing the service to their venture. If the joint venture includes most physicians who refer patients for that particular type of service, it will be difficult or impossible for other facilities to compete or new facilities to enter the market. See generally Kevin J. Arquit, Director, Bureau of Competition, Federal Trade Commission, "A New Concern in Health Care Antitrust Enforcement: Acquisition and Exercise of Market Power by Physician Ancillary Joint Ventures" (Jan. 20, 1992).

<sup>19</sup> See *eg.*, *Atlantic Richfield Co. v. USA Petroleum Co.*, 110 S.Ct. 1884 (1990).

and under health reform. Competition on the merits weeds out some competitors.

Our home health agencies welcome competition on the merits, which the antitrust laws promote. In the situation presented above, however, there is no competition on the merits and therein, lies the problem. Competitors of the hospital's home care agency are not forced from the market because of their inferiority in relation to the hospital's agency, but rather because of the hospital's ability to control referrals and exploit its patients' lack of information about competing agencies. If integrated health care systems are allowed to gain market power under the guise of a "health plan," they will be able to control patient choice even if the patients are given information about the plan's services because the patients will be "locked up" in that particular plan.

The Supreme Court, in a landmark antitrust case last year, recognized that lack of information by consumers could result in a seller exercising market power over them and that this lack of information was an important consideration in determining whether an antitrust violation had occurred.<sup>20</sup> Lack of information (or the cost of obtaining information) reduces the ability of consumers to switch to potentially less costly and better services and thus permits the seller to charge higher prices or provide lower quality than otherwise would be possible. Indeed, the seller need not even have a large market share for this power to result as long as information about competitors can be suppressed.

This scenario is more than idle speculation. At least one antitrust case has challenged a hospital's steering patients needing home health services to its affiliated home health agency.<sup>21</sup> Similarly, a number of antitrust suits have challenged steering by hospitals to their affiliated provider of patients needing durable medical equipment, resulting in three major decisions by federal circuit courts of appeals, all in favor of the plaintiff.<sup>22</sup> Thus, even absent reform, the problem is real, and the loser is the consumer.

The adverse effects on competition in home care markets can be magnified

<sup>20</sup> *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 112 S.Ct. 2072 (1992).

<sup>21</sup> *Beacon Med Care, Inc. v. Sound Home Health Servs., Inc.*, No. C84-478T (W.D. Wash. filed Aug. 9, 1984).

<sup>22</sup> *M&M Medical Supplies & Serv., Inc. v. Pleasant Valley Hosp.*, 981 F.2d 160 (4th Cir. 1992) (en banc); *Advanced Health Care Servs. v. Radford Community Hosp.*, 910 F.2d 139 (4th Cir. 1990); *Key Enters., Inc. v. Venice Hosp., Inc.*, 919 F.2d 1550 (11th Cir. 1990) (vacated and rehearing en banc granted).

when hospitals integrate horizontally. Many home care patients are hospital inpatients needing home care services at discharge. When hospitals integrate, by merging, for example, their power over referrals for home health services merges and increases as well. Typically, if both hospitals have home care companies, those companies also merge, increasing their market power in the market for home care services.

The same anticompetitive problem can arise short of merger. For example, competing hospitals might establish, as many have done, a single home care company by forming a home care joint venture. The result may be anticompetitive if, had they not formed the joint venture, the hospitals would have entered the home care market independently or if the hospitals tacitly or explicitly agree to refer their patients needing home care to their joint venture. That type of agreement is analogous to physicians referring patients to joint ventures in which they have an economic interest, which empirical studies have shown increase both utilization and price.<sup>23</sup> Hospital joint ventures formed to provide durable medical equipment have been subjected to antitrust challenge.<sup>24</sup>

The integration that health reform might generate if the antitrust laws are relaxed will exacerbate the competitive problems already experienced in home care markets. The managed competition model will induce hospitals to integrate horizontally as they attempt to negate the effects of health alliance purchasing power. Managed competition also will induce hospitals to diversify—integrate non-horizontally—even further to become the exclusive provider of both hospital services and the full array of health care services to AHPs, including home care.<sup>25</sup> Health care systems, for example, are acquiring physician practices to be able to offer medical services in a package with hospital services.<sup>26</sup> They desire to offer a “seamless system” of health care in

which the system provides all needed goods and services.

This presents no anticompetitive problem if all providers remain able to compete based on the merits of their products and services, and purchasers have access to the provider offering the lowest quality-adjusted price. Seamless systems, in fact, do have the potential to produce significant efficiencies, particularly by reducing the health plan's transactions costs in contracting with providers. *Seamless systems, however, will not result in lower costs or higher quality if they obtain market power, and thus vigorous antitrust enforcement in the world of managed care will be crucial.* Consumer welfare will depend on the ability of integrated and non-integrated providers to compete against one another.

Hospitals are likely to use the managed competition environment affirmatively to squeeze other home health competitors out of the market, by, for example, “bundling” their package of services (which includes home care) such that the price for each service is not discernible and thus comparable. The transaction may resemble or constitute a tying or “leveraging” arrangement whereby the health system refuses to sell some services unless the purchaser buys all. Or, if the health system does offer the services separately, it may price its home care at below cost and then cross-subsidize these losses temporarily with profits from other services. It then easily might be able to recoup its losses after competing home health agencies are forced from the market. The result will be higher prices to consumers, lower quality, and little, if any, freedom or choice.

#### IV. What's the Answer?

The answer to this potential conundrum is both simple and clear: It is imperative both that Congress *not* loosen the antitrust constraints on activities such as these and that health care reform include provisions designed to ensure that services, such as home care, are selected on a competitive basis. The proponents of antitrust relief have failed to make their case, and the dangers from granting relief are manifest.

We will be able to suggest specific strategies to ensure competition after we have seen and analyzed the specifics of the Clinton proposal. We believe, however, that any reform legislation should require that *all providers* be permitted to compete to offer their various services. Statutes or regulations should require, for example, that health plans select providers based on

competitive bids or a similar type of competitive process. Regulations could delineate objective criteria for selection based on price, quality, services, and cost effectiveness, perhaps with provisions for appeal when health plans fail to follow competitive procedures.

#### V. Conclusion

Home health services are a key part of the health care matrix. The industry's importance is growing rapidly as the country seeks better access to less expensive forms of patient care and more types of services can be provided safely in the home. Accordingly, it is important that markets for home health services remain open and competitive, offering patients cost effective, high quality services and continuing innovation. Providing hospitals (or any providers) with an antitrust exemption will inevitably lead to a loss of patient choice, quality care, innovation and effective cost control.

Thus, competition in home care markets is critically important to consumers, providers, and the government alike. That competition should not be needlessly eroded by unwarranted special interest exemption legislation or lenient antitrust enforcement rules that may benefit particular providers but will irreparably damage the health care delivery system and those it serves.

American Federation of Home Health Agencies, 1320 Fenwick Lane, Silver Spring, Maryland 20910, (301) 588-1454.

Home Health Services and Staffing Association, 119 S. Saint Asaph St., #115D, Alexandria, Virginia 22314, (703) 836-9863.

#### Patient First

Home Health Nursing Services, Inc., 811 West Avenue, P.O. Box 1026, Wellington, Texas 79095-1026

To: Gail Kursh,

From: Monni J. Reed, R.N., D.O.N., Patient First Home Health, Wellington, Texas

Re: Proposed final judgment for United States v. Health Choice of Northwest Missouri, Inc.

As a practicing nurse for the last seventeen years I have observed the emergence of home health from the hospital, Dr's office, and now, home health office point of view.

While working in the Doctors office I saw home health nurses come in with problems, concern and suggestions for their patients care. At that time the local hospital had no home health so the Dr. felt free to admit to an Agency without concern about hospital conflict. I had left the Doctors office and was working in the hospital when it opened it's own home health agency to try to increase revenue to keep its doors open. (This hospital has approx. 30 beds). Every Doctor on staff

<sup>23</sup>The concern over steering of patients by physicians led Congress in the Omnibus Reconciliation Act of 1993, § 13562, amending section 1877 of the Social Security Act (42 U.S.C. § 1395nn), to prohibit physician “self-referrals” for certain designated services, including home health services.

<sup>24</sup>E.g., *Alexandria Medical Arts Pharmacy, Inc. v. Alexandria Health Servs. Corp.*, No. 88-0110A (E.D. Va. filed Feb. 3, 1988 (three hospital durable medical equipment joint venture)).

<sup>25</sup>See generally Sandy Lutz, *Hospitals Continue to Move Into Home Care*, *Mod. Healthcare*, Jan. 25, 1993, at 28.

<sup>26</sup>See generally, *Dynamic Diversification: Hospitals Pursue Physician Alliances, “Seamless” Care*, *Hospitals*, Feb. 5, 1992, at 20; *Urge to Merge Strong in Health Care Field*, *Flint J.*, July 4, 1993.

was expected to refer to the hospital home health. Families and patients were bombarded with literatures stressing the need to use the hospital home health if they supported the "local community" and want to help keep the hospital in existence. I witnessed a staff R.N. be terminated because she worked for another home health on her days off. (She'd been with that hospital for 6 to 10 years). After I had left that small town hospital and started working for a home health agency in another small town, I frequently carried lab specimens and Doctor orders to the small hospital in the town I now work. I was very comfortable going into the hospital to visit patients who were already on our home health services. That halted abruptly when this hospital opened their own home health agency. Now, my patients and their families report that while hospitalized, the hospital home health director tries (and sometimes does) to get them to switch to the hospital home health to support the community and keep the hospital open.

This is directly against guidelines but happens every day. Hospital administrators feel they are above the rules and regulations that the rest of us must live by. By passing this bill as it stands we will only be giving them the final go ahead.

Monni J. Reed

Kevin Miller, RRT, RCP

306 Live Oak St., College Station, Texas 77840, Home 409-693-6419, Office 409-774-1198

November 29, 1995.

To: Gail Kursh,

*Chief, Professions & Intellectual Property Section/Health Care Task Force, Dept. of Justice, Antitrust Division, 600 E St., N.W., Room 9300, Washington, D.C. 20530*

IE; Final Judgment for United States v. Health Choice of Northwest Missouri, Inc., et al., Case #95-6171-CV-SJ-6

Dear Ms. Kursh: I have been a health care professional for many years with most of my employment within hospitals as management or in supervisory positions. This has given me great knowledge of billing practices, accreditation surveys as well as expansion of service projects that include home health and home medical equipment ventures.

The majority of hospitals in the United States commonly overcharge, over utilize service and often provide poor quality of care. The poor quality of care and malpractice are seldom noticed by JCAHO or the general public as these problems are most often covered up or altered to appear to be appropriate care. Most surveys are announced and scheduled. This allows hospitals time to alter paper work and generate reports that indicate they are performing well in the patients best interest. Further most hospital bills are not closely scrutinized and contain a tremendous amount of over billing and or charges for unnecessary procedures and supplies. I am confident that 80-90% of all patient bills are in some way inflated. When over billing is discovered most hospitals simply correct the bill and indicate that there was a billing

error. I have noted many of these practices at virtually every hospital I have worked with and is common knowledge among many health care professionals.

In the last few years there have been more and more hospitals ever expanding into home health, home medical equipment, extended care facilities and other areas they feel would profit them. Their position allows them total access to these patients and the ability to self refer them to their affiliates. The patient loses their freedom of choice for health care. Home care services have been available for many years provided by established free standing home health agencies throughout America. These agencies are experts with many years of experience providing home care. They possess great knowledge of the home care field and employ a variety of medical professionals. These free standing agencies for the most part provide good care and have saved tax payers money. It is well understood that home care is by far, less expensive than hospitalization. This cost savings have helped the home care market to grow and have decreased the patients average stay in the hospital. There is currently a large network of free standing home care providers within most areas of our country and there is not a need for hospitals to extend their care in these areas. This would only drive free standing providers out of business and allow hospitals the opportunity to monopolize on every aspect of health care. This move would further burden our entire American health care system and add to the current health care crisis.

There is always a conflict of interest whenever a hospital based provider of home health care is allowed to control all referrals. If the DOJ allows this to happen, they are not protecting the taxpayers interests. It would only benefit hospitals. The ever increasing cost of health care can be attributed to hospitals that exploit their positions and have caused health care spending to increase unchecked. It alarms me to think of the consequences this action would cause and its impact on all Americans. A standard referral procedure should be developed by the DOJ, not Heartland as this will only result in exploitation of patient referrals. I have enclosed information on a recent ruling that should provide guidance for the DOJ. Further hospitals should be limited to prevent monopolistic practices. There is little risk of liability to hospitals if they inform the patient that they are not responsible for non affiliates upon referral.

The final judgement in this case may be viewed as a precedence in future cases that are similar. For this reason great care should be taken to insure that stringent guidelines are in place that govern hospitals referral policies. Further restrictions are needed to prevent hospitals from pursuing ventures that are not in the best interest of the public. It should be clear that hospitals and large health care systems are in a prime position to commit Medicare fraud and abuse. The hospitals that are venturing into home care should be suspect and closely scrutinized to help discourage this abuse.

In closing I would like to thank the DOJ for allowing comments on this case prior to the final judgment. I hope that these comments are helpful in determining this case.

Best Regards,

Kevin E. Miller

American Federation of Home Health Agencies, Inc.

1320 Fenwick Lane, Suite 100, Silver Spring, MD 20910, Phone (301) 588-1454, Fax (301) 588-4732

December 4, 1995.

Ms. Gail Kursh,

*Chief, Professions & Intellectual Property Section, Health Care Task Force, Antitrust Division, Department of Justice, Room 9300-600 E Street, N.W., Washington, D.C. 20530.*

Dear Ms. Kursh: The American Federation of Home Health Agencies (AFHHA) wishes to comment on the Department of Justice's proposed final judgment in the *United States v. Health Choice of Northwest Missouri, Inc., et al.*, Case No. 95-6171-CV-SJ-6, in the U.S. District Court for the Western District of Missouri. AFHHA is a national association representing Medicare participating home health agencies, the majority of which are free-standing small business providers.

AFHHA contends that the proposed judgement, if finalized, will convey to hospital based entities a strong competitive advantage, blessed by the Department of Justice, which is not equitable to patients, other providers, or the Medicare program. We are pleased that the proposed judgement constitutes an acknowledgement that the patient has the right to receive home health and other services from a provider of his or her choice. Unfortunately, the Department of Justice would allow this right to be easily circumvented by the discharging entity.

The proposed judgement does little to address current monopolistic practices of some hospital networks. Home health providers are experiencing ongoing problems with the refusal of hospitals to refer patients to home care agencies other than their own. This extends to the point of refusing to honor the patient's or family's specific choice of provider and even though the non-affiliated agency may offer a broader range of service and greater access to care, including emergency services.

Our members are Medicare participating, which means that they meet very strict Federal conditions of participation, and are certified as meeting such standards by state surveyors and/or by an accrediting body, i.e., the Joint Commission for the Accreditation of Healthcare Organizations or the National League for Nursing.

The procedures which you outline enable a hospital to cast doubt on the reputation of all non-affiliated home health agencies and ensure that hospital based home care providers will receive virtually all referrals. Giving the hospital the right to hype or puff their "excellent" services while disparaging other providers with comments such as "we cannot make a recommendation," "have done no evaluation," and "cannot speak to the quality of care" they provide stacks the deck in favor of the hospital and against competing providers.

The judgment also grants an unfair advantage to the hospital's ancillary services by providing that the only source of

information that must be mentioned regarding services offered by independent providers is the Yellow Pages. Referring patients to the Yellow Pages leaves them to perform the legwork to identify other qualified providers. Placed in this position, most patients will simply agree to accept the hospital's ancillary service. Confused, sick, frail elderly patients cannot "look it up" in the phone book, even if able to read the print. Nor do families ordinarily have the energy, time, knowledge, or resources to fight for their right to choose a provider at a time when they are tending to a hospitalized family member.

The Department of Justice may in fact end up exacerbating the problem of captive referrals. Hospitals are purchasing physician practices and providers of ancillary services, thereby guaranteeing a steady stream of referrals. We have received many reports that physicians have refused to sign home care orders unless the patient agrees to use the hospital based home health agency and that physicians have told patients to find new doctors if they wish to receive services from non-affiliated providers. For their part, physicians with privileges at, or on staff of, hospitals are often subjected to enormous pressure to channel all referrals to hospital based entities. The Heartland solution does not address such abuses.

AFHHA urges that the judgment be revised as follows, in the interest of curbing monopolistic practices, promoting competition, and preserving the small business infrastructure:

1. Hospital discharge planners must demonstrate knowledge of available resources and providers in the community, and assist the patient in making contact, if requested.
2. Patients requiring post hospital home health services must be provided with a written alphabetical list of all duly certified providers in the area, along with phone numbers.
3. Along with the written list of providers, the hospital must distribute brochures supplied by home health agencies in the area.
4. The hospital must indicate the types of services offered by each listed agency, what hours services are available, and whether the home care provider is certified to participate in the Medicare program by the state or by an accrediting body. (Brochures supplied by providers could also serve this purpose.)
5. Hospitals may not arbitrarily omit providers from the list.
6. The patient's choice of provider must be honored. Referrals of patients who indicate no preference must be made on a rotating basis to those home health agencies which offer the range of services ordered by the physician.
7. The referring hospital must disclose any financial relationship with providers on the list supplied to patients.
8. The discharging hospital must obtain written acknowledgement from patients and/or family members that they have received the required information.
9. Referring hospitals must establish a grievance procedure for use by any patient or provider who believes that their rights under this judgment or under Medicare law have

been violated. Any such grievance must be heard by a neutral mediator within five business days of the alleged violation.

These changes we recommend will help preserve competition. It was robust competition that enabled the home health infrastructure to respond to the challenge of the 1982 implementation of the Medicare Diagnostic Related Group reimbursement system for hospitals. This reimbursement change led to the earlier discharge of patients from hospitals. Home health agencies have implemented continuous quality improvement programs, developed technological and service innovations, and bent over backwards to satisfy the consumer of home care services. Where home health providers are guaranteed a steady stream of referrals by virtue of steering of patients by a parent hospital, the quality, innovation, and consumer satisfaction associated with a competitive system will be greatly compromised.

With Congress looking at competitive markets as a big part of the solution to what ails publicly funded health care programs, this is not the time for the Antitrust Division to enfranchise one model—the hospital based model—as the prime deliverer of home care in communities across the nation.

Sincerely yours,

Ann B. Howard,  
*Executive Director.*

NAMES

National Association for Medical Equipment Services

December 4, 1995.

Ms. Gail Kursh,  
*Chief, Professions & Intellectual Property Section, Health Care Task Force, Department of Justice, Antitrust Division, 600 E Street, NW, Room 9300, Washington, DC 20530.*

Dear Ms. Kursh: The National Association for Medical Equipment Service (NAMES) hereby submits comments on the proposed consent order in United States v. Health Choice of Northwest Missouri, Inc., et al., Case No 95-6171-CV-S1-6 (W.D. Mo.).

NAMES is a nonprofit association of over 1800 suppliers of home medical equipment (HME) and services, in approximately 4000 sites across the country. Based upon individual patient needs and according to physicians' prescriptions, NAMES members furnish a wide variety of equipment, supplies, and services for home use, from traditional medical equipment such as oxygen and hospital beds, highly sophisticated items and services such as parenteral and enteral nutrition and supplies and specialized wheelchairs. NAMES member companies include both "freestanding" independent HME entities and those with hospital affiliations, either through ownership or contractual arrangements.

NAMES is concerned with those provisions of the proposed settlement involving Heartland Health Systems Inc., which set forth the hospital's obligations when referring patients to hospital-affiliated ancillary service providers, including its HME supplier. DOJ's focus in the case was

on a separate issue—collusion with physicians—and the "patient referral to affiliated companies" aspect of the hospital operation necessarily constituted a smaller part of the agency's scrutiny. NAMES is concerned, however, that these provisions of the final agreement (Section II, entitled "Ancillary Service Referrals") may be viewed as setting a standard for the industry for hospital-owned or affiliated HME providers.

Referrals by a hospital to an affiliated ancillary service provider give rise to numerous regulatory issues relating to patient freedom of choice, including whether full disclosure of the affiliation has been made to patients and whether the patients, in turn, have provided informed consent to receive services from the affiliated provider. NAMES' Code of Ethics addresses this issue specifically, providing at paragraph 9 that HME suppliers must:

*avoid participating, directly or indirectly, with a source of patient referrals in a "captive referral arrangement" whereby patients are directed to utilize a supplier of home medical equipment in derogation of the patients' rights to select the supplier of their choice.*

Some NAMES members have expressed the view that the proposed policy—which does not require the hospital having an affiliated ancillary service provider to inform the patient of other area suppliers—does not ensure informed patient consent and freedom of choice.

Given the complexity of the issues involved, and the fact that this aspect of the settlement did not constitute DOJ's primary focus in this case, NAMES recommends that the DOJ clarify the proposed order to make clear that if it is not intended to establish an industry standard. Alternatively, DOJ should furnish a more detailed explanation of the competitive factors which it considered in accepting the hospital's proposal in this case.

Overall, NAMES believes that an effort to articulate standards for hospital referrals to affiliated HME suppliers would be beneficial. The adoption of clear, objective standards would do much to reduce or eliminate the multiple disputes which have arisen in this area.

Please do not hesitate to contact us with any questions.

Sincerely,  
William D. Coughlan,  
*President and CEO.*

NAMES

National Association of Medical Equipment Suppliers

*CODE OF ETHICS*

Having been accepted into membership in the National Association of Medical Equipment Suppliers, we do hereby subscribe without reservation to the Association's Code of Ethics.

The purpose of the Code of Ethics shall be to set and improve standards within the practice of providing home medical equipment and services. To maintain the ethical conduct and integrity of this Association, a member pledges to abide by the following:

1. To render the highest level of care promptly and competently taking into account the health and safety of the patient.

2. To serve all patients regardless of race, creed, national origin or reason of illness.

3. To provide quality home medical equipment and services which are appropriate for the patients' needs.

4. To instruct the patients and/or caregivers in the proper use of the equipment.

5. To explain fully and accurately to patients and/or caregivers patients' rights and obligations regarding the rental, sale and service of home medical equipment.

6. To respect the confidential nature of the patients' records and not to disclose such information without proper authorization, except as required by law.

7. To continue to expand and improve professional knowledge and skills so as to provide patients with equipment and services which are continually updated.

8. To abide by both Federal and local laws and regulations which govern the home medical equipment industry.

9. To avoid participating, directly or indirectly, with a source of patient referrals in a "captive referral arrangement"; whereby patients are directed to utilize a supplier of home medical equipment in derogation of the patients' rights to select the suppliers of their choice.

10. To act in good faith; to be honest, truthful and fair to all concerned.

#### Gibson Health Services

1468 State Street, P.O. Box 368, East St. Louis, IL 62202, (618) 274-6026

December 4, 1995.

Ms. Gail Kursch,

*Chief Professions & Intellectual Property Section, Health Care Task Force, Department of Justice, Anti-trust Division, 600 E. Street, N.W., Room 9300, Washington, DC 20530.*

Re: United States v. Health Choice of Northwest Missouri, et al, Case No. 95-6171-CV-SJ-6, United States District Court for the Western District of Missouri.

Dear Ms. Kursch: I understand that you are accepting comments on the proposed settlement for the above referenced case.

I feel that it is not only unjust but also inhumane to condone, endorse or approve a policy or settlement that allows a discharge planner to give a patient a telephone book unless the patient asks a second time instead of a list of area Home Health Agencies.

My staff and I would like for you to consider the following regarding the Department of Justice's recommended Home Health Referral Policy:

1. It represents a discriminatory act against a person who is illiterate or who has a limited reading and/or mental capacity.

2. If the patient cannot read or has a limited mental capacity, this denies the patient their right to make an *informed* decision.

3. Depending upon the community the hospital is located, the phone book may not list all of the agencies that provide services where the patient lives. For example, if this

patient lives in East St. Louis, Illinois and was in a St. Louis, Missouri hospital (which is common) and is given a St. Louis, Missouri phone book, my agency in East St. Louis would never be recognized.

4. It reflects a blatant kickback violation because the "intent" is merely to increase the hospital's revenues. Does the hospital have its own ambulance service? transportation service? private duty service? home oxygen service? etc.? If not, how is the patient made aware of their option for these services? If options are offered for services that they do not provide, sounds like something is really wrong not to do the same for services they do provide.

5. While we can clearly understand that a hospital may not want to "endorse" other Home Health Agencies, providing a list of available agencies could be beneficial to everyone. The patient is conveniently given information for decision making, the free standing Home Health Agency is fairly recognized and the hospital has a better working relationship with the Home Health Agency which helps everyone.

6. The hospitals could simply provide a list of agencies by name, address, phone and area served. It would be ideal to also include the disciplines and specialties offered by the agency. The hospital Discharge Planner could then read off the list of agencies serving the patient's community. A senior citizen or person with limited reading ability might recognize the name of an agency he or she is familiar with. In addition, many persons prefer to support agencies within their community. This is particularly important in minority communities where there may be a strong ethnic consciousness to support their own minority businesses to help with jobs, taxes, etc.

7. It's simply more convenient for the patient. Patients are now leaving the hospital in more acute states. If you were sick, would you want to try to find something in the Yellow Pages that you knew nothing about?

8. If this hospital is only going to give the patients a phone book and the sick person says "That's OK, I don't feel like looking through a phone book," will the hospital's Home Health Agency follow *all* patients that are discharged from the hospital?

- The patient with no coverage?
- The patient that lives in the high crime areas?
- The patient that travelled a long distance to this hospital who lives perhaps 50 miles or more away??
- The patient on Medicaid (The significance of this will vary from state to state. Some states reimburse cost while other states reimburse well below cost. For example, in Illinois, Medicaid only pays \$41.55 per visit without consideration that the cost is \$55 to \$75 per visit.)

In summary, we would recommend that Sections II.B.2 and II.B.3 of the attached recommended policy be removed to reflect that a list of area Home Health Agencies are read and given to the patient which includes the hospital's home health agency. The hospital could note that they are not endorsing the other agencies, but stress that the information is given for them to make the choice. The patient/family should be offered

the time, if desired, to call some of the agencies if they want more information.

If I can be of further assistance in this matter, do not hesitate to call. Thank you for your attention.

Sincerely,

Patricia A. Gibson,  
*Chief Executive Officer.*

C: National Association of Home Care,  
Illinois Home Care, Council

Law Offices, Small, Craig & Werkenthin, A  
Professional Corporation

Suite 1100, 100 Congress Avenue, Austin,  
Texas 78701-4099, (512) 472-8355, San  
Antonio Office, 300 Convent Street, Suite  
1950, San Antonio, Texas 78205-3738, (210)  
226-2080, Facsimiles, Austin: (512) 320-  
9734, San Antonio: (210) 226-2646.

December 1, 1995.

Ms. Gail Kursch,

*Chief, Professions & Intellectual Property  
Section/Health Care Task Force,  
Department of Justice, Antitrust Division,  
600 E St. N.W., Room 9300, Washington,  
DC 20530, VIA FAX NO. (202) 514 9978.*

Re: Comments on Proposed Final Judgment;  
*United States v. Health Choice of  
Northwest Missouri, Inc., et al.*, Case No.  
95-6171-CV-SJ-6; In the U.S. District  
Court for the Western District of  
Missouri.

Dear Ms. Kursch: This law firm represents Texas Home Health, Inc. which is a home health care provider in Texas. With respect to the Proposed Final Judgment in the above matter, Texas Home Health submits the following comments.

The referral procedure developed by Heartland Health System would allow Heartland to maintain a competitive advantage over other providers in the situations in which the patient does not have a provider preference. Under Heartland's proposal, if the patient does not have a preference, the discharge planner is allowed to inform the patient that Heartland has the capability to provide the services and apparently would be allowed to make representations as to the quality of service to be provided. If the patient does not accept Heartland's services, it appears that the patient would be given a telephone book and informed that there are other providers for which quality representations cannot be made.

If this procedure is followed, it is unlikely that any provider other than Heartland would receive referrals. Apart from the fact that Heartland would be in a position to embellish quality and provide tacit indications that it is preferable to other providers, if a patient has no preference as to providers, the patient will more likely than not choose Heartland because it has no other information about the other providers. The patient would be forced to locate other providers in a telephone book and make its own investigation. It is unlikely patients will expend this effort. Additionally there may be a perception that the other providers do not provide services having the same degree of quality as Heartland.

To correct these deficiencies in the proposal, the discharge planner should

provide the patient with the names of every provider that has requested to be included on the information listing. No preference should be given to Heartland, and the same type of information should be given for each provider. Heartland should be precluded from making oral representations about its services or implying that its services are superior to those of other providers unless other providers are given the opportunity to make similar presentations.

Other providers should be given the opportunity to have brochures distributed to the patients. The essence of the procedure should be to ensure that the patient has freedom of choice and that Heartland cannot exploit its position to give it a competitive advantage. Heartland's proposal will not accomplish this.

Only if all providers participate on a level playing field can freedom of choice truly occur. All providers should be given the opportunity to be included on a listing of eligible providers and to provide information that can be evaluated by the patient without influence from the discharge planner.

Otherwise, the discharge planner could effectively control the patient's decision or provide information in a favorable light to Heartland. The effect of this is that other providers are precluded from having the opportunity to market their services to potential consumers.

Texas Home Health respectfully requests that you consider the potential abuse with the proposed referral procedure.

Very truly yours,

William R. McIlhany

Central Home Health Care

Decatur Office, 495 Winn Way Suite 100,  
Decatur, Georgia 30030, 404/296-0805.

November 29, 1995.

Gail Kursh,

*Chief, Professional & Intellectual Property  
Section/Health Care Task Force,  
Department of Justice, Antitrust Division,  
600 E. Street, N.W., Room 9300,  
Washington, D.C. 20530.*

Re: *Comments on Proposed Final Judgement:  
United States v. Health Choice of  
Northwest Missouri, Inc., et al., Case No.  
95-6171-CV-SJ-6 in the U.S. District  
Court for the Western District of  
Missouri.*

Dear Ms. Kursh: As a home health care provider I have first-hand knowledge of the subject matter the Department of Justice is dealing with in the above referenced matter. I also understand the influence a hospital can exert in a patient's selection of post-hospital ancillary services, including the selection of a home health care provider. For these reasons I have reviewed and studied the DOJ's recommended home health, DME and hospice referral policy for Heartland Hospital.

In the interest of protecting patient choice (which is guaranteed by both Federal and State laws) as well as maintaining fair competition consistent with the antitrust laws and FTC regulations, I respectfully submit that the final proposed judgement (recommended policy) be modified as such:

- strengthen limitations on the hospital's ability to refer its patients to its own hospital-based components;

- require the hospital to provide patients with an updated list of Medicare/Medicaid providers in the community;

- require the hospital to use a rotation system, which assures equitable referrals to all providers in the area;

- require the hospital to permit (on their premises, during normal working hours) representatives of freestanding providers—other than their own hospital-based components—to visit their patients who have been admitted for hospitalization; and to expose the patient population to the availability of outside services as well;

- make the hospital publicly post its daily referrals to both its hospital-based entities and to other providers in the community.

On behalf of our home health agency and the patients we serve, we respectfully ask that you give these comments due consideration. These issues are of even more concern in today's era of health care and provider consolidation.

Sincerely,

Sandy Caroland,  
*Administrator.*

Healthfield Services of Middle Georgia, Inc.  
2490 Riverside Drive, Macon, Georgia 31204,  
912/743-5769.

November 29, 1995

Gail Kursh,

*Chief Professional & Intellectual Property  
Section/Health Care Task Force,  
Department of Justice, Antitrust Division,  
600 E. Street, N.W., Room 9300,  
Washington, D.C. 20530.*

Re: *Comments on Proposed Final Judgement:  
United States v. Health Choice of  
Northwest Missouri, Inc., et al., Case No.  
95-6171-CV-SJ-6 in the U.S. District  
Court for the Western District of  
Missouri.*

Dear Ms. Kursh: As a home health care provider, I have first-hand knowledge of the subject matter the Department of Justice is dealing with in the above referenced matter. I also understand the influence a hospital can exert in a patient's selection of post-hospital ancillary services, including the selection of a home health care provider. For these reasons, I have reviewed and studied the DOJ's recommended home health, DME and hospice referral policy for Heartland Hospital.

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- make the hospital publicly post its daily referrals to both its hospital-based entities and to other providers in the community.

On behalf of our home health agency and the patients we serve, we respectfully ask that you give these comments due consideration. These issues are of even more concern in today's era of health care and provider consolidation.

Sincerely,

William H. Hursey,  
*Administrator.*

Date: November 29, 1995

To: Gail Kursh, Department of Justice,  
Washington, D.C.

Re: The final judgement for United States v.  
Health Choice of Northwest Missouri,  
Inc. Case #95-6171.

I support the referral procedure Heartland Health System developed for home health, DME and hospice services.

If a physician specifies the provider to be used, ancillary services continue to be medically directed. This prevents the physician or facility from incurring any liability by selecting providers through rotation or otherwise without credentialing or quality assurance procedures. The patient should be asked if this is acceptable, and if so, referred to that provider.

The patient's preference should always be honored if the physician does not order a specific provider.

Agencies should honestly and conscientiously cooperate in providing information to assure comprehensive services to clients and their families.

It has been my experience, hospice services are not as competitive as home health because of the profits involved. The number of home health agencies has escalated dramatically this last year. I am saddened, because I see home health becoming "big business" and not a community service any longer. Agencies within our service area have always respected each other and provided service for our individual communities. Many of the newer for-profit agencies do not follow the Medicare guidelines. Some agencies tell their patients that they may drive and never address safety or interim care needs for fear of losing a patient.

Heartland Health Systems has developed a referral system that keeps home health and hospice medically directed and holistic in nature, the way it was intended.

Sincerely,  
 Reneah Wilson,  
*Home Health/Hospice Director, Ochiltree  
 Hospital District, 2402 South Main, Perryton,  
 Texas 79070.*

Shannon Medical Center  
 Home Health Services, 120 E. Harris, San  
 Angelo, Texas 76902, (915) 6533-6741

November 27, 1995.

Gail Kursh,  
*Chief, Professions & Intellectual Property  
 Section/Health Care Task Force,  
 Department of Justice, Antitrust Division,  
 600 E. St., N.W., Room 9300,  
 Washington, D.C. 20530.*

Dear Ms. Kursh: As a hospital-based provider of home care services, I am in favor of the proposed final judgment in the United States vs. Health Choice of Northwest Missouri, Inc. et al., Case No. 95-6171-CV-SJ-6. I find the requirements set out for referrals determination quite satisfactory in assuring patient choice and maintaining competition. Contrary to popular beliefs, hospital-based home care agencies do not have a monopoly on referrals and many of us do our utmost to provide patient choice and are very conscientious in maintaining the Medicare Conditions of Participation. I strongly encourage the judgment to stand and for the Department of Justice to resist placing any additional burdens on providers which would be unnecessary.

Thank you for your consideration.

Yours truly,

Janis Fuchs,  
*Director, Shannon Home Health Services, 127  
 E. Beauregard, San Angelo, Texas 76903.*

Keweenaw Home Nursing & Hospice  
 414 Hecla Street, Laurium, Michigan 49913,  
 Fax: (906) 337-9929, 1-800-594-7053, (906)  
 337-5700

December 1, 1995.

Gail Kursh,  
*Chief Professions & Intellectual Property  
 Section/Health Care Task Force, Dept. of  
 Justice, Antitrust Division, 600 E. St.,  
 NW, Room 9300, Washington, DC 20530.*

Dear Ms. Kursh: As an owner of a small rural free standing home health care agency, I have real concern about the recent DOJ ruling in the matter of U.S. v. Health Choice of Northwest Missouri, Inc.

Our agency has an excellent reputation for quality in our community. In over 6 years of existence we have been Medicare certified without a single deficiency. For nearly 3 years, we have maintained CHAP accreditation through the community Health Accreditation Program of the National League for Nursing.

The two local hospitals have teamed together and created their own home care agency. To some degree these hospitals give patients choice but certainly will not continue to give choice under the DOJ ruling. These hospitals are very aware of our quality and reputation and certainly could "speak to the quality" of our program.

Please reconsider the DOJ's decision in the case and protect the individuals freedom of

choice. The future of the free standing agency depends on it.

Sincerely,  
 Diane Tiberg

Visiting Nurse Services of Southern  
 Michigan, Inc.

311 East Michigan Avenue, Suite 200, Battle  
 Creek, Michigan 49017-4939, Battle Creek  
 (616) 962-0303, Coldwater (517) 279-7550,  
 Albion (517) 629-8100, Toll-Free 1-800-  
 622-9822, FAX (616) 962-8810

November 28, 1995.

Gail Kursh,  
*Chief Professional and Intellectual Property  
 Section, Health Care Task Force,  
 Department of Justice, Anti Trust  
 Division, 600 E. St. NW, Room 9300,  
 Washington, D.C. 20530.*

Dear Mrs. Kursh: We are writing to give input in the case, United States v. Health Choice of Northwest Missouri, Inc. et al; case number 95-6171 CV-SJ-6 in the U.S. District Court for the Western District of Missouri.

We are a non-profit home care agency serving Southwest Michigan. We wish to urge that hospitals be required to continue to offer patients choices for care so that the value of the free market can continue to influence quality. Patients need to be able to judge and select based upon quality. Monopoly influence often tends to rule out this free choice.

We propose that the final judgment be modified to:

- Strengthen limitations on the hospital's ability to refer it's patients to it's own hospital-based components;
- Require the hospital to use a rotation system, which assures equitable referrals to all providers in the area;
- Require the hospital to permit (on their premises, during normal working hours) representatives of freestanding providers—other than their own hospital-based components—to visit their patients who have been admitted for hospitalization; and to expose the patient population to the availability of outside services as well; and,
- Make the hospital publicly post it's daily referrals to both it's hospital-based entities and to other providers in the community.

Please consider this as the final judgment is made. Thank you.

Sincerely,  
 Judy Hoelscher,  
*Vice President of Clinical Services.*

Visiting Nurse Association of Martin/St.  
 Lucie County, Inc.  
 2400 S.E. Monterey Road, Suite 100, Stuart,  
 Florida 34996, (407) 286-1844, All Areas  
 930-6877, Joint Commission on  
 Accreditation of Health Care Organizations

November 28, 1995.

Gail Kursh  
*Chief, Professions & Intellectual Property  
 Section, Health Care Task Force,  
 Department of Justice, Antitrust Division,  
 600 E. St. N.W. Room 9300, Washington,  
 D.C. 20530.*

Re: United States v. Health Choice of  
 Northwest Missouri, Inc., et. al. Case No.  
 95-0171-CV-SJ-6.

Dear Ms. Kursh: The proposed final judgement for U.S. v. Health Choice is a step back for quality care in the home health care setting. Competition supports and promotes a high quality of care, evidenced by clinical outcomes, cost-effective clinical guidelines, patient satisfaction and appropriate use of community resources. Your proposed judgement has the potential to create a monopoly for hospital-based home health care agencies and may end competition in home health care.

Hospitals have a "captured audience" of vulnerable patients who feel dependent upon the hospital staff. Patients are not likely to go against a discharge planner's referral to the hospital home health agency for fear that their failure to "cooperate" may create an environment where the patient's continuing needs (in-patient needs and paperwork for reimbursement needs) may not be met or may be delayed.

Additionally, hospitals exert their influence over physicians (with hospital privileges) to refer only to the hospital-based agency in order to support the hospital. Some hospitals have even moved their home health agency from being a separate entity to a hospital department, so that self-referrals are not subject to GAO investigations instituted by Rep. Pete Stark (D-Calif.). A second reason is to shift administrative costs under the present MEDICARE Cost Reimbursed Home Health System.

Over the past two years hospitals discontinued the referral rotation system; discontinued hospital access to patients by agencies who serve them, refer only to their own agencies, called physicians to ask why a hospital patient was referred to an outside agency, etc. These actions clearly demonstrate a move to a monopoly system.

Hospital arguments for promoting their own agency at the exclusion of outside agencies include continuum of care, referrals to other agencies would require hospital credentialing of outside agencies, and hospitals always give the patient a choice. It is easy to refute these claims.

The traditional continuum of care has always been from organization to organization, be it a hospital or other community resource agency, with patient information transferred between professionals who are trained to focus on continuity and coordination of care. Just because a home health agency has the same name or is affiliated with a hospital does not, in itself, assure a continuum of quality care.

The responsibility of a discharge planner includes knowledge and judgement regarding all home health care community resources that would benefit the patient. Discharge planners know resources available and receive feedback regarding the quality of care from these resources. Many state home health agency licensure laws establish standards that agencies must meet, so hospitals know that standards are met and don't need to "credential" them. Additionally, many home health agencies today are accredited themselves through either the Joint Commission on the Accreditation of Health

Care Organization (JCAHO), or the Community Health Accreditation Program (CHAP).

Finally, hospitals ALWAYS state they give the patient a choice, yet many patients have told outside agencies that during their hospitalization, hospital representatives have almost insisted they use a hospital-based agency. Also, physicians who refer to outside agencies tell outside agencies that as soon as the patient is admitted, before the physician even discusses discharge with the patient (to advise them of options), the hospital-based agency has already been in to talk with the patient and already has them signed up as a referral for their agency.

Thank you for the opportunity to send my comments on your proposed final judgement for the above mentioned case. Please don't be persuaded by big hospital corporations and hospital lobbyists to pass a judgement that quite probably abolishes competition in home health care and effectively gives patients *no choice*.

Sincerely,

Robert J. Quinn,  
Director of Operations.

Cornerstone Home Health Care  
6300 Samuell Blvd., Suite 120 B, Dallas,  
Texas 75228-7100, Phone: (214) 681-1600,  
Fax: (214) 381-2900

Gail Kursh,  
Chief, Professions and Intellectual Property  
Section, Health Care Task Force, Dept. of  
Justice, Antitrust Division, 600 E St.,  
NW., Room 9300, Washington, DC  
20530.

To: Gail Kursh,

As an owner of an independent home health agency, I recommend that the Department of Justice should allow the hospital discharge planner give a list of all home health agencies serving the neighborhood of the patients residence area. I would also recommend that the patients be given a brochure of the agencies requested by the patient so they will be able to choose the service of their choice. The hospital based agencies should self refer no more than 50% of the patients discharged from the hospital to its own or related home health agency. The discharge planner should give a list of all agencies serving the area to the doctors at the hospital for their information.

I hope my suggestions will help you and the survival of all the independent home health agencies.

Sincerely,

Tom Varughese,  
Administrator.

National Home Infusion Association  
225 Daingerfield Road, Alexandria, VA  
20314, Phone 703-549-3740, Fax 703-683-  
3619

December 4, 1995.

Gail Kursh,  
Chief, Professions & Intellectual Property  
Section, Health Care Task Force,  
Department of Justice, Antitrust Division,  
600 E Street NW., Room 9300,  
Washington, DC 20530.

Dear Ms. Kursh: On behalf of the members of the National Home Infusion Association, I am writing to express our concerns regarding the proposed final judgment for *United States v. Health Choice of Northwest Missouri, Inc., et al.*, Case No. 95-6171-CV-SJ-6 in U.S. District Court for the Western District of Missouri.

Specifically, while we believe the proposed final judgment in regard to the referral policy is a well intended attempt to address this issue, we are concerned that instead it will further strengthen the growing anticompetitive environment in which institutions capture referrals for their own outpatient service companies.

Nationwide, two out of every three hospitals now offer some form of home care services and the numbers are continuing to grow at a rapid pace. That means that today, institutional inpatients have a higher potential to be captively referred to an institution's own outpatient service company than ever before.

The department's proposed guidelines appear to base the balance to an institution's self-referral with a physician discharging a patient, out of the same institution who grants that physician privileges to work within that institution, into the care of a competitor of that institution and with the hospital's own filtration of information to the patient as it concerns competitors to its outpatient service company(ies).

Our organization routinely receives calls from both outpatient providers and physicians indicating that hospitals are increasingly pressuring physicians and patients, both directly and indirectly, to utilize the hospital's own outpatient services.

It is our belief that outpatient service providers should be allowed unfiltered access to potential referral patients, and that restrictions should be placed on a hospital's ability to pressure physicians. We believe this will create and foster a competitive environment.

Therefore, NHIA urges you to support the incorporation of the Coalition for Quality Health Care's recommendations into the final judgment, namely:

- to strengthen limitations on the hospital's ability to refer its patients to its own hospital-based components; to require the hospital to use a rotation system which assures equitable referrals to all providers in the area; and
- to require the hospital to permit (on their premises, during normal working hours), representatives of freestanding providers—other than their own hospital-based components—to visit their patients who have been admitted for hospitalization; and
- to expose the patient population to the availability of outside services as well; and
- to make the hospital publicly post its daily referrals to both its hospital-based entities and to other providers in the community.

It is NHIA's position that the proposed final judgment needs to recognize that both patients and physicians are in a vulnerable position within an institution and that measures such as those recommended by the Coalition for Quality Health Care need to be incorporated to foster and ensure a competitive environment.

Sincerely,

Robin J. Richardson,  
Executive Director.

Visiting Nurse Associations of America  
3801 E. Florida Ave., Suite 900, Denver, CO  
80210, (303) 753-0218, Fax 753-0258

December 4, 1995.

Ms. Gail Kursh,  
Chief Professions & Intellectual Property  
Section/Health Care Task Force,  
Department of Justice, Antitrust Division,  
600 E Street, NW., Room 9300,  
Washington, DC 20530.

Re: *United States v. Health Choice of Northwest Missouri, Inc., et al.*, Case No. 95-6171-CV-SJ-6 in the U.S. District Court for the Western District of Missouri.

Dear Ms. Kursh: The Visiting Nurse Associations of America (VNAA) presents the following comments to urge the United States Department of Justice (DOJ) to withdraw its consent to the proposed final judgment regarding *United States v. Health Choice of Northwest Missouri, Inc., et al.* in order to modify the judgment to better serve the public interest.

VNAA is a national membership organization, representing 210 Visiting Nurse Associations (VNAs) throughout the United States. VNAs are home- and community-based, nonprofit, Medicare-certified home health and hospice agencies. The VNA mission is to provide the most compassionate and cost-effective care possible to our patients without regard to their ability to pay. VNA's services range from homemaker services to skilled nursing care, including high-tech services such as blood transfusions and chemotherapy. HCFA's 1993 data demonstrate that 26% of all Medicare home health admissions that year were to VNAs. VNAs also carry the majority of Medicaid home care and a significant volume of privately-insured home care. Because VNAs have provided care regardless of patients' ability to pay for over 100 years, they have been, and continue to be, the safety net for uninsured and underinsured patients. Charity support allows VNAs to be that safety net, bridging the gap between cost of care and reimbursement.

As the delivery of health care moves increasingly away from the hospital to the home, patients must be assured they have access to a broad range of providers, including free-standing agencies such as VNAs. VNAs have both the historic mission and the cutting edge clinical advances for treating patients in the home. VNAA believes that the policy regarding patient referral by a hospital system to home care and other ancillary services, which is outlined in the proposed final judgment for *United States v. Health Choice of Northwest Missouri, Inc., et al.*, would be detrimental to this goal. This judgment, as currently written, would restrict a patient's freedom to choose his or her own home care provider because a patient most likely would not be made aware of all qualified providers in the community at the time of hospital discharge. As a result, the judgment would conflict with current Medicare and Medicaid policy that protects

patient choice and fair competition (42 USC § 1395a) and (42 USC § 1396a(23)).

VNAA requests the DOJ to revise its judgment to better protect patient choice and competition by requiring hospitals to present a written list of local Medicare- and Medicaid-certified home care and other ancillary providers to a patient at the same time that a hospital informs the patient of its own accredited ancillary services. VNAA also requests that participating hospitals be required to provide such patients with a written explanation of the Medicare and Medicaid statutes that protect a patient's freedom-to-choose his or her provider of services and the quality standards the listed certified agencies must meet as specified by the programs' conditions of participation.

Thank you for your consideration of our comments.

Sincerely,

William G. Vanell,  
President and CEO.

Home Care Association of America

9570 Regency Square Blvd., Jacksonville, FL 32225, 1-800-386-HCAA

December 1, 1995

Gail Hursh,

*Chief Professions & Intellectual Property Section Health Care Task Force, Department of Justice, Antitrust Division, 600 E. Street, N.W., Room 9300, Washington, D.C. 20530.*

Re: United States v. Health Choice of Northwest Missouri, et al Case No. 95-6171-CV-SJ-6.

Dear Gail Hursh: I am general counsel for Home Care Association of America (HCAA) which represents two hundred forty (240) home care agencies throughout the United States with nine (9) in Missouri.

We are very cognizant of hospitals similar to Heartland Hospital committing similar offenses and believe that the free standing home health agencies will not be adequately protected by the "DOJ's Recommended Home Health, DME, and Hospice Referral Policy for Heartland Hospital".

Under the proposed recommendation, the Hospital will still have an unfair advantage over any home care agency not affiliated with the hospital. The hospital essentially has a captive audience and has no requirement to even suggest that there are other home care agencies in the community that provide similar services. Under II (B)(2) of the recommendation, if a patient has not made a preference, the hospital is in the position to move the patient directly into their own service and the patient would never know the availability of any other service. Patients coming out of a hospital are generally willing to do what ever the hospital staff suggest.

To put a requirement on the patient to make a request for other providers is putting an undue burden on the patient and the other providers in the community. Medicare does not allow advertisement as a reimbursable cost to providers and therefore because the hospital has a captive patient, they are able to inform the patient about their service without any additional cost. Other providers are generally precluded from discussing their services with a patient in the hospital. This

gives the hospital a marked advantage because the patient has no choice.

We at HCAA would request that you reconsider your recommendations and modify them as follows:

The hospital shall not be allowed to self refer any more than thirty (30) percent of all the patients which do not have a preference. Patients not having a preference of a specific provider would be referred to providers registered with the hospital on a rotation basis. Thus no agency could be given preferential treatment and the hospital would not monopolize the care for patients who have not been informed as to the services available in the community. Any willing provider qualified under Medicare shall be allowed placement on the referral list and shall receive patients on the rotation basis.

We believe that the above referral plan would be beneficial to all and would not preclude the hospital from self referral completely. This also does not disrupt the hospital by requiring that the other providers be allowed to discuss their services with patients prior to the patient leaving the hospital.

We believe that if you make the above change to your recommendation it will preclude a substantial amount of future litigation in the anti-trust area with hospitals.

We request that you reconsider your recommendations and include our suggested change.

If you should have any questions, or would like to discuss this further, please feel free to contact me directly.

Sincerely,

H. Kenneth Johnston II,  
General Counsel.

cc: Dwight Cenac, Chairman of the Board

NARD Legislative Defense Fund, National Association of Retail Druggists  
205 Daingerfield Road, Alexandria, Virginia 22314

December 1, 1995.

Gail Kursh,

*Chief, Professions & Intellectual Property Section, Health Care Task Force, Department of Justice, Antitrust Division, 600 E Street, NW, Room 9300, Washington, D.C. 20530.*

Dear Ms. Kursh: The purpose of this correspondence is to express our concerns regarding the proposed final judgment for *United States v. Health Choice of Northwest Missouri, Inc., et al.*, Case No. 95-6171-CV-SJ-6 in U.S. District Court for the Western District of Missouri.

On behalf of our members in Missouri and throughout the country, we urge you to support the incorporation in the final judgment and recommendations of the Coalition for Quality Health Care, namely:

- to strengthen limitations on the hospital's ability to refer its patients to its own hospital-based components; to require the hospital to use a rotation system which assures equitable referrals to all providers in the area; and
- to require the hospital to permit (on their premises, during normal working hours,) representatives of freestanding providers—

other than their own hospital-based components—to visit their patients who have been admitted for hospitalization; and

- to expose the patient population to the availability of outside services as well; and
- to make the hospital publicly post its daily referrals to both its hospital-based entities and to other providers in the community.

On behalf of more than 75,000 independent retail pharmacists nationwide, we reiterate our concern that the final judgment be formulated to assure that consumers truly have a choice of competitors.

The ability of the consumer to select the health care provider or health care entity of their choice is an essential ingredient in maintaining a competitive environment in our marketplace.

Sincerely,

John M. Rector,

*Senior Vice President of Government Affairs and General Counsel.*

In The United States District Court, For The Western District of Missouri

*United States of America, Plaintiff, v. Health Choice of Northwest Missouri, Inc., Heartland Health System, Inc., and St. Joseph Physicians, Inc., Defendants. Civil Action No. 95-6171-CV-SJ-6.*

*Motion For Leave To Appear As Amicus Curiae, File Briefs and Participate In Hearings On Proposed Final Judgment*

The Coalition for Quality Healthcare, a nonprofit Missouri corporation organized to assure consumer access to timely and relevant information and to promote competitiveness in the health care field, hereby moves the Court, pursuant to 15 U.S.C. § 16(b), for leave to appear as Amicus Curiae in this case and to file the accompanying Memorandum of Amicus Curiae in Opposition to Proposed Final Judgment in this matter. Amicus also respectfully requests that it be allowed to present evidence and participate in oral arguments in support of its Memorandum of Amicus Curiae in any proceedings held by the Court to determine whether approval of the proposed Final Judgment is in the public's interest.

In support of its Motion, Amicus attaches and incorporates its Memorandum of Law.

Respectfully submitted,

Armstrong, Teasdale, Schlafly & Davis.  
Thomas M. Bradshaw, Mo. 20411,  
Dianne M. Hansen, Mo. 40356,  
1700 City Center Square, 1100 Main Street,  
Kansas City, Missouri 64105, (816) 221-3420,  
(816) 221-0786 FAX.

and

Glenn E. Davis, Mo. 30308,  
Diane E. Felix, Mo. 28439,  
One Metropolitan Square, Suite 2600, St.  
Louis, Missouri 63102-2704, (314) 621-5070.  
Attorneys for Amicus Curiae, The Coalition  
for Quality Healthcare

#### Certificate of Mailing

I hereby certify that a true and correct copy of the foregoing document was mailed, postage prepaid, this 1st day of December, 1995, to the following counsel of record:

Lawrence R. Fullerton, Esq., Edward D. Eliasberg, Jr., Esq., Antitrust Division, U.S. Dept. of Justice, 600 E Street, N.W., Room 9420, BICN Bldg., Washington, D.C. 20530  
Thomas D. Watkins, Esq., Watkins, Boulware, Lucas, Miner, Murphy & Taylor, 3101 Frederick Avenue, St. Joseph, MO 64506-0217  
George E. Leonard, Esq., Shugart, Thomson & Kilroy, 12 Wyandotte Plaza, 120 West 12th Street, Kansas City, MO 64105-0509  
Richard D. Raskin, Esq., Sidley & Austin, One First National Plaza, Chicago, IL 60603  
Brian B. Myers, Lathrop & Norquist, 2345 Grand Avenue, Suite 2600, Kansas City, MO 64108  
Dianne M. Hansen,  
Attorneys for Amicus Curiae, The Coalition for Quality Healthcare.

In The United States District Court, For The Western District of Missouri

*United States of America*, Plaintiff, v. *Health Choice of Northwest Missouri, Inc., Heartland Health System, Inc., and St. Joseph Physicians, Inc.*, Defendants. Civil Action No. 95-6171-CV-SJ-6.

#### Memorandum of Law In Support of Motion To Appear As Amicus Curiae and To File Amicus Brief and To Participate In Proceedings On Proposed Final Judgment

For the reasons set forth below, the Coalition for Quality Healthcare, requests permission to appear as Amicus Curiae and to file, and to have the Court consider, the accompanying Memorandum of Law of Amicus Curiae in Opposition to the Proposed Final Judgment in *United States v. Health Choice of Northwest Missouri, Inc., et al.*, No. 95-6171-CV-SJ-6.

Amicus also requests the opportunity to be heard and present evidence at any hearing scheduled by the Court to determine whether approval of the proposed Final Judgment is in the public's interest.

#### Status of Amicus Curiae

The Coalition for Quality Healthcare (the "Coalition") is a nonprofit Missouri corporation organized to assure consumer access to timely and relevant information and to promote competitiveness in the healthcare field. The Coalition is comprised of concerned citizens and providers of ancillary healthcare services in Northwest Missouri, including St. Joseph, Missouri and its surrounding areas. Members of the Coalition include owners of long-term care facilities, home health care agencies, pharmacies, medical equipment companies, and other service oriented businesses operating in the healthcare field.

The Coalition believes that the proposed Final Judgment is not in the public's interest. The terms and provisions of the "referral policy" which is incorporated into the Final Judgment, if approved by this Court, will directly injure members of the public, including patients who will be denied the right to make an informed choice among all available ancillary services providers, and non-Heartland ancillary services providers who will be foreclosed from obtaining business from patients being discharged from Heartland's acute care hospital. The practical effect of the referral policy is that Heartland will continue to increase its monopoly power in the ancillary services market through predatory practices and leveraging, causing antitrust injuries.

On November 22, 1995, pursuant to the Tunney Act, the Coalition filed its formal Comment with this Court, directed to the Department of Justice, Antitrust Division. Amicus now seeks the Court's permission to supplement its Comment with the attached Memorandum of Amicus Curiae setting forth arguments and authorities in opposition to the proposed Final Judgment and recommending to the Court alternative provisions, including a model referral policy, which the Coalition believes will better serve the public's interest.

Amicus further seeks permission to participate in any proceedings or hearings before this Court to determine whether the proposed Final Judgment is in the public's interest.

#### Statutory Right to Appear as Amicus Curiae

Under Section 16(f) of the Tunney Act, 15 U.S.C. § 16, the Court may authorize full or limited participation in proceedings before the court by interested persons or agencies, including appearance amicus curiae,

intervention as a party pursuant to Fed.R.Civ.P. 24, examination of witnesses or documentary materials, or participation in any other manner and extent which serves the public interest as the Court may deem appropriate. *Id* §§ 16(f)(3), 16(f)(5).

Courts frequently permit amicus submissions in Tunney Act proceedings. See e.g. *United States v. Microsoft Corp.*, 56 F.3d 1448 (D.C. Cir. 1995); *United States v. Airline Tariff Publishing Co.*, 1993-1 Trade Cases ¶ 70,191 (D.C. Dist. 1993); *United States v. International Telephone & Telegraph Co.*, 349 F.Supp. 22, 26 n.2 (D. Conn. 1972).

The Coalition believes that the proposed consent decree is of the greatest possible importance to the citizens and patients utilizing acute healthcare services and ancillary healthcare services in Northwest Missouri and Northeast Kansas. As discussed more fully in the accompanying Memorandum of Amicus Curiae, the Final Judgment and Competitive Impact Statement filed by the Department of Justice fails to provide the Court with either the factual or economic analysis necessary for the Court to determine whether the proposed decree is sufficient to restore competition to the managed care services and ancillary healthcare services markets within Heartland's geographic region. Nor has Heartland supplied the affidavits of even a single economist describing the likely consequences of the proposed referral policy on the existing ancillary services market. Compare e.g., *United States v. Western Electric Co., Inc.*, 993 F.2d 1572, 1578-1582 (D.C. Cir. 1993) (describing numerous affidavits from economic experts that provided factual record for determining whether proposed decree and modification was in the public interest).

The Court must look at the competitive impact of a proposed judgment upon the public generally and upon individuals or entities alleging specific injury from the violations set forth in the complaint. See 15 U.S.C. § 16(3). In the Memorandum of Amicus Curiae, the Coalition describes in detail, supported with letters from its members, the anticompetitive effect that the proposed consent decree will have on both ancillary service providers and non-Heartland physicians, and economic data indicating that members of the public have suffered and will continue to suffer antitrust injuries if the proposed Final Judgment and the incorporated referral policy are approved.

In view of the paucity of the existing record, consideration of additional submissions under Section 16(f) is particularly appropriate.

#### Conclusion

For the foregoing reasons, amicus respectfully requests that the Court grant it leave to file the accompanying Memorandum under section 16(f) of the Tunney Act, 15 U.S.C. § 16, and that the Court further consider the Memorandum on the merits in making its public interest determination under Section 16(e). Finally, amicus respectfully requests that the Court allow it to present evidence and participate in any proceedings before this Court to determine whether the proposed Final Judgment is in the public's interest.

Respectfully submitted,

Armstrong, Teasdale, Schlafly & Davis  
Thomas M. Bradshaw, Mo. 20411  
Dianne M. Hansen, Mo. 40356  
1700 City Center Square, 1100 Main Street,  
Kansas City, Missouri 64105, (816) 221-3420,  
(816) 221-0786 FAX.

and

Glenn E. Davis, Mo. 30308  
Diane E. Felix, Mo. 28439  
One Metropolitan Square, Suite 2600, St.  
Louis, Missouri 63102-2704, (314) 621-5070.  
Attorneys for Amicus Curiae, The Coalition  
for Quality Healthcare

#### Certificate of Mailing

I hereby certify that a true and correct copy of the foregoing document was mailed, postage prepaid, this 1st day of December, 1995, to the following counsel of record:

Lawrence R. Fullerton, Esq., Edward D.  
Eliasberg, Jr., Esq., Antitrust Division, U.S.  
Dept. of Justice, 600 E Street, N.W., Room  
9420, BICN Bldg., Washington, D.C. 20530  
Thomas D. Watkins, Esq., Watkins, Boulware,  
Lucas, Miner, Murphy & Taylor, 3101  
Frederick Avenue, St. Joseph, MO 64506-  
0217  
George E. Leonard, Esq., Shugart, Thomson &  
Kilroy, 12 Wyandotte Plaza, 120 West 12th  
Street, Kansas City, MO 64105-0509  
Richard D. Raskin, Esq., Sidley & Austin, One  
First National Plaza, Chicago, IL 60603  
Brian B. Myers, Lathrop & Norquist, 2345  
Grand Avenue, Suite 2600, Kansas City,  
MO 64108  
Dianne M. Hansen,  
Attorneys for Amicus Curiae, The Coalition  
for Quality Healthcare.

In the United States District Court, for  
the Western District of Missouri

*United States of America*, Plaintiff, v.  
*Health Choice of Northwest Missouri, Inc.,  
Heartland Health System, Inc., and St.  
Joseph Physicians, Inc.*, Defendants. Civil  
Action No. 95-6171-CV-SJ-6.

#### Order

On Motion for Leave to Appear as  
Amicus Curiae in the above matter  
brought by the Coalition for Quality  
Healthcare, and for good cause shown,

IT IS HEREBY ORDERED that the  
Coalition for Quality Healthcare is  
hereby granted leave to appear as  
Amicus Curiae in this case, including  
the right to file briefs, participate in oral  
arguments and present evidence at any  
hearings scheduled by the Court to  
determine whether approval of the  
proposed Final Judgment is in the  
public's interest.

IT IS SO ORDERED.

HON. HOWARD F. SACHS,  
*Sr. U.S. District Judge.*

In the United States District Court, for  
the Western District of Missouri

*United States of America*, Plaintiff, v.  
*Health Choice of Northwest Missouri, Inc.,  
Heartland Health System Inc., and St. Joseph  
Physicians, Inc.*, Defendants. Civil Action No.  
95-6171-CV-SJ-6.

#### Memorandum of Amicus Curiae in Opposition To Proposed Final Judgment

Armstrong, Teasdale, Schlafly & Davis  
Thomas M. Bradshaw, Mo. 20411,  
Dianne M. Hansen, Mo. 40356,  
1700 City Center Square, 1100 Main Street,  
Kansas City, Missouri 64105, (816) 221-3420,  
(816) 221-0786 FAX.

and

Glenn E. Davis, Mo. 30308,  
Diane E. Felix, Mo. 28439,  
One Metropolitan Square, Suite 2600, St.  
Louis, Missouri 63102-2704, (314) 621-5070.

The Coalition for Quality Healthcare  
(the "Coalition"), as amicus curiae,  
submit for the Court's consideration and  
information the following arguments  
and authorities in opposition to the  
proposed Final Judgment in this matter.

#### I. Background

The Antitrust Division of the  
Department of Justice ("DOJ") has  
determined that between April 14, 1986  
and June 9, 1995, Health Choice of  
Northwest Missouri, Inc. ("Health  
Choice"), Heartland Health System, Inc.  
("Heartland"), St. Joseph Physicians,  
Inc. ("SJPI") and others acted in concert  
to restrain or prevent the development  
of competitive managed health care  
programs in Buchanan County,  
Missouri, Complaint, ¶ 25. The DOJ  
found that this anticompetitive conduct  
constitutes an unreasonable restraint of  
price and other competition among  
managed care plans and among  
physicians in Buchanan County, which  
deprives consumers and third-party  
payers of the benefits of free and open  
competition in the purchase of health

care services in Buchanan County.  
Complaint, ¶ 27.

The Coalition is a nonprofit Missouri  
corporation organized to assure  
consumer access to information and to  
promote competition in the healthcare  
field. It is comprised of concerned  
citizens and providers of ancillary  
healthcare services in Northwest  
Missouri, including St. Joseph, Missouri  
and its surrounding areas. Members of  
the Coalition include owners of long-  
term care facilities, home health care  
agencies, pharmacies, medical  
equipment companies, and other service  
oriented businesses operating in the  
healthcare field. The Coalition believes  
that the deleterious effects of  
defendants' anticompetitive conduct  
reaches beyond those enumerated in the  
Complaint and impacts not only the  
consuming public and physicians, but  
also all ancillary services providers  
operating within Heartland's geographic  
region who are not affiliated with  
Heartland.

The Coalition understands that the  
principal focus of the DOJ's  
investigation resulting in the proposed  
consent judgment related to defendants'  
efforts to interfere with managed care  
programs, and that the subject of  
ancillary services arose very late in the  
investigation process. It is noteworthy  
that the Complaint before the Court  
makes no reference to ancillary services  
at all. The DOJ has informed the  
Coalition that it has no "determinative  
materials" from the investigation  
concerning the "referral policy" referred  
to in the Final Judgment. In sum, as the  
proposed judgment relates to ancillary  
services, the Coalition believes that the  
referral policy itself is beyond the scope  
of the Complaint, is an ill-advised  
addition to the proposed consent  
judgment, and is included in the  
proposed judgment without adequate  
investigation and attention to its  
consequences. Accordingly, the  
Coalition's objections to the proposed  
Final Judgment, and in particular the  
referral policy it includes, are both  
procedural and substantive in nature.

As discussed in this Memorandum,  
the proposed Final Judgment, which  
incorporates Heartland's ancillary  
services "referral policy"<sup>1</sup> into its  
terms, is *not* in the public's interest  
because it violates a consumer/patient's  
right to make an informed choice among  
all ancillary services providers and  
because the referral policy enhances  
Heartland's capacity to monopolize the

<sup>1</sup> Attached as Exhibit 1 is a copy of the Heartland  
Ancillary Services Referral Policy which is  
incorporated into the terms of the proposed Final  
Judgment.

ancillary services market within Northwest Missouri and Northeast Kansas. Further, the proposed Final Judgment lacks an effective, affirmative Compliance Program since it relies solely on "self-reporting" by the defendants. Finally, the Final Judgment contains no provisions detailing the manner in which alleged violations of the consent decree should be brought before the Court for appropriate judicial enforcement proceedings.

For these reasons, as set forth in the Comment previously filed by Amicus on November 22, 1995,<sup>2</sup> and as set forth more fully below, amicus curiae opposes the proposed Final Judgment.

## II. The Permissible Scope of This Court's Review

In 1974, Congress enacted the Antitrust Procedures and Penalties Act ("APPA"), also known as the Tunney Act, 15 U.S.C. §§ 16 (b)-(h) (1995), out of concern with "prior practice, which gave the [Justice] Department almost total control of the consent decree process, with only minimal judicial oversight." *United States v. American Tel. & Tel.*, 552 F.Supp. 131, 148 (D.D.Cir. 1982), *aff'd sub nom.*, *Maryland v. United States*, 460 U.S. 1001 (1983). Congress sought to eliminate "judicial rubber stamping" of such consent decrees<sup>3</sup> by providing that "before entering any consent judgment \* \* \* the court shall determine that the entry of such judgment is in the public interest." 15 U.S.C. § 16(e).

The legislative history of the Tunney Act shows that Congress did not intend the court's action to be merely pro forma. *United States v. Gillette Co.*, 406 F.Supp. 713, 715 (D. Mass. 1975). When the government and putative defendant(s) present a proposed consent decree to the district court for review under the Tunney Act, the court can and should inquire into the purpose, meaning and efficacy of the proposed decree. *U.S. v. Microsoft Corp.*, 56 F.3d 1448, 1462 (D.C.C. 1995). Moreover, if third parties contend that they have been positively injured by the decree, a district judge should hesitate before assuming that the decree is appropriate.

<sup>2</sup> A copy of the Comment filed by the Coalition for Quality Healthcare with the Department of Justice is attached as Exhibit 2.

<sup>3</sup> As a sponsor of the Act, Senator Tunney declared: "Specifically, our legislation will \* \* \* make our courts an independent force rather than a rubber stamp in reviewing consent decrees, and it will assure that the courtroom rather than the backroom becomes the final arbiter in antitrust enforcement." *The Antitrust Procedures and Penalties Act: Hearings on S. 782 and S. 1088 before the Subcommittee on Antitrust and Monopoly of the Committee on the Judiciary*, 93d Cong., 1st Sess. (1973).

*Id.* Similarly, a district court is expected to closely scrutinize the compliance mechanisms of a proposed consent decree. *Id.*

In making its inquiry, many courts have held hearings,<sup>4</sup> with testimony of experts, witnesses, and interested persons,<sup>5</sup> and ordered the DOJ to produce its "determinative" documents and materials to interested parties, as required by Section 16(b) of the Tunney Act.<sup>6</sup> For example, in *United States v. Central Contracting Co., Inc.*, 537 F.Supp. 571 (1982), the DOJ asserted that "there were simply no documents or materials \* \* \* that contributed materially to the formulation of the proposed relief." *Id.* at 573. The district court found the government's assertion disingenuous in light of the government's similar claims in 172 out of 188 prior cases that it considered neither documents nor any materials determinative. *Id.* at 577. The Court refused to blandly (and blindly) accept the government's certification that no documents or materials led to the government's determination that it should enter into a consent decree. *Id.* at 575. Rather, the Tunney Act required a "good faith review of all pertinent documents and materials and a disclosure" of those materials called for by the Act. *Id.* at 577.

A pro forma approval is certainly not warranted here. The well-publicized and lengthy investigation into the defendants' activities has resulted in a proposed final judgment that reaches beyond the DOJ's managed care investigation and includes a wholly deficient referral policy relative to ancillary services. Amicus curiae formally requested copies of any "determinative" materials or documents from the DOJ so that its counsel could properly evaluate the terms and conditions of the proposed Final Judgment and Competitive Impact Statement.<sup>7</sup> The Department of Justice

<sup>4</sup> See, e.g., *United States v. Westinghouse Elec. Corp.*, 1988 WL 47345 (D.D.C.); *United States v. Bechtel Corp.*, 1979 WL 158 (N.D. Cal.), *aff'd* 648 F.2d 660 (9th Cir. 1981), *cert. denied*, 454 U.S. 1083; *United States v. Mid-America Dairymen, Inc.*, 1977 WL 4352 (W.D. Mo.).

<sup>5</sup> To facilitate its review, the district court may "authorize full or limited participation in proceedings before the court by interested persons or agencies." 15 U.S.C. § 16(f)(3). *United States v. BNS, Inc.*, 858 F.2d 456, 459 (9th Cir. 1988).

<sup>6</sup> The court can also condition approval of a consent decree on the Antitrust Division's making available information and evidence obtained by the government to potential, private plaintiffs which will assist in the effective prosecution of their claims. *United States v. Associated Milk Producers, Inc.*, 394 F.Supp. 29, 45 (W.D. Mo. 1975), *citing* U.S. Code Cong. and Admin. News 1974, 93rd Cong. 2nd Sess., pp. 6538-39.

<sup>7</sup> By letter of November 13, 1995, the Coalition requested the Department of Justice to produce a

denied that any such documents exist.<sup>8</sup> Accordingly, the Court should carefully evaluate whether this is in the public interest, particularly when the DOJ has not been forthcoming with disclosure of the underlying factual materials supporting the proposed policy.

Amicus respectfully requests the Court to hold a hearing to determine whether the proposed consent decree is in the public's interest and to allow amicus to present evidence, including testimony, to support its arguments, as outlined below, that the consent decree is not in the public's interest.

## III. Arguments and Authorities

A. The Final Judgment is not in the public's interest because the incorporated Heartland Referral Policy prevents patients from making an informed choice regarding ancillary services.

Heartland has diversified into the ancillary services market and now owns, operates or otherwise controls or is affiliated with various ancillary services providers including a skilled nursing facility, a rehabilitation facility, a pharmacy, and a home health care agency. Heartland now competes with other "downstream providers" in the ancillary services market and, through its referral policy and discharge practices, unfairly monopolizes that market by "steering" or "channeling" its patients to its affiliated ancillary services providers. The channeling of patient choice is sufficient to show injury to consumers and a violation of the antitrust laws. *Key Enterprises of Delaware, Inc.*, 919 F.2d 1550, 1559 (11th Cir. 1990), vacated with instructions to dismiss (due to post-appeal settlement of case), 9 F.3d 893 (11th Cir. 1993).

Anticompetitive steering tactics include, but are not necessarily limited to, referring all business to the hospital-affiliated service providers when the patient is offered no meaningful choice among competing suppliers;<sup>9</sup> refusing

list of determinative materials to its counsel. (See Exhibit 3, attached.)

<sup>8</sup> On November 21, 1995, the Department of Justice, Antitrust Division, responded to the Coalition that the Department had determined that no such materials or documents existed. (See Exhibit 4, attached.)

<sup>9</sup> Frequently, patients will have no immediate preference among downstream suppliers because they remain too ill to make a rational choice, because they lack information about the competitive attributes of different suppliers, because the information they do have provides little objective guidance about the services provided by different companies, or because the cost of the products and services will be paid by third party payors and thus little incentive exists to engage in price comparisons. Or the patient simply may place

to make available materials concerning the services of competing suppliers; and permitting hospital-affiliated service providers access to patients needing ancillary services but denying access to competitors. See J. Miles, *Health Care & Antitrust Law*, "Provider Diversification," ch. 14 § 14.01 (Clark, Boardman & Callaghan 1995).

The antitrust laws do not require the consumer to suffer some form of direct or immediate monetary damage before a defendant's anticompetitive conduct is actionable. Being denied equal access to services is sufficient to violate the antitrust laws. See *Aspen Skiing Company v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 105 S.Ct. 2847, 2859-60 (1985) (consumers injured by not having easy access to all four skiing mountains); see also *Association of General Contractors of Cal. v. California St. Council of Carpenters*, 459 U.S. 519, 103 S.Ct. 897, 903 (1983) ("coercive activity that prevents its victims from making free choices between market alternatives is inherently destructive of competitive conditions and may be condemned even without proof of its actual market effect.").

In *Key Enterprises*, a hospital, after forming a durable medical equipment company ("DME") joint venture, steered its patients needing DME to the venture. The hospital changed two longstanding policies after the venture was formed. First, although no DME vendors had been permitted access to hospital patients prior to the venture, only representatives of the venture were permitted access to patients needing DME afterward. Second, although independent home health nurses had been primarily responsible for selecting the appropriate DME vendor prior to the venture, a representative of the venture subsequently took that responsibility.

In addition, the hospital instituted a default policy by which patients without a preference of a DME supplier would be referred to the venture automatically whereas a rotation system among DME vendors had been used previously. *Id.* at 1558. As a result of these practices, the DME venture's market share promptly increased from about 9 percent prior to the venture with the hospital to around 61 percent, while the competing DME's market share decreased from about 73 percent to 30 percent. Moreover, 64 percent of the venture's business consisted of the hospital's patients and about 85 percent of all hospital referrals for DME went to

the venture. *Id.* at 1566. In upholding a jury verdict on the attempted monopolization claim, the appeals court held that the hospital's conduct was predatory and sufficient to show a dangerous probability of monopolization. *Id.*<sup>10</sup>

The proposed Final Judgment in this case trenches the defendants' ability to engage in anticompetitive practices and to violate the antitrust laws because it requires Heartland physicians to "observe the attached and incorporated Heartland referral policy relating to the provision of ancillary services." Final Judgment, VII (B)(1). That referral policy impermissibly steers or channels Heartland patients to Heartland-affiliated ancillary services providers:

(1) The policy allows the doctor to initially order that a particular ancillary services provider be used, rather than allow the patient to choose freely among any of the ancillary services providers in the Northwest Missouri area. Because Heartland employs or is otherwise associated with the majority of physicians with staff privileges at Heartland's hospital, doctors will routinely order Heartland ancillary services providers for the patient. Hospital patients requiring ancillary services are frequently elderly, in ill health and are unlikely to question, let alone contest, a doctor's order, or to understand the basis for the recommendation or any underlying conflict of interest.

(2) Even if the doctor does not designate a certain ancillary services provider, the patient is nonetheless "steered" to Heartland because the patient is only informed that Heartland has excellent, fully accredited ancillary services available and then the patient is given a Heartland brochure. The patient is *not* informed about the availability of any competing ancillary services providers in the Northwest Missouri area.

(3) If the patient rejects Heartland's ancillary services providers, or specifically asks what other providers are available, the patient is *not* given the names of or any information about non-Heartland providers. Rather, the patient is told that Heartland cannot provide any information about or recommend any of the other ancillary services providers and the patient is then merely referred to the telephone book to look for other providers.

If a firm attempts to exclude rivals on some basis other than efficiency, it is

fair to characterize its behavior as "predatory." *Aspen Skiing Company v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 605 (1985). The predatory effect of Heartland's mandated referral policy is that consumers are channeled to Heartland-affiliated ancillary services providers, rather than being given timely and equal access to sufficient information on all ancillary services options and quality to be allowed to make an informed choice among those options. The presence of the referral policy in the proposed Final Judgment is a thinly-disguised but calculated effort to obtain the imprimatur of the Court's approval on a referral policy designed to maintain entry barriers to other ancillary service providers and enhance the defendants' market power.

B. Heartland, through its Referral Policy, effectively monopolizes the ancillary services market within Heartland's geographic service region, resulting in antitrust injury to consumers and other ancillary services providers.

The proposed Final Judgment and its incorporated referral policy impair competition in an unnecessarily restrictive way by foreclosing competing ancillary services providers from obtaining access to patients being discharged from acute care. The effect on competing ancillary service providers is devastating, because patients being discharged from acute care are a critical source of business for competing ancillary services providers. The effect of the referral policy is especially onerous because Heartland is the only acute care facility located in Buchanan County, Missouri. The closest comparable facility is North Kansas City Hospital, located in Clay County, Missouri, 60 miles south of St. Joseph.

To the extent that Heartland patients are systematically and successfully "steered" to Heartland affiliated service providers, competitors will be foreclosed from that source of patients. This raises serious antitrust concerns because there may be an insufficient number of remaining referrals for competitors to remain viable. The hospital-affiliated ancillary services providers are already obtaining a substantial market share and an unwarranted degree of market power in the ancillary services market, enabling them to raise and sustain prices above (or lower quality below) levels that would be achieved in a truly competitive marketplace.

Although firms have no duty under the antitrust law to promote their competitors, there are recognized exceptions to this rule in hospital diversification cases. One exception,

substantial trust in the hospital or its doctor and thus select its affiliated company because of its affiliation with the hospital. J. Miles, *Health Care & Antitrust Law*, "Provider Diversification," ch. 14, § 14.01 (Clark, Boardman & Callaghan 1995).

<sup>10</sup> Attached as Exhibit 5 for the Court's convenience is a copy of the *Key Enterprises* opinion which contains a thorough discussion of anticompetitive practices such as "channeling" and "leveraging" in a hospital diversification case.

applicable to the Heartland case, is where a hospital "leverages" its market power in one market (the "upstream" acute care market) to obtain a competitive advantage in a second separate market (the "downstream" ancillary services market). See e.g., *Advanced Health-Care Services, Inc. v. Radford Community Hospital*, 910 F.2d 139 (4th Cir. 1990) (hospital with monopoly power in the market for acute care hospital services can use that power to foreclose competition and gain unfair competitive advantage in the downstream market for ancillary services and DME); *Key Enterprises*, 919 F.2d at 1566-68.

The terms and the practical effect of Heartland's referral policy allow Heartland to gain an unfair competitive advantage in the ancillary services market. Comments and data supplied by competitors of Heartland-affiliated ancillary services underscore the concerns about the anticompetitive aspects of the proposed consent decree.<sup>11</sup> Specific examples of these concerns follow.

Patients from private (non-Heartland) long-term care facilities who are transferred to Heartland's hospital for acute care are not returned to the private long-term care facility upon discharge, even if the patient had been a long term resident of the private facility. Rather, the patients are transferred to either Heartland's skilled nursing facility, which charges a higher daily rate than comparable facilities in the community, or to Heartland's rehabilitation center. The patients are then kept in these Heartland care facilities until their Medicare coverage is exhausted. The patients are only returned to their former private facility if Heartland does not want them or if there is no Medicare coverage or private source of payment for the patient's care.

Patients of private home health care agencies experience similar exclusion from their prior provider. Patients who have been cared for by a non-Heartland home health care agency prior to being admitted to Heartland's hospital are not returned to that agency upon discharge. Instead, patients are being directed to Heartland's home health care unless the patient objects to the doctor's order or recommendation to use Heartland. The patients in question are often elderly, infirm and vulnerable, and may be unaware that they can object to a change in home health care providers and insist

<sup>11</sup> Attached as Exhibit 6 are letters from various ancillary services providers who compete with Heartland in the Joseph, Missouri service provider area, objecting to the proposed Final Judgment and explaining the direct impact of the Referral Policy on those providers.

that their former agency resume care upon the patient's discharge, or unable to assert their right to do so.

Heartland hospital staff do not give notice to a patient's prior ancillary services provider when that patient is to be discharged from the hospital. In some instances, prior providers report that their patients have been home for two to four days with no follow-up care by their home health care agency because the hospital failed to notify the former provider of the patient's discharge. This is grossly harmful to the patient and greatly affects the quality of the patient's care.

C. The Final Judgment contributes to cause direct antitrust injury to the public.

Owners of private long-term care facilities and home health care agencies uniformly report a significant loss in revenue, patient census and hospital referrals since Heartland began its referral policy.<sup>12</sup> Figures obtained from the 1994 Home Health Agency Annual Report show that among four competing home health care agencies operating in the St. Joseph, Missouri region, Heartland Home Care admitted almost 300 more new patients to its home health care service than its next closest competitor in St. Joseph, Missouri.<sup>13</sup>

An institutional pharmacy which serves 60 private (non-Heartland) nursing homes in St. Joseph and the surrounding area has lost significant amounts of business due to the overall loss of private nursing home patients to the Heartland system.<sup>14</sup> Heartland's own pharmacy services the needs of patients using Heartland's ancillary services.

<sup>12</sup> See Exhibit 6. Carriage Square Health Care Center reports that medicare patient days decreased from 5,689 in 1989 to 91 in 1995; St. Joseph Convalescent Center reports a loss of 1,302 patient days in 1993-94, 1,369 patient days in 1994-95, and 1,091 patient days between July, 1995 and September, 1995; Tiffany Square Convalescent Center reports that its occupancy rate dropped from 93.5% in 1993 to 79.7% in 1995; and Caregivers Home Health, Inc. reports that hospital patient referrals for home health care dropped from a high of 22 patients per month to a low of 8 patients per month during the period January, 1994 to July, 1995.

<sup>13</sup> See Exhibit 7, 1994 Home Health Agency Annual Reports for Heartland Home Care, Caregivers Home Health, Inc., Benders Home Care, Inc. and Kendallwood Home Health. [Note that the patient census figures for Kendallwood have been reduced by 50% on the Recap Sheet #1 to reflect only Kendallwood's St. Joseph agency, since Kendallwood operates another agency outside of the St. Joseph, Missouri region].

<sup>14</sup> See Exhibit 6, letters from Lipira Pharmacy indicating a yearly loss in revenue of between \$80,000 to \$100,000 due to loss of patients to Heartland's skilled nursing facility or Heartland's rehabilitation facility.

The Coalition believes these developments are not the result of Heartland's provision of superior or more efficient care or services. Rather, these trends reflect the effects of the referral policy, discharge practices, and other conduct by Heartland to steer patients to its own services and those of its affiliates.

D. Heartland's Referral Policy is inconsistent with federal regulations related to Discharge Planning that govern Medicare and Medicaid hospitals and with standards of the Joint Commission for Accreditation of Healthcare Organizations ("accreditation standards") to which Heartland subscribes.

Heartland's referral policy does not allow ancillary services providers, who have an established relationship with the patient before admission to Heartland's acute care hospital, to participate in discharge planning for their patients, thus preventing the providers from competing in the marketplace for the patient's business. Providers are given no notice of their patient's discharge by Heartland and have been specifically denied the opportunity to participate in discharge planning meetings for their patients. Heartland's referral policy is inconsistent with new federal regulations pertaining to discharge planning for the patient and with accreditation standards pertaining to informed consent by patients.

Effective January 12, 1995, the Health Care Financing Administration (HCFA) issued new regulations adopting more specific patient discharge planning standards for hospitals participating in Medicare and Medicaid programs. 42 CFR § 482.43.<sup>15</sup> The new regulations require, among other things, that a Medicare/Medicaid participating hospital:

(1) Identify at an early stage of hospitalization those patients likely to suffer adverse health consequences without discharge planning. § 482.43(a).

(2) Provide a "discharge planning evaluation" to such patients and to others upon request, which must include an evaluation of:

(a) The likelihood of a patient needing post-hospital services and of the availability of the services. § 482.43(b)(3).

(b) The likelihood of a patient's capacity for self-care or of the patient being cared for in the environment from

<sup>15</sup> Attached as Exhibit 8 is a copy of the Final Rule, published in 59 Fed. Reg. 64141 (December 13, 1994).

which he or she entered the hospital. § 482.43(b)(4).

(3) Discuss the results of the evaluation with the patient or individual acting on his or her behalf. § 482.43(b)(6).

(4) If the evaluation indicates the need for a discharge plan, an RN, social worker, or other appropriately qualified personnel must develop such a plan. § 482.43(c)(1);

(5) As needed, the patient and family members or interested persons must be counseled to prepare them for post-hospital care. § 482.43(c)(5).

The hospital has an obligation under these new regulations to evaluate the patient's capacity to return to the pre-hospitalization environment, which necessarily includes the ancillary services providers involved with the patient's care before the hospitalization. If the patient elects to return to the care of the same ancillary service provider as before hospitalization, it is reasonable to consider that pre-hospitalization ancillary services provider to be an "interested person" who must be "counseled", i.e. advised of the planned discharge date for the patient, in order to assure that appropriate arrangements are made on a timely basis.

One of the comments discussed by the HCFA in the Order of Rulemaking suggests that the hospital be required to give each patient the full range of options to consider for post-hospital care. In responding, HCFA stated that: "In most instances the focus on a return to the prehospitalization environment is a valid one, serving the interests of the patient within available community resources." HCFA concluded that the new regulation did not preclude a patient from being offered a full range of options to consider for post-hospital care and determined that no further change to the regulation was necessary. 64 Fed. Reg. 64147. The HCFA also agreed to incorporate, into the HCFA's "Interpretive Guidelines" covering discharge planning, the requirement that the hospital should "maintain complete and accurate information on community long-term care services and facilities for advising patients and their representatives of their options." 59 Fed. Reg. 64148.<sup>16</sup>

The Joint Commission for Accreditation of Healthcare Organizations ("JCAHO") has established standards for accredited hospitals governing Patient Rights and Organization Ethics, with the stated goal

of helping to "improve patient outcomes by respecting each patient's rights and conducting business relationships with patients and the public in an ethical manner".<sup>17</sup> An accredited hospital is required to obtain informed consent for all patient care, including discharge planning services. JCAHO Standard RI.1.2.1. The stated JCAHO intent for this requirement is to ensure that the hospital's staff clearly explain to the patient and, when appropriate, the patient's family, "any professional relationship to another health care provider or institution that might suggest a conflict of interest." JCAHO Standard RI.1.2.1. This standard requires Heartland's physicians or other staff members treating the patient, to explain to the patient any business relationships between the treating physician or hospital and any other organization of health care service involved in the patient's care, including Heartland's affiliation with certain ancillary service providers.

Moreover, an accredited hospital must operate according to a code of ethical behavior. JCAHO Standard RI.4. The JCAHO's stated intent for this standard is that a hospital must conduct its business patient care activities in an honest, decent, and proper manner, which includes marketing, admission, transfer, and discharge functions. JCAHO Standards RI.4

Heartland's referral policy, the manner in which it manages discharge planning functions, and related conduct are inconsistent with both the HCFA regulations and the JCAHO standards.

E. The Court should strike the Referral Policy from the Final Judgment, or in the alternative, order Heartland to adopt a revised policy such as the "Model Referral Policy" submitted by Amicus Curiae.

For those reasons set forth in Part III (A) to (D) above, amicus urges the Court to strike Heartland's referral policy from the terms and conditions of the proposed Final Judgment. The referral policy is not a necessary component for the protection of managed care, the principal thrust of the proposed judgment and the entire focus of the Complaint. Even if it does relate to managed care issues, however, it should be rejected as inappropriate. In the alternative, amicus respectfully suggests that the parties adopt or the Court impose a substitute referral policy whose terms and conditions are similar to those set forth in the "Model Referral

Policy" attached to this Memorandum as Exhibit 9.

Anticompetitive concerns, whether directly related to managed care or not, can best be met through a referral policy that affords each patient equal access to and information about all ancillary services available within Heartland's geographic region. By the same token, the policy should provide ancillary services providers equal access to Heartland patients. Amicus curiae strongly believes that its Model Referral Policy achieves these objectives. The highlights of the policy include the following provisions:

1. The hospital must commit to promote and support a patient's right to make an informed choice by ensuring that its staff and employees implement and follow the terms of the referral policy.

2. The policy is to be administered and monitored by an independent social worker or "ombudsman," whose salary and expenses could be shared equally among the competitors (including Heartland), in order to preserve the ombudsman's independence.

3. When ancillary services are ordered by a physician, the ombudsman must fully inform the patient of all options for ancillary services within Heartland's geographic region and insure that a patient's choice of provider is honored.

4. When a patient is admitted to Heartland's hospital from a private long-term or skilled nursing facility, or if a patient is a current client of a home health care agency, that provider's name should be noted on the patient's chart. Prior ancillary services providers must be notified of and encouraged to participate in any discharge planning for their patients.

5. All ancillary services providers will be allowed access to Heartland patients who request contact with that provider, or if the patient is a current client of that provider. Further, all ancillary services providers should be allowed to supply the ombudsman with brochures about their services which will be available to the patient, but not to competing ancillary services providers.

A referral policy embracing the foregoing provisions would promote healthy competition in the ancillary services market and "level the playing field."

F. The terms of the Final Judgment give unfair competitive advantage to Heartland in the primary care physician market.

Other terms and conditions of the Final Judgment give unfair competitive advantage to Heartland in the primary care physician market. Specifically,

<sup>16</sup> As of the date of filing this Memorandum, the HCFA had not yet issued new Interpretive Guidelines incorporating the referenced requirement.

<sup>17</sup> Joint Commission for Accreditation of Healthcare Organizations, "Patient Rights and Organizational Ethics," § 1 (1995).

under the terms of the proposed consent decree, Heartland is allowed to employ or acquire, without preapproval from the DOJ, an unlimited number of physicians who are not currently located in Buchanan County, so long as less than 20% of the physician's income was derived from patients living in Buchanan County. Final Judgment, Part VIII (B).

Further, the consent decree does not limit the number of new doctors that Heartland can bring into Buchanan County to work for Heartland (as employees or through acquiring their practice), so long as Heartland incurs substantial costs in recruiting the doctors, or gives them substantial financial support or income guarantees. Even though the acquisitions require prior notice to the government, approval will be given if the financial criteria are met. Final Judgment, Part VIII (C).

Finally, the consent decree allows Heartland, with prior DOJ approval, to acquire the practice or employ any physician who finds he or she cannot practice in Buchanan County *unless* hired by Heartland. Final Judgment, Part VIII (D).

The foregoing provisions enable Heartland to further enhance its monopoly power and regional control of physician services, i.e. if independent physicians cannot compete successfully with doctors owned by Heartland, they have to join Heartland to survive. The practical effect of the foregoing provisions is that Heartland's physician base will continue to grow and monopolize the market for primary care physicians in Northwest Missouri and Northeast Kansas, leaving sole practitioners with little choice but to join Heartland or move their practices elsewhere. One can scarcely posit a clearer example of single firm power to control price and exclude competition.

Amicus curiae urges the Court to scrutinize the terms of the proposed Final Judgment and Competitive Impact Statement in light of the fact that neither the DOJ nor the defendants have produced any studies, surveys, or other economic data, or even any affidavits from economists, to show that the proposed decree will result in an increase in competition in the managed care program market, the primary care physician market, or the ancillary services market, or that the decree will prevent Heartland from monopolizing the remainder of those markets. Amicus accordingly urges the Court to require further submissions from the DOJ both by way of expert affidavits and the production of documents and economic data, to explain how permitting Heartland to continue to acquire

unlimited numbers of primary care physicians and to continue to allow its physicians to channel Heartland patients to Heartland-affiliated ancillary services providers, can be argued to be in the "public interest."

G. The proposed Final Judgment lacks an effective and affirmative Compliance Program and enforcement provisions.

The proposed consent decree lacks accountability provisions to ensure that Heartland hospital patients, and patients of Heartland's physicians, are being given sufficient, unbiased information to allow the patient to make an informed choice among all available ancillary services providers. Moreover, the Compliance Program set forth in the proposed Final Judgment requires only self-reporting of Heartland's proposed acquisitions or other actions covered by the Final Judgment and an annual certification by the defendants that the Final Judgment terms are being adhered to. Final Judgment, § X. Although the DOJ is given what it already has—"access" to the defendants' records and personnel and the right to obtain written reports from the defendants—there is no *requirement* that written reports be made to the DOJ by any of the defendants, and no requirement that the Department *will* conduct periodic or even annual inspections of books and records and interview of personnel.

Without an affirmative requirement of regular, periodic written reports or government inspections to determine compliance, it will be virtually impossible to determine whether violations of the terms and provisions of the Final Judgment have occurred.

In addition to lacking effective compliance provisions, the proposed Final Judgment provides no judicial mechanism to monitor and enforce the final judgment if its terms are violated. In *United States v. Associated Milk Producers, Inc.*, 394 F.Supp. 29 (W.D. Mo. 1975), Judge Oliver addressed these very concerns, finding that "many persons who may be affected by a consent decree simply do not possess and are not furnished with any information in regard to the manner in which alleged violations of a final judgment entered upon a proposed consent decree are to be brought before the Court for appropriate judicial enforcement proceedings." *Id.* at 46. To remedy this situation, Judge Oliver entered a Supplemental Order establishing enforcement and modification procedures to be followed in the event of violations by the defendants of the final judgment.

Similar, appropriate judicial enforcement provisions should be

crafted by the Court and included in the Final Judgment, or as a Supplementary Order, in this proceeding.

#### IV. Conclusion

The proposed Final Judgment is not in the public's interest because it fails to address adequately, much less remedy, the foregoing concerns about the Heartland referral policy, Heartland's physician practice and recruitment efforts, and Heartland's other conduct, which create conditions that facilitate unlawful maintenance of monopoly power by Heartland through anticompetitive and coercive means, conditions conducive to a successful attempt by Heartland to monopolize both the primary care physician market and the ancillary services market in Northwest Missouri and Northeastern Kansas, and conditions that permit Heartland to channel or steer patients in need of ancillary services only to providers it owns, controls, or in which it maintains a significant economic interest.

Amicus strongly urges the Court to strike the incorporated referral policy from the terms of the proposed Final Judgment, or in the alternative to revise the referral policy to conform to the terms and conditions set forth in the "Model Referral Policy" proposed by amicus. In addition, amicus urges the court to strengthen the oversight and reporting provisions of the Compliance Program contained in the constant decree, and to incorporate into the consent decree enforcement and modification procedures to be followed in the event of violations by the defendants of the decree.

Finally, amicus respectfully requests the Court to allow amicus to participate in any proceedings or hearings conducted by the Court to determine whether the proposed consent decree is in the public's interest, including oral arguments and presentation of evidence in support of amicus curiae's opposition to the proposed decree.

Respectfully submitted,

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#### Certificate of Mailing

I hereby certify that a true and correct copy of the foregoing document was mailed, postage prepaid, this 1st day of December 1995 to the following counsel of record:

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Western Illinois Home Health Care, Inc.

Gail Hursh,

*Chief Professions & Intellectual Property Section, Health Care Task Force, Department of Justice, Antitrust Division, 600 E. Street, N.W., Room 9300, Washington, D.C. 20530*

Dear Gail Hursh: I am writing in reference to the proposed settlement of *United States v. Health Choice of Northwest Missouri*, et al. Case No. 95-6171-CV-SJ-6. I am writing in reference to deep concern over the settlement of this case that could open wider an exclusive market to the hospital based home care agency. They now, even with the present statute, control the referrals out of the hospital with intentional direction to their hospital based home care agency. Opening this door even wider will put them in the drivers seat and force many independent home care agencies out of business. It defeats any strives to force excellent care with the forces of competition, and puts them in control of our health care dollar usage.

In our area, hospitals have even excluded us from visiting previous patients that are hospitalized. We have lost patients that had asked for us stating in misleading terms that I am sending your home care nurse out; to their dismay when they arrive home they have never met that nurse or the hospital agency.

I had read once that there was a movement to require hospitals to publicize a list of discharges and where the referral was made and to incorporate fines for misuse of their system. I would hope we would go in that direction in some fashion to prevent what was not ever intended; exclusive control of the health care system by certain providers.

I appreciate your sincere review of this point of view and concern.

Sincerely,

Barbara Byers,

*Chief Executive Officer, Western Illinois Home Health Care Inc.*

Delta County Memorial Hospital

100 Stafford Lane, P.O. Box 10100, Delta, Colorado 81416-5003, (970) 874-7681

November 30, 1995.

Gail Kursh,

*Chief Professions & Intellectual Property Section, Health Care Task Force, Department of Justice, Antitrust Division, 600 E. St. N.W., Room 9300, Washington, D.C. 20530*

Ms. Kursh, I recently read the article in "Home Health Line" regarding the judgement for the *United States vs Health Choice of Northwest Missouri, Inc.*, et al., Case No. 95-6171-CV-SJ-6, regarding the choice of Home Health Agencies for hospitalized patients.

The article was very informative and very timely for our institution. We have a hospital-based Home Health agency and in the past year there has been several new agencies that have moved into the area. Generally, when our physicians order Home Health it will be the hospital's agency, since they are familiar with the nursing staff, their practices and the quality of care they provide.

Currently, our Discharge Planners will inform the patient the physician has ordered Home Health and that the hospital has it's own agency. If the patient requests other options for Home Health, we provide them with a written list of the other agencies in the area, then inform them that this will have to be discussed and approved by the physician, since he is the one who have to deal with a different agency. So far, this has worked well.

We have been approached by outside Home Health agencies requesting to sit in our Discharge Planning Conferences, which I find totally inappropriate. That is like having a stranger come in off the streets and hear about our patients, their medical condition or home situation, a total breach of patient confidentiality. Our hospital's Home Health agency does participate in our Discharge Planning Conferences, since many of the patients are currently their clients and any new referrals will probably go to them.

I certainly do not agree with a rotation system either. Discharge Planning in our community is difficult enough without having the added complication of keeping track which agency is next on the list. Along with the fact we have no first-hand knowledge about the quality of care they provide. Nor do I agree with allowing them access to our patients in the hospital. These patients are here because they are sick, they certainly do not want or need a "Salesman" pounding on their door. For one thing the patient may not even need Home Health. Secondly, I am sure our patients do not want four or five agency personnel knowing about their medical condition or that they are even in the hospital. AGAIN, WHAT HAPPENED TO PATIENT CONFIDENTIALITY????

I think if these Home Health agencies want to expose the public to the availability of other Home Health Care agencies in the area, they need to advertise like every other business. That way patients may ask for their particular agency if or when the need arose.

Thank you for this opportunity to express our concerns on this matter.

Sincerely,

Ramona Frazier,  
*QA/Risk Manager.*  
 Joyce Gillespie,  
 Marti Svensen

North Georgia Home Health Agency, Inc.  
 Main Office, 1875 Fant Drive, Ft. Oglethorpe, Georgia 30742, 706/861-5940

December 1, 1995.

Gail Kursh,

*Chief, Professional & Intellectual Property Section/Health Care Task Force, Department of Justice, Antitrust Division, 600 E. Street, N.W., Room 9300, Washington, D.C. 20530.*

*Re: Comments on Proposed Final Judgement: United States vs. Health Choice of Northwest Missouri, Inc., et al., Case No. 95-6171-CV-SJ-6 in the U.S. District Court for the Western District of Missouri*

Dear Ms. Kursh: As a home health care provider I have first-hand knowledge of the subject matter the Department of Justice is dealing with in the above referenced matter. I also understand the influence a hospital can exert in a patient's selection of post-hospital ancillary services, including the selection of a home health care provider. For these reasons, I have reviewed and studied the DOJ's recommended home health, DME and hospice referral policy for Heartland Hospital.

In the interest of protecting patient choice (which is guaranteed by both Federal and State laws,) as well as maintaining fair competition consistent with the antitrust laws and FTC regulations, I respectfully submit that the final proposed judgement (recommended policy) be modified as such:

- Strengthen limitations on the hospital's ability to refer its patients to its own hospital-based components;

- Require the hospital to provide patients with an updated list of Medicare/Medicaid providers in the community;

- Require the hospital to use a rotation system, which assures equitable referrals to all providers in the area;

- Require the hospital to permit (on their premises, during normal working hours) representatives of freestanding providers—other than their own hospital-based components—to visit their patients who have been admitted for hospitalization; and to expose the patient population to the availability of outside services as well;

- Make the hospital publicly post its daily referrals to both its hospital-based entities and to other providers in the community.

On behalf of our home health agency and the patients we serve, we respectfully ask that you give these comments due consideration. These issues are of even more concern in today's era of health care and provider consolidation.

Sincerely,

Sherylon Smith,  
*Administrator.*

SS:so

Lutheran Home Care Service, Inc.  
2700 Luther Drive, Chambersburg, PA  
17201-8132, VOICE/TDD/TT/FAX, 717/264-  
8178 and 762-3996

December 1, 1995.

Gail Kursh,  
Dept. of Justice, Antitrust Division, 600 E. St.,  
N.W., Room 9300, Washington, D.C.  
20530

Dear Ms. Kursh, I am writing to register a complaint regarding the proposed referral policy for home health, DME and hospice recommended by the Department of Justice. We have been the primary provider of home health and hospice within our community for 18 years. Due to philosophical differences between our agency and the local hospitals we did not become the hospitals home health provider. The two small local hospitals brought in another home care agency from outside of our area. This provider already has an advantage over us since they have formed an alliance with the hospitals. Our hospitals, have tried to be very fair in offering choices to the patients, however, if this new referral policy is approved then we are at a significant disadvantage.

Lutheran Home Care Services, Inc. supports the modifications as proposed by the Coalition for Quality Healthcare. Those of us who have provided faithful quality services, as well as hundreds of thousands of dollars in benevolent care over many years should not be put at significant risk which would occur if this policy were passed. We are doing our part to try and keep our share of the market. We should not be penalized by a policy that clearly favors the hospital based agencies.

Sincerely,

Diane M. Howell,  
Executive Director.

November, 27, 1995.

Gail Kursh,  
Chief, Professions & Intellectual Property  
Section/Health Care Task Force, Dept. of  
Justice, Antitrust Division, 600 E St., NW  
Room 9300, Washington, DC 20530

Dear Ms. Kursh: I am an employee in a small, rural freestanding home health care agency. I have read with great dismay the recent DOJ ruling in the matter of United States v. Health Choice of Northwest Missouri Inc.

In our own community, a local hospital-based program has instituted unfair practices which have practically eliminated competition in our service area.

I know that in our government, numbers count. Let me add my voice to the many who will ask you to modify the decision to include the following language:

¶ Strengthen limitations on a hospital's ability to refer its patients to its own hospital-based components;

¶ Require the hospital to use a rotation system, which assures equitable referrals to all providers who offer the same level of certification and/or accreditation, or higher in the area—Hospitals are well aware of the accreditation of local providers;

¶ Require the hospital to permit (on their premises, during normal working hours), representatives of freestanding providers;

¶ Make the hospital publicly post its daily referrals to both its hospital-based entities and to other providers in the community.

Sincerely yours,

Gaina Keljawski.

Tugaloo Home Health Agency, Inc.  
P.O. Box 77, Lavonia, Georgia 30553, (706)  
356-8480

December 1, 1995.

Gail Kursh,  
Chief, Professional and Intellectual Property  
Section/Health Care Task Force,  
Department of Justice, Antitrust Division,  
600 E. St., NW., Room 9300, Washington  
DC 20530

Re: *Comments on Proposed Final Judgment  
United States v. Health Choice of  
Northwest Missouri, Inc., et al., Case No.  
95-6171-CV-SJ-6 in the U.S. District  
Court for the Western District of Missouri*

Dear Ms. Kursh: As a home health care provider I have first-hand knowledge of the subject matter the Department of Justice is dealing with in the above referenced matter. I also understand the influence a hospital can exert in a patient's selecting of post-hospital ancillary services, including the selection of a home health care provider. For these reasons I have reviewed and studied the DOJ's recommended home health, DME and hospice referral policy for Heartland Hospital.

In the interest of protecting patient choice (which is guaranteed by both Federal and State laws) as well as maintaining fair competition consistent with the antitrust laws and FTC regulations, I respectfully submit that the final proposed judgment (recommended policy) be modified as such:

- Strengthen limitations on the hospital's ability to refer its patients to its own hospital-based components;
- Require the hospital to provide patients with an updated list of Medicare/Medicaid providers in the community;
- Require the hospital to use a rotation system, which assures equitable referrals to all providers in the area;
- Require the hospital to permit (on their premises, during normal working hours) representatives of freestanding providers—other than their own hospital-based components—to visit their patients who have been admitted for hospitalization; and to expose the patient population to the availability of outside services as well;
- Make the hospital publicly post its daily referrals to both its hospital-based entities and to other providers in the community.

On behalf of our home health agency and the patients we serve, we respectfully ask that you give these comments due consideration. These issues are of even more concern in today's era of health care and provider consolidation.

Sincerely,

Captain C.C. Dudley,  
Executive Director.

November 27, 1995.

Gail Kursh,

Chief, Professions & Intellectual Property  
Section/Health Care Task Force, Dept. of  
Justice, Antitrust Division, 600 E St.,  
NW., Room 9300, Washington, DC 20530

Dear Ms. Kursh: I am an employee in a small, rural freestanding home health care agency. I have read with great dismay the recent DOJ ruling in the matter of United States v. Health Choice of Northwest Missouri, Inc.

In our own community, a local hospital-based program has instituted unfair practices which have practically eliminated competition in our service area.

I know that in our government, numbers count. Let me add my voice to the many who will ask you to modify the decision to include the following language:

¶ Strengthen limitations on a hospital's ability to refer its patients to its own hospital-based components;

¶ Require the hospital to use a rotation system, which assures equitable referrals to all providers who offer the same level of certification and/or accreditation, or higher in the area—Hospitals are well aware of the accreditation of local providers;

¶ Require the hospital to permit (on their premises, during normal working hours), representatives of freestanding providers;

¶ Make the hospital publicly post its daily referrals to both its hospital-based entities and to other providers in the community.

Sincerely yours,

L. Patterson

November 13, 1995.

Chief Gail Kursh,  
Profession & Intellectual Property Section,  
Health Care Task Force, Department of  
Justice, Antitrust Division, 600 E St.,  
NW., Room 9300, Washington, DC 20530

Dear Chief Kursh: This letter is to provide my comments on the proposed final judgement for United States v. Health Choice of Northwest Missouri, Inc. et al., Case No. 95-6171-CV-SJ-6 in the U.S. District Court for the Western District of Missouri.

I have read the Department of Justice's recommended home health, DME and hospice referral policy for Heartland Hospital and as a home health provider I find it continues to impede fair competition and preserves the hospital monopoly on referrals to home care.

My background encompasses home care from public health to proprietary agencies. I have witnessed hospital-based agencies take on case overloads that prevents adequate care being provided. A prime example is Medicare patients requiring skilled nursing and home health aide services. In the Omaha area there is a severe shortage of home health aides so the patient is advised they are entitled to two "bath visits" per week. The patient often infers this is all Medicare allows when instead it is all that can be staffed. The assumption cannot be made that the agency is just being conservative with Medicare because often the skilled nursing and therapies are maximized when the patient really needs more assistance with personal care. The purchase power of Medicare is severely decreased when one agency provides a "bath visit" for one hour

versus an agency that can provide staff to provide a two hour visit giving more personal care. With the lack of competition and patients not knowledgeable of their benefits we will continue to see our health care dollars erode.

I do not feel this present policy goes far enough to encourage fair competition. I would like to see the final judgement modified to strengthen limitations on the hospitals ability to refer its patients to its own health care agencies. I think the hospital should be required to use a rotation system which assures equal referrals to all providers and allow the freestanding providers to visit the hospitalized population to expose them to the availability of outside services.

Thank you for your consideration on this issue.

Glenelle Kruse,

208 N. Chestnut, Glenwood, Iowa 51534, 712-527-4372.

Cabarrus County Home Health

28 Branchview Dr., NE, P.O. Box 707, Concord, N.C. 28026-0707, Phone (704) 788-8180, Fax (704) 788-9876

November 30, 1995.

Gail Kursh,

*Chief, Professional & Intellectual Property Section/Health Care Task Force, Department of Justice, Antitrust Division, 600 E Street, NW, Room 9300, Washington, DC 20530*

Re: *Comments on Proposed Final Judgment: United States v. Health Choice of Northwest Missouri, Inc., et al., Case No 95-6171-CV-SJ-6 in the U.S. District Court for the Western District of Missouri*

Dear Ms. Kursh: As a home health care provider I have first-hand knowledge of the subject matter the Department of Justice is dealing with in the above referenced matter. I also understand the influence a hospital can exert in a patient's selection of post-hospital ancillary services, including the selection of a home health care provider. For these reasons I have reviewed and studied the DOJ's recommended home health, DME and hospice referral policy for Heartland Hospital.

In the interest of protecting patient choice (which is guaranteed by both Federal and State laws) as well as maintaining fair competition consistent with the antitrust laws and FTC regulations, I respectfully submit that the final proposed judgment (recommended policy) be modified as such:

\* Strengthen limitations on the hospital's ability to refer its patients to its own hospital-based components;

\* Require the hospital to provide patients with an updated list of Medicare/Medicaid providers in the community;

\* Require the hospital to use a rotation system, which assures equitable referrals to all providers in the area;

\* Require the hospital to permit (on their premises, during normal working hours) representatives of freestanding providers—other than their own hospital-based components—to visit their patients who have been admitted for hospitalization; and to expose the patient population to the availability of outside services as well;

\* Make the hospital publicly post its daily referrals to both its hospital-based entities and to other providers in the community.

On behalf of our home health agency and the patients we serve, we respectfully ask that you give these comments due consideration. These issues are of even more concern in today's era of health care and provider consolidation.

Sincerely,

JoAnn Reed,  
*Director.*

Emerald Care

2923 Rousseau Court, Gastonia, NC 28054, Fax: 704-864-3673, Toll-Free Tel: 1-800-427-1143, Telephone: 704-867-1141

December 1, 1995.

Gail Hursh,

*Chief Professions & Intellectual Property Section, Health Care Task Force, Department of Justice, Antitrust Division, 600 E. Street, NW., Room 9300, Washington, D.C. 20530*

Re: *United States versus Health Choice of Northwest Missouri, et al., Case Number 95-6171-CV-SJ-6*

Dear Ms. Hursh: I have received a copy of your recommended Home Health, Durable Medical Equipment and Hospice Referral Policy for Heartland Hospital and I have reservations about your recommended action. Please consider the following:

- Hospitals now own physician practices and in our area, our community-based hospital owns several physician practices and is planning to build a five-story building for physician offices. The physicians, therefore, are strongly encouraged to refer to the hospitals' home health agency. Because of the financial-ownership relationship, this "encouragement" is more like a demand or directive. This type of relationship/requirement approaches a conflict of interest issue.

Concerning Heartland Hospital not being able to recommend another home health agency:

- A community-based hospital has a responsibility to maintain information on pertinent resources for the education of their staff. While no hospital can fully guarantee or totally recommend the services of any large home health agency, including their own, they can and should give patients an informed choice based upon written or verified information from the established, licensed and accredited home health agency, home medical equipment company, pharmacies, etc. Your statement implies that since a home health agency is not part of a hospital, i.e., Heartland, the discharge planner cannot recommend them.

I applaud your effort in emphasizing *patient choice* in the referral/selection of a home health agency. Patients need to be informed of the resources such as licensed/accredited home health agencies before a decision is made. Physicians also need the ability to make a choice that is based on the good of their patients and what their patients want without possible recrimination by the hospital, with whom the physician may have an employee relationship.

Many patients who need home health services are elderly and vulnerable. The idea that these fragile persons have to ask for choices of available ancillary services, after being identified as needing these services, is not fair to the client.

I thank you for the opportunity to comment. If you have any questions please do not hesitate to call.

Sincerely,

Eileen A. Klimkowski,  
*Executive Director.*

Cooper Home Health, Inc.

51 North Side Square, Cooper, Texas 75432, 903-395-2811, 800-395-5357, FAX 903-395-2766

November 30, 1995.

Gail Kursh,

*Chief, Professions & Intellectual Property Section/Health Care Task Force, Department of Justice, Antitrust Division, 600 E St., NW., Room 9300, Washington, DC 20530*

Re: *United States v. Health Choice of Northwest Missouri, Inc., et al., Case No. 95-6171-CV-SJ-6*

Dear Chief Kursh: As an owner/administrator of a private home health agency in Texas, I would like to comment on the above referenced case and ask for consideration for small business owners. It appears that this case reflects the same problems experienced by privately owned home health agencies in competition with hospital-based agencies. In short, hospitals have a built-in referral base and are reluctant to refer patients to outside home care agencies for obvious reasons. I personally am familiar with numerous examples in which patients were not given a choice, and some were even misled into thinking their physician had made the choice for them. In reading the proposed procedure developed by Heartland Health System, I am convinced that approval of this procedure will solidify the power of hospital discharge planners to exclude outside agencies and refer exclusively to their own.

The proposed procedure is also in direct conflict with the Texas Association for Home Care Code of Ethics which states:

- Agencies shall honestly and conscientiously cooperate in providing information about referrals and shall work together to assure comprehensive services to clients and their families.

- Member agencies shall not engage in coercive or unreasonably restrictive exclusionary behavior which would restrict or impede consumer choice of provider agencies. A member agency or related entity that provides a screen to clients for home care referrals shall not use that position to influence a client's choice and to direct referrals to itself, and shall inform clients of the availability of home care providers and advise clients that they have the right to choose the provider they prefer.

The proposed procedure would allow Heartland Health System to present information regarding its service without any mention of other providers. It is obvious this procedure does not allow the patient to make

an informed choice, especially if he does not express a preference. At a minimum, the discharge planner should be required to make available a listing of all providers in the patient's community without showing preference to any provider.

I would sincerely appreciate your careful consideration of this case, and hope that you can be sympathetic to the position of privately owned businesses. Many current practices are already in violation of the antitrust laws, and approval of Heartland's proposed procedure would give hospitals and other health systems the ability to restrict trade even further. Thank you for your concern.

Respectfully,

Nicki J. Beeler,  
Administrator.

At Home Health Care

900 Veterans Blvd., Suite 230, Redwood City,  
California 94063, (415) 368-1182, FAX (415)  
368-1184

December 2, 1995.

Ms. Gail Kursh,

Chief, Professional & Intellectual Property  
Section/Health Care Task Force,  
Department of Justice, Antitrust Division,  
Room 9300, 600 E. Street, N.W.,  
Washington, D.C. 20530.

Dear Ms. Kursh: Below are comments on the proposed final judgement for United States v. Health Choice of Northwest Missouri, Inc., et al., Case No. 95-6171-CV-SJ-6.

Section II.B.2. and 3. of the referral policy:

De facto, the result will be no true patient choice. Before long, no other qualified provider will ever hear about potential clients they could be caring for. If the hospital is allowed to be the first and only provider to "sell to" the sick and dying, the frail elderly, and their beleaguered families, few other providers will get referrals. This is a fox in the hen house situation.

We say this because hospitals, being almost universally in a strapped financial condition, put enormous pressure on their self-owned home care agencies. In our area, they are nothing less than predatory. They discard the literature we deliver to the hospital, they cajole the doctors at hospital staff meetings, and they disguise home care agency nurses as hospital-employees, i.e., Discharge Planners.

Earlier this year, we received a referral from the ALS foundation (Lou Gehrig's Disease) and the patient's family. When our nurse went to the hospital for the discharge planning session, the hospital's "discharge planner" was actually a nurse from the hospital-based home care agency. In fact, she made the comment that she didn't quite know how to handle the situation; she said she'd never given a patient to another agency before.

Usually, the "discharge planners" are more discreet than this, but they invariably believe that all hospital patients belong to them. If they "release" a patient to another agency, they believe it is a result of their largesse.

A common ploy is "I'm so sorry Mrs. So-and-so, but the paperwork is already made out. Just try us for the first day. If it doesn't

work out, you can change agencies tomorrow." The normal reply from a sick, elderly person is, "I don't want to be a bother to anyone." A frail, fatigued, 85-year old should not be expected become an informed consumer at the time of discharge.

Handing the patient a phone book is completely unacceptable. The very least they could do is provide them a "Help at Home" booklet or "Senior Handbook" published, if not by the hospital itself, then by the county of residence. As written, this art of the recommended referral policy would be insulting to the patient.

We urge the Department of Justice to make sure that Heartland is not made the fox in the hen house. Even more cogent, however, is the Department's moral obligation to insure that American citizens, at their most vulnerable moment, are not taken advantage of.

Sincerely yours,

Robert J. Brock,  
Vice President.

cc: California Association for Health Care at  
Home, Attn: Connie Little, RN

November 30, 1995.

Gail Kursh,

Chief, Professions & Intellectual Property  
Section/Health Care Task Force,  
Department of Justice, Antitrust Division,  
600 E St., NW, Room 9300, Washington,  
DC 20530.

Re: U.S. v. Health Choice of N.W. Missouri,  
Inc., Case No. 95-6171-CV-SJ-6

Dear Chief Kursh: As a social worker for a private home health agency in Texas, I would like to comment on the above mentioned case and ask for consideration for patient rights to informed choices. Hospitals have a built-in referral base and are reluctant to refer patients to home health agencies other than their own. In reading the proposed procedure developed by Heartland Health System, I am convinced that approval of this procedure will give discharge planners the power to refer exclusively to their own agencies. The proposed procedure is also in direct conflict with the Texas Association for Home Care code of Ethics. Patients must have the right to make a informed choice of health care. Thank you for your concern.

Respectfully,

Gregory Grinstead.

November 27, 1995.

Gail Kursh,

Chief Professions & Intellectual Property  
Section/Health Care Task Force, Dept. of  
Justice, Antitrust Division, 600 E St. NW  
Room 9300, Washington, D.C. 20530

Dear Ms. Kursh: I am an employee in a small, rural freestanding home health care agency. I have read with great dismay the recent DOJ ruling in the matter of United States v. Health Choice of Northwest Missouri Inc.

In our own community, a local hospital-based program has instituted unfair practices which have practically eliminated competition in our service area.

I know that in our government, numbers count. Let me add my voice to the many who will ask you to modify the decision to include the following language:

fi Strengthen limitations on a hospital's ability to refer its patients to its own hospital-based components;

fi Require the hospital to use a rotation system, which assures equitable referrals to all providers *who offer the same level of certification and/or accreditation, or higher* in the area—Hospitals are well aware of the accreditation of local providers;

fi Require the hospital to permit (on their premises, during normal working hours), representatives of freestanding providers;

fi Make the hospital publicly post its daily referrals to both its hospital-based entities and to other providers in the community.

Sincerely yours.

Margaret Klan,

4 Oakridge Drive, Marquette, MI 49855.

Richmond Healthcare Consultants, Inc.

303 South A Street, Richmond, IN 47374,  
(317) 935-4677

November 30, 1995.

Gail Hursh,

Chief, Professions & Intellectual Property  
Section/Health Care Task Force,  
Department of Justice, Antitrust Division,  
600 E Street, N.W. Room 9300,  
Washington, D.C. 20530

Re: *United States v. Health Choice of Northwest Missouri, et al.*, Case No. 95-6171-CV-SJ-6, United States District Court for the Western District of Missouri

The proposed settlement would unduly burden non-hospital based home care agencies.

As a President of two non-hospital owned agencies in a 78,000 population community with one hospital, my agencies, as well as the other non-hospital agencies, have to scratch and dig to PRESERVE our clients who become hospitalized. The hospital has been documented pressuring our patients to change to the hospital owned agency.

We have clients who specifically request us by name and they get the hospital based agency in spite of their requests. They voice dissatisfaction to their doctors who are also under pressure by the hospital (via their privileges) to refer only to hospital based agency services.

We (the non-hospital based agencies) must constantly monitor their activities to prevent duress to our patients.

A settlement as described would in my opinion let free the modicum of restraint the hospital maintains now due to the existing anti-trust regulations.

There would be no holds barred, no competition for the hospital and I see even now the effects of lesser quality provided by some hospital based services becoming even less quality oriented without strict enforcement of anti-trust activities. The hospital presently takes the bulk of all discharged clients as it is.

I plead for enforcement of the anti-trust regulations, not a lessening of them. On behalf of my staff and clients, I thank you for your time.

Sincerely,  
Robin King,  
Administrator.

RK/sf

Cooper Home Health, Inc.,  
51 North Side Square, Cooper, Texas 75432,  
903-395-2811, 800-395-5357, FAX 903-  
395-2766.

November 30, 1995.

Gail Kursh,  
Chief, Professions & Intellectual Property  
Section/Health Care Task Force,  
Department of Justice, Antitrust Division,  
600 E St., N.W., Room 9300, Washington,  
D.C. 20530

Re: United States v. Health Choice of  
Northwest Missouri, Inc., et al., Case No.  
95-6171-CV-SJ-6

Dear Chief Kursh: As an owner/DON of a small, private home health agency in Texas, I would like to take this opportunity to comment on the above case. This case reflects a growing problem for those of us in the private industry. There is fierce competition in the home health industry for patient referrals on the whole. Most hospitals now have their own home health departments. These hospitals have a built in referral system and are reluctant to refer patients to competing agencies for obvious reasons. Currently discharge planners are required to give patients a choice when a referral for home health is ordered by the physician. Some discharge planners are not giving patients a choice now due to pressures from their administration to refer to the hospital home health. Should the proposed procedure be approved, there will be very little, if any, incentive for outside referrals to be made. This will effectively exclude private home health agencies from receiving any referrals from hospitals.

The main focus of those of us in the health care industry should always be the welfare of the patient. The patient must always be given a choice and assisted with whatever information he or she needs to make that choice. This proposed process, as it is currently written, would remove patient welfare as a top priority and be replaced by the desire for increased revenue/volume.

I feel that at the very least, the discharge planners must give patients a list of home health agencies in the area. I also feel that patients should be assisted to make decisions about different agencies; i.e.: agencies that may specialize in certain areas of service.

Please consider all of the above when making a decision about this proposed procedure. The relationship between hospitals and home health agencies is strained now due to competition for patients. The passing of this procedure would only prove to give hospitals a greater monopoly than they currently have further straining relationships and shoving patient welfare to a far, distant priority.

Thank you for your time and concern in this matter.

Sincerely,  
Tina Janes,  
DON.

Tami L. Becker, R.N., B.S.N.,  
14 Zanella Dr., Emmitsburg, Md. 21727

November 15, 1995.

Gail Kursh,  
Chief, Professions & Intellectual Property  
Section/Health Care Task Force, Dept. of  
Justice, Antitrust Division, 600 E Street,  
Northwest—Room 9300, Washington,  
D.C. 20530

Dear Gail: I am writing in response to the article published in \* \* \* home health line, November 13, 1995, regarding the final judgement for United States v. Health Choice of Northwest Missouri, Inc., et al., Case No. 95-6171-CV-SJ-6.

First of all, I wish to express my thanks to the Department of Justice for accepting written comments on its proposed final judgement in this precedent setting case.

As a supervisor for a non-profit home health agency serving a small, but rapidly growing rural community, I have seen considerable changes in the delivery of home health care over the thirteen years I have worked for this company. Our agency has been in business for over twenty years providing care to the residents of our county, and has taken pride in it's ability to change and grow to meet the needs of the area. We have been proactive in stream-lining our services to become more efficient and cost effective, while assuring a continued high quality of care. Despite our small size, we have been able to negotiate with several managed care organizations winning contracts to provide care to the local residents. This enables persons within our county boundaries to continue to have a choice between our agency and the large, unfamiliar home health agencies located in other counties or states.

We are well aware of the practices of many of these for-profit home health agencies, which contend the ability to provide services to a large geographic area in order to win managed care contracts; but, in reality have no providers in many of the rural areas which they service. Frequently, we are called by area residents who may have had our services in the past, complaining that their physician prescribed nurse, therapy, or aide services prior to their discharge from a hospital. Once they were home, they found that only one or two of the services were provided in a timely manner, as the other service(s) were unavailable due to "staffing shortages". In one case, a patient who had been hospitalized for a hip replacement waited more than a week for therapy. In another case, an immobilized patient never received aide services to which he was entitled, leaving his elderly spouse solely responsible for his personal care needs. Both of these patients had advised their referring hospitals that they wished to be referred to our agency, but were told that they had to use the agency with which the hospital was contracted. Quite obviously, these patients both received less than adequate care, when there were local agencies willing and able to provide the service.

In most cases, it is the vulnerable elderly population which become the victims in the competition between home health agencies. Even if they are mentally and physically able to understand their rights when it comes to choosing medical care, they are afraid to speak up, for fear of what will happen if they need to seek care in a particular facility in the future. Furthermore, we are seeing an increase in the number of patients seeking assistance after they have been discharged from their home health agency. The home health agency, having exhausted the patient's home health insurance benefit, release the patient, to their own capabilities. It is then expected that we, the non-profit home health agency, will pick up where the for-profit agency left off and provide uncompensated care. While we are committed to caring for the indigent, un-insured and under-insured of our county, it is only through the small margin of profit reimbursement we receive from the insured clients, that we can continue to provide the charity care for which we are known. As many of the patients referred to us are non-pay or partial pay on admission to our program, it does not take long to exhaust our resources.

We have neither asked for, or received a governmental subsidy to assist in the provision of our services for over two years. Therefore, it does not seem reasonable to allow the for-profit agencies to discharge patients with continuing home health needs, after having depleted their insurance benefits.

The referrals we receive have been won by our continued reputation for excellence within our community. We have no money for marketing. Most of our referrals come by word of mouth, either from a patient, physician or a referral source with whom we have worked in the past. Despite the evolution of managed care, we continue to subsist based upon our willingness to streamline and cost cut. However, a form of competition which we will not survive is the ability of hospitals to form home health agencies, and retain all of their paying referrals. Our local community hospital is now in the process of forming a home health agency, which we have supported from the onset. We feel that while another home health agency in our county will most definitely impact our referral base, it is important that all community hospitals augment their outpatient services to remain viable. Never-the-less, if that hospital or any hospital is allowed prevent patients from learning of and utilizing other agencies, we will have no chance for survival. This, in my opinion, is not fair market competition but rather the creation of a monopoly.

Thank you again for the opportunity to express my concerns with regards to this issue.

Sincerely,  
Tami L. Becker.

Texas Association for Home Care  
3737 Executive Center Drive, Suite 151,  
Austin, Texas 78731, (512) 338-9293  
December 1, 1995.  
Gail Kursh,

Chief, Professions & Intellectual Property  
Section, Health Care Task Force,  
Department of Justice, Antitrust Division,  
600 E St. NW., Room 9300, Washington,  
DC 20530

Re: United v. Health Choice of Northwest  
Missouri, Inc. et al, Case No. 95-6171-  
CV-SJ-6, District Court for the Western  
District of Missouri

Dear Ms. Kursh: The Texas Association for Home Care represents over 650 home and community support services agencies throughout Texas providing home health, hospice and personal assistance services. Our membership includes freestanding and hospital based, as well as proprietary and non-profit agencies. We have provided all of our members a copy of the proposed final judgment which outlines a policy for patient referral by the hospital system to home care and other ancillary services.

The paramount questions in determining acceptability of the referral policy should be (1) is the patient advised that he has a choice of providers for ancillary services? (2) is adequate information made available for the patient to make an informed selection? The sequence in which the information is provided with relationship to the provisions of information about the hospital's ancillary services is also a key factor in determining acceptability of the policy.

The Texas Association for Home Care unanimously passed a Code of Ethics in September 1995 in order to promote the provision of high quality home and community support services to patients by member agencies. Two provisions in our Code of Ethics are relevant to this case:

- Agencies shall honestly and conscientiously cooperate in providing information about referrals and shall work together to assure comprehensive services to clients and their families.
- Member agencies shall not engage in coercive or unreasonably restrictive exclusionary behavior which would restrict or impede consumer choice of provider agencies. A member agency or related entity that provides a screen to clients for home care referrals shall not use that position to influence a client's choice to direct referral to itself, and shall inform clients of the availability of home care providers and advise clients that they have the right to choose the provider they prefer.

We will appreciate your serious consideration of all comments that you receive from the industries affected to protect the patient's freedom of choice and to prevent unreasonable restraint of trade.

Sincerely,

Anita Bradberry,  
Executive Director.

Diana L. Gustin, Attorney at Law  
Plaza Tower, Suite 2001, 800 South Gay  
Street, Knoxville, Tennessee 37929,  
Telephone (615) 523-5545, Telecopier (615)  
523-4738

November 30, 1995.

Ms. Gail Kursh,

Chief, Professions & Intellectual Property  
Section, Health Care Task Force,  
Department of Justice, Antitrust Division,  
600 E. St., N.W., Room 9300,  
Washington, D.C. 20530

Re: Written Comments on the proposed final  
judgment for: *United States v. Health  
Choice of Northwest Missouri, Inc., et al.*  
Case No. 95-6171-CV-SJ-6 in the U.S.  
District for the Western District of  
Missouri.

Dear Ms. Kursh, I am writing in response to the article in the newsletter of Home Health Line on November 13, 1995, which noted that providers are being given a chance to comment on the proposed final judgment for the above captioned matter. I represent several home health care agencies, one of which contacted me concerning this matter. I have reviewed the proposed order with my client and discussed the ramifications of the changes which might result in hospital discharge policies as a result of this litigation. My client and I do not believe the policy endorsed by the DOJ goes far enough to protect independent freestanding home health care agencies from unfair competition by hospitals. I believe the final judgment should be modified in accordance with the Coalition for Quality Healthcare, the group of St. Joseph health care providers which proposed that the final judgment be modified to:

- Strengthen limitations on hospital's ability to refer its patients to its own hospital-based components;
- Require the hospital to use a rotation system which assures equitable referrals to all providers in the area;
- Require the hospital to permit representatives of freestanding providers to visit the hospital patients who have been admitted for hospitalization and thereby expose the patient population to the availability of outside services;
- Make the hospital publicly post its daily referrals to both its hospital-based entities and to other providers in the community.

In addition to endorsing the changes suggested by the Coalition, I would like to take this opportunity to comment on some other concerns in regard to the DOJ's recommended referral policy.

First of all, I believe it is extremely important to protect the patient's right to be informed and to participate in the planning of their own care. In fact, 42 Code of Federal Regulation Section 484.10 codifies the patients's right to be informed, in advance about the care to be furnished and of any changes in the care to be furnished. I believe this requires more than allowing a physician to order an Ancillary Service, specify the provider to be used and *then* ask the patient if this is acceptable. The patient should be educated about the available choices in order to make an informed decision. Requiring hospitals to permit representatives of freestanding providers to visit the hospital patients who have been admitted for hospitalization and thereby expose the patient population to the availability of outside services would accomplish this objective. Requiring hospitals to publicly post daily referrals to both its hospital-based

entities and to other providers in the community would be a simple and easy way to monitor the hospitals' referral practices.

Secondly, the disclaimer contained in the DOJ's recommended home health, DME and hospice referral policy could be quite misleading. The social worker, who is asked a *second* time, about other providers "should indicate that Heartland has done no independent review or evaluation of these providers and cannot speak to the quality of care they provide\*\*\*"

This infers that other agencies' quality of care is not equal to (or better than) the hospital's quality of care. This suggestion may be used to frighten the patient into choosing the hospital affiliated agency. Since quality assurance and condition of participation surveys are performed on a regular basis upon all home health care agencies which participate in the Medicare program, it should be *presumed* that those agencies which have maintain their license in good standing have the level of quality care necessary. In short, quality controls exist for freestanding agencies which are not being mentioned to the patient yet the suggestion is being made that providers, other than the hospital affiliated provider, could be lacking in quality in comparison thereto. This type of misleading disclaimer could be construed as unfair competition.

Finally, the application of the prohibition on self-referral should be considered in this context. 42 U.S.C. Section 1320a-7b states that whoever knowingly and willfully solicits or receives any remuneration directly or indirectly, overtly or covertly, in cash or in kind, in return for referring an individual to a person for the furnishing or arranging for the furnishing of any items or service for which payment may be made in whole or in part under Title XVIII or a State health care program, shall be guilty of a felony and upon conviction thereof, shall be fined not more than \$25,000 or imprisoned for not more than five years, or both. This section of the Medicare Act could be read to find that payment of wages to the hospital social worker or discharge planner or referring physician would qualify as acceptance of remuneration for referral to the hospital affiliated provider. In fact, the very abuse this statute seeks to prohibit could occur if hospitals are continually allowed to automatically refer all ancillary services to their own affiliated providers. There is an incentive for overutilization being perpetuated by allowing a hospital to automatically refer to itself.

Based upon all of these points, I strongly suggest consideration of language which would provide additional safeguards in the referral policy at issue in this litigation. Thank you for the opportunity to provide comments on this subject. If you have any questions concerning this letter, please feel free to contact my office.

Sincerely,  
Diana L. Gustin.

Villa-Care Home Health, Professional Home Health Services

1100 Bridgewood Dr., Suite 110, Fort Worth, Texas 76112, (817) 451-3654, Metro (817) 429-9229, Fax (817) 451-3806

November 30, 1995.

Gail Kursh,

*Chief, Professions & Intellectual Property Section/Health Care Task Force, Department of Justice, Antitrust Division, 600 E Street, NW., Room 9300, Washington, DC 20530.*

Re: United States v. Health Choice of Northwest Missouri, Inc., et al., Case No. 195-6171-CV-SJ-6, U.S. District Court for the West District of Missouri.

Dear Ms. Kursh: As a home health provider, the proposed final judgment for above referenced case creates serious questions for us. From the provisions I have read, it seems that this proposal from Heartland Health System would continue to allow Heartland to refer to their own ancillary services with few exceptions. This could, and probably would, have a negative impact on private, free-standing ancillary services of all kinds.

Texas Association for Home Care embraces a code of ethics that includes cooperation between agencies in providing information about referrals and the provision of comprehensive services to clients and their families. Also included in this code is that member agencies will not engage in coercive or unreasonably restrictive exclusionary behavior which would restrict or impede consumer choice of provider agencies. The proposed final judgment would be unreasonably restrictive, exclusionary, coercive, and as a result, detrimental to any agency not attached to a hospital or other large health care system.

"If the patient has no preference, a referring person shall indicate that Heartland has an excellent, fully accredited Ancillary Service that is available to the patient, and the appropriate Heartland brochure may be given" is *not* allowing the patient the right to choose. The patient remains uninformed about options in the community, unless by some chance s/he has more knowledge than the average patient about resources available.

It is the obligation, duty and responsibility of free-standing ancillary services to provide information to the healthcare system regarding their qualifications which may include Medicare certification, JCAHO accreditation, etc. It should also be the obligation, duty and responsibility of the healthcare system to make that information available to all patients. In light of the changes being proposed in the Medicare payment method to home health agencies, it is the fear of many of the free-standing agencies that the healthcare systems will take only those patients felt to be "cost effective," and all others will be referred out.

Too many times the elderly population is neglected or abused by healthcare providers. To pass this final judgment would be another opportunity for huge healthcare systems to

benefit financially from the unsuspecting public.

I appreciate this opportunity to express my feelings regarding this issue and hope that the final judgment will be more favorable to the patient and the independent ancillary service providers.

Sincerely,

Meredith H. Tracy,

*Director of Nursing.*

Total Professional Health Care, A Subsidiary of NuMED Home Health Care, Inc.

5770 Roosevelt Blvd., Suite 700, Clearwater, FL 34620, (813) 531-0299, (813) 530-4912 Fax

November 30, 1995.

Gail Kursh,

*Chief, Professions and Intellectual Property Section, Health Care Task Force, Department of Justice, Antitrust Division, 600 East Street N.W., Room 3900, Washington, D.C. 20530.*

Dear Ms. Kursh. This is in response to an article written in the Home Health Line regarding the proposed Department of Justice's final judgement for the United States versus Health Choice of Northwest Missouri Inc., et al, case number 956171-cv-sj-6.

As a home health provider, Total Professional Health Care has three major areas of concern. Although the prepared judgement appears to give the beneficiary the right to choose his or her provider, we fear that the method in which the alternatives are presented still favor the hospital based affiliated provider. Please refer to B#2, "if the patient has no preference, a referring person shall indicate that Heartland has an excellent, fully accredited Ancillary Service that is available to the patient, and the appropriate Heartland brochure may be given." Based upon this reference, we would like to pose a question; If you were the beneficiary, who would you choose? The unknowing guest of the hospital could be swayed into believing that the hospital based affiliates are the "only" choice.

The second area of concern is the issue of quality care. Since it appears that there will a minimum amount of competitiveness among the ancillary services, who will ensure that the best care is provided? Can you ensure the beneficiary that his or her "choice" of providers is the correct one? Who is willing to take responsibility for inferior care should the situation arise?

Lastly, a member of the free standing provider community, our business will be dramatically affected by this proposed final judgement. We have already experienced difficulty accessing patient's charts. Several of the physicians who who have ordered our home health services for their patients in the past have yielded to internal pressures from within the hospitals to order hospital based home health agencies.

We have been providing quality care to our community since 1976 and have earned an excellent reputation. We consider the opportunities afforded to the hospital based ancillary services to be grossly unfair. We hope that you will consider these facts when making your final decision.

Thank you for allowing us to comment on this very important matter. Should you have any questions, please do not hesitate to contact me at (813) 531-0299.

Sincerely,

Margaret VanDeMar,

*Regional Director.*

cc: Susan Carmichael, President, NuMED Home Health Care

Idaho Home Health, Inc.

1910 Channing Way, Idaho Falls ID 83404, (208) 528-2877, (800) 464-2877, fax (208) 529-529-5867

December 3, 1995.

Gail Kursh,

*Chief, Professions & Intellectual Property Section/Health Care Task Force, Department of Justice, Antitrust Division, 600 E St., N.W., Room 9300, Washington, D.C. 20530*

Dear Ms. Kursh: The proposed settlement between the DOJ and Heartland Health System Inc., undermines the free enterprise system and sentences the small, community-based entrepreneur to the assembly line. A more equitable approach to the problem would be:

1. Strengthen limitations on the hospital's ability to refer its patients to its own hospital-based components;

2. Require the hospital to use a rotation system, which assures equitable referrals to all Providers in the area;

3. Require the hospital to permit (on their premises, during normal working hours) representatives of freestanding providers—other than their own hospital-based components—to visit their patients who have been admitted for hospitalization; and to expose the patient population to the availability of outside services as well;

4. Make the hospital publicly post its daily referrals to both its hospital-based entities and to other providers in the community.

Incorporating the above recommendations into the DOJ settlement would go a long way toward resolving the inequities that have existed between hospitals and community-based entities.

Thank you,

Frank Dalley,

*President.*

November 27, 1995

Gail Hursh,

*Chief Professions & Intellectual Property Section, Health Care Task Force, Department of Justice, Antitrust Division, 600 E. Street, NW., Room 9300, Washington, D.C. 20530*

Dear Ms. Kursh: I am an employee in a small, rural freestanding home health care agency. I have read with great dismay the recent DOJ ruling in the matter of United States v. Health Choice of Northwest Missouri Inc.

In our own community, a local hospital-based program has instituted unfair practices which have practically eliminated competition in our service area.

I know that in our government, numbers count. Let me add my voice to the many who

will ask you to modify the decision to include the following language:

- Strengthen limitations on a hospital's ability to refer its patients to its own hospital-based components;

- Require the hospital to use a rotation system, which assures equitable referrals to all providers *who offer the same level of certification and/or accreditation, or higher* in the area—Hospitals are well aware of the accreditation of local providers;

- Require the hospital to permit (on their premises, during normal working hours), representatives of freestanding providers;
- Make the hospital publicly post its daily referrals to both its hospital-based entities and to other providers in the community.

Sincerely yours.

Sharon Fries.

November 27, 1995

Gail Hursh,

*Chief Professions & Intellectual Property Section, Health Care Task Force, Department of Justice, Antitrust Division, 600 E. Street, NW., Room 9300, Washington, D.C. 20530*

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Sincerely yours.

Lou Ann Balding.

November 27, 1995.

Gail Kursh,

*Chief, Professions & Intellectual Property Section/Health Care Task Force, Dept. of Justice, Antitrust Division, 600 E St., NW Room 9300, Washington, DC 20530*

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Sincerely yours,

Diane Gadomski

November 27, 1995.

Gail Kursh,

*Chief, Professions & Intellectual Property Section/Health Care Task Force, Dept. of Justice, Antitrust Division, 600 E St., NW Room 9300, Washington, DC 20530*

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Sincerely yours,

Darrel Benneto

November 27, 1995.

Gail Kursh,

*Chief, Professions & Intellectual Property Section/Health Care Task Force, Dept. of Justice, Antitrust Division, 600 E St., NW Room 9300, Washington, DC 20530*

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Sincerely yours,

Jayne E. Majors

November 27, 1995.

Gail Kursh,

*Chief, Professions & Intellectual Property Section/Health Care Task Force, Dept. of Justice, Antitrust Division, 600 E St., NW Room 9300, Washington, DC 20530*

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- Make the hospital publicly post its daily referrals to both its hospital-based entities and to other providers in the community.

Sincerely yours,

Irma Powers

November 27, 1995.

Gail Kursh,

*Chief, Professions & Intellectual Property Section/Health Care Task Force, Dept. of Justice, Antitrust Division, 600 E St., NW Room 9300, Washington, DC 20530*

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- Require the hospital to permit (on their premises, during normal working hours), representatives of freestanding providers;
- Make the hospital publicly post its daily referrals to both its hospital-based entities and to other providers in the community.

Sincerely yours,

MaryAnn Perry

November 27, 1995.

Gail Kursh,

*Chief, Professions & Intellectual Property Section/Health Care Task Force, Dept. of Justice, Antitrust Division, 600 E St., NW Room 9300, Washington, DC 20530*

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- Make the hospital publicly post its daily referrals to both its hospital-based entities and to other providers in the community.

Sincerely yours,

Sherri Rule

November 27, 1995.

Gail Kursh,

*Chief, Professions & Intellectual Property Section/Health Care Task Force, Dept. of Justice, Antitrust Division, 600 E. Street, N.W., Room 9300, Washington, D.C. 20530.*

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- Require the hospital to permit (on their premises, during normal working hours), representatives of freestanding providers;
- Make the hospital publicly post its daily referrals to both its hospital-based entities and to other providers in the community.
- FAIR competition requests in better, fair priced care for our patients.

Sincerely yours,

Joan Risk,

Gail Kursh,

*Chief, Professions & Intellectual Property Section/Health Care Task Force, Dept. of Justice, Antitrust Division, 600 E. Street, N.W., Room 9300, Washington, D.C. 20530.*

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- Make the hospital publicly post its daily referrals to both its hospital-based entities and to other providers in the community.

Sincerely yours,

Emma Jean Fowler

November 27, 1995.

Gail Kursh,

*Chief, Professions and Intellectual Property Section/Health Care Task Force, Dept. of Justice, Antitrust Division, 600 E. St., NW., Room 9300, Washington, DC 20530*

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- Make the hospital publicly post its daily referrals to both its hospital-based entities and to other providers in the community.

Sincerely yours,

Brenda Phillips

November 27, 1995.

Gail Kursh,

*Chief, Professions and Intellectual Property Section/Health Care Task Force, Dept. of Justice, Antitrust Division, 600 E. St., NW., Room 9300, Washington, DC 20530*

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- Require the hospital to use a rotation system, which assures equitable referrals to all providers *who offer the same level of certification and/or accreditation, or higher* in the area—Hospitals are well aware of the accreditation of local providers;
- Require the hospital to permit (on their premises, during normal working hours), representatives of freestanding providers;
- Make the hospital publicly post its daily referrals to both its hospital-based entities and to other providers in the community.

Sincerely yours,

Stephanie Paderson,

November 27, 1995.

Gail Kursh,

*Chief, Professions & Intellectual Property Section, Health Care Task Force, Dept. of Justice, Antitrust Division, 600 E. St., NW., Room 9300, Washington, DC 20530*

Dear Ms. Kursh: I am an employee in a small, rural freestanding home health care agency. I have read with great dismay the recent DOJ ruling in the matter of *United States v. Health Choice of Northwest Missouri Inc.*

In our own community, a local hospital-based program has instituted unfair practices

which have practically eliminated competition in our service area.

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Sincerely yours,

Stephanie Wickstrom

November 27, 1995.

Gail Kursh,  
Chief, Professions & Intellectual Property  
Section, Health Care Task Force, Dept. of  
Justice, Antitrust Division, 600 E. St.,  
NW., Room 9300, Washington, DC 20530

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Sincerely yours,

Deanna LaBelle

November 27, 1995.

Gail Kursh,  
Chief, Professions & Intellectual Property  
Section/Health Care Task Force, Dept. of  
Justice, Antitrust Division, 600 E. St., NW,  
Room 9300, Washington, DC 20530

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Sincerely yours,

Susan Hakola

November 27, 1995.

Gail Kursh,  
Chief, Professions & Intellectual Property  
Section/Health Care Task Force, Dept. of  
Justice, Antitrust Division, 600 E. St., NW,  
Room 9300, Washington, DC 20530

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Sincerely yours,

Donna Carlson Albire

November 27, 1995.

Gail Kursh,  
Chief, Professions & Intellectual Property  
Section/Health Care Task Force, Dept. of  
Justice, Antitrust Division, 600 E. St., NW,  
Room 9300, Washington, DC 20530

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- Make the hospital publicly post its daily referrals to both its hospital-based entities and to other providers in the community.

Sincerely yours,

Rene Dawe

November 27, 1995.

Gail Kursh,  
Chief, Professions & Intellectual Property  
Section/Health Care Task Force,  
Department of Justice, Antitrust  
Division, 600 E. St., NW, Room 9300,  
Washington, D.C. 20530

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- Make the hospital publicly post its daily referrals to both its hospital-based entities and to other providers in the community.

Sincerely yours,

Marybeth Coyne,  
Occupational Therapist.

November 27, 1995.

Gail Kursh,  
Chief, Professions & Intellectual, Property  
Section/Health Care Task Force, Dept. of  
Justice, Antitrust Division, 600 E. St., NW  
Room 9300, Washington, DC 20530

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- Make the hospital publicly post its daily referrals to both its hospital-based entities and to other providers in the community.

Sincerely,

Chris Renland

District Health Department No. 4

Alpena County, 1521 W. Chisholm St., Alpena, MI 49707, (517) 356-4507, Fax (517) 356-9080

November 29, 1995.

Gail Kursh,

*Chief, Professional and Intellectual Property Section, Health Care Task Force, Department of Justice, Anti-Trust Division, 600 E Street, NW, Room 9300, Washington, DC 20530*

Re: United States v. Health Choice of Northwest Missouri, Inc. et al., Case No. 95-6171-CV-SJ-6

Dear Ms. Kursh: It is with great concern that I read of the Department of Justice's proposed final judgement concerning the above case. As the proposed judgement currently reads, home health care programs which are not affiliated with hospitals are put at a severe disadvantage, because they will not have access to patients in a hospital's system.

The precedence this rule sets will not only be a blow to independent home health agencies, such as ours, but also to patients. At the time when patients are most in need of knowing their available options, they are least able to explore them. Safeguards must be in place to assure that patients are made aware of options available to them at the time of discharge. Only when knowing the options will a patient be able to make an informed choice.

Please let this letter serve as a request that the final judgement be modified to:

- Strengthen limitations on a hospital's ability to refer its patients to its own hospital based components;
- Require the hospital to use a rotation system which assures equitable referrals to all providers in the area; and
- Require the hospital to unbiasedly inform a patient of his or her options when establishing their discharge plan.

Choice can only be choice when one knows what their alternatives are. Only by

making such modifications will we ensure a patient's choice is protected.

Sincerely,

Christopher J. Benedict,  
*Health Educator.*

District Health Department No. 4

Alpena County, 1521 W. Chisholm St., Alpena, MI 49707, (517) 356-4507, Fax (517) 356-9080

November 29, 1995.

Gail Kursh,

*Chief, Professions & Intellectual Property Section, Health Care Task Force, Department of Justice, Antitrust Division, 600 E Street, NW., Room 9300, Washington, DC 20530*

Re: United States v. Health Choice of Northwest Missouri, Inc., et al., Case No. 95-6171-CV-SJ-6

Dear Ms. Kursh: It is with great concern that I read of the Department of Justice's proposed final judgment concerning the above case. As the proposed judgment currently reads, home health care programs which are not affiliated with hospitals are put at a severe disadvantage, because they will not have access to patients in a hospital's system.

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Choice can only be choice when one knows what their alternatives are. Only by making such modifications will we ensure a patient's choice is protected.

Sincerely,

Kathy Orban,  
*Home Care Nursing Director.*

Harbors Home Health and Hospice

201 7th Street, Hoquiam, WA 98550, (360) 532-5454

December 1, 1995.

Gail Kursh,

*Chief, Professional & Intellectual Property Section, Health Care Task Force, Department of Justice, Antitrust Division, 600 "E" Street, N.W., Room 9300, Washington, D.C. 20530*

Re: Comments of proposed final judgement for United States vs. Health Choice of Northwest Missouri, Inc., et al., Case No. 95-6171-CV-SJ-6, U.S. District Court

I believe the policy as written does not adequately protect patient choice and fair competition.

I feel the hospital should be required to provide a quarterly updated list from the surveyors of Medicare and Medicaid certified providers to patients who were not receiving service from a Home Health Agency at time of hospital admission and do not have a preference of home care providers. Additionally, the referring entity should not be able to steer or influence patients toward their own provider entity. Hospitals should be prohibited from steering patients away from an established relationship with a free standing agency.

I have experienced in practice, patients who were open to a free standing agency on admission to the hospital and notice was given to the social service department of the established relationship. The patients were referred and opened to the facility based agency upon discharge. When queried, neither the patient or family made the choice to change and in some cases insisted they be referred back to their original agency so they might continue with the same caregivers. Other patients and families said they would stay with the hospital based to avoid bother and to be sure they could again be admitted to the facility. In other cases, the frail elderly suffered from confusion or just did what "they" recommended.

Frail elderly suffering from chronic illnesses deserve to be protected when their defenses are compromised.

Please see that the final judgement assures patient choice and fair competition protected by Medicare (42 USC § 1395a) and Medicaid (42 USC § 1396a(23)).

Thank you for your consideration of these comments.

Sincerely,

DeLila Thorp,

*Administrator.*

Faith Community Hospital

171 Magnolia St., Jacksboro, Texas 76458, 817-567-6633, FAX 817-567-5714

November 27, 1995.

Gail Kursh,

*Chief, Professions & Intellectual Property Section/Health Care Task Force, Dept. Of Justice, Antitrust Division, 600 E St., NW, Room 9300, Washington, DC 20530*

I would like to take this opportunity to comment on the United States v. Health Choice of Northwest Missouri, Inc., et al., Case No. 95-6171-CV-SJ-6.

It is a fact that fraud is running ramped in home health and DME services in the health field. With the implementation of the Stark I and Stark II amendment, some of the fraud activity by hospitals and physicians has been curtailed.

I have no knowledge of case no. 95-6171-CV-SJ-6, however, I would like to respond to one of the provisions as set forth:

- If a physician orders an Ancillary Service and specifies the provider to be used (whether specifically written in the chart or other written notifications), then a referring person shall contact the patient indicating that the physician has ordered an Ancillary Service and has ordered that a particular

provider be used. The patient should be asked if this is acceptable, and if so, referred to that provider.

This section is where I have a problem due to the possibility that a physician who may have a vendetta against a hospital based home health service can willfully, without any repercussion, direct all patients away from that service.

The physician should not be allowed to order a patient to use a particular home health service. This should be solely the patients choice.

This judgement, if approved, can and probably will set a standard for other hospital systems. When you have only 2 or 3 physicians on medical staff and a physician becomes disgruntled with any faction of the hospital, dependent upon his client base, he could severely threaten the viability of the hospital.

So, with this in mind, I ask that you please reconsider the terminology used, whereby the physician can specify the provider.

Sincerely,

Ronald G. Ammons,  
Administrator.

R.D. #3 Box 284, Meadville Pa. 16335

December 1, 1995.

Gail Kursh,

Chief, Professions & Intellectual Property  
Section/Health Care Task Force, Dept. of  
Justice, Antitrust Division, 600 E St.,  
NW., Room 9300, Washington, DC 20530

Dear Gail Kursh: Regarding the article in Home Health Line, 11-13-1995, Vol. XX, No. 43, and the Dept. of Justice recommended home care referral policy for Heartland Hospital System Inc.

I am very concerned that Americans are losing their freedom of choice. I currently work for a home health company that is not locally hospital based. I have found citizens in our community, to a large extent, are unaware there is any choice and assume each company is one and the same. In the past I worked for the local hospital based program and when competition arrived positive changes occurred. I am aware of some changes that occurred prior to and since I left their employment. Competition has benefited our community. Example. Referred patients requiring home health care are now seen within 24<sup>hrs</sup>, unless the patient requests otherwise. Previously patients often were scheduled per office convenience with several day delays.

- Ordered therapy/treatment (which can safely be completed in the home) are more rapidly available (staff educated to complete) when the treatment is available from competition.

- Local low pay scale for home care nurses has been brought in line with surrounding communities.

- I realize that hospitals are concerned about their fiscal responsibility and home care is economically positive for the hospital but are there assurances that optimal care will be provided safely and efficiently to our society. I feel a monopoly may lead to a decline in services provided to the client/patient in home care. I agree with the "Coalition for Quality Healthcare" proposal

. . . modifications are necessary to ensure optimal health care to our society. Freedom of choice should prevail. Patients and physicians will have freedom to change if dissatisfied with a current provider. I feel competition helps to ensure the best home care skilled services to our neighbors, friends, and loved ones.

Sincerely yours,

Sharon Ferguson

Memorial Medical Center of East Texas

P.O. Box 1447, Lufkin, Texas 75901 (409) 634-8111

November 29, 1995.

Gail Kursh,

Chief, Professions and Intellectual Property  
Section/Health Care Task Force,  
Department of Justice, Antitrust Division,  
600 East Street, NW, Room 930,  
Washington, DC 20530

Dear Ms. Kursh, Memorial Medical Center of East Texas is a private, non-profit hospital system which also includes a skilled nursing facility, rehab facility, inpatient psychiatric facility and home health care. In our community, population 40,000, there are eleven free-standing home health care agencies and two hospital based. The marketing efforts by the hospital based agencies are limited to access through the hospital medical staff system and educational programs for hospital staff such as social workers and utilization review nurses.

It poses an ethical dilemma for the hospital "discharge planning" staff members to give information or a list of other agencies for several reasons. We have no way to reliably ascertain the quality of care given by these agencies. Often we have patients who are admitted after being a patient of another home health agency and we have questions about the care that was rendered. For our hospital to give brochures or provide a list would constitute, in the eyes of the consumers, the endorsements of these agencies. This causes grave concern from the hospital risk management department. It would be impossible to keep a current list since agencies routinely open, close, change locations and change staff. To require the hospital to keep up with all of this is an unnecessary administrative burden.

In no other hospital practice are we required to advocate for our competition. If a patient comes in for outpatient lab or mammography we are not required to give them a listing of all other free-standing labs or mammography centers in our region. It has always been an enigma to me that the home health agencies were singled out for this constraint. Therefore, I wish to voice my support of the procedure developed by Heartland Health Systems and currently under consideration in the United States v. Health Choice of Northwest Missouri, Inc., et al., case no 95-6171-CV-SJ-6 currently in the United States District Courts for the Western District of Missouri.

Should you have any questions or need further input, I am available to you at 800-944-0825.

Thank you very much.

Patricia R. Jones,

Administrative Director, Memorial Medical  
Center HomeCare.

Supportive Care Services—Hospice Brazos  
Valley

2729 A East 29th Street, Bryan, TX 77802,  
Phone #: (409) 776-0793, 1-800-824-2326,  
Fax #: (409) 774-0041

November 29, 1995.

Gail Kursh,

Chief, Professions & Intellectual Property  
Section/Health Care Task Force,  
Department of Justice, Antitrust Division,  
600 E St., NW, Room 9300, Washington,  
DC 20530

Dear Ms. Kursh: I am writing to you in response to a Texas Association for Home Care Fax Alert. This Alert was dated November 24, 1995. It was regarding the Dept. of Justice proposed final judgment for United States v. Health Choice of Northwest Missouri, Inc., et al.

My concerns emanate about the scenario of:

- If a physician orders an Ancillary Service, but does not specify the provider to use, then the patient shall be contacted and informed that his physician has ordered an Ancillary Service and shall be asked if he has a preference as to which provider to use.

- If the patient has no preference, a referring person shall indicate that Heartland has an excellent, fully accredited Ancillary Service that is available to the patient, and the appropriate Heartland brochure may be given. If the patient accepts, then the referral shall be made to Heartland's Ancillary Service.

It is this second paragraph that is of great concern to me as both a consumer and a provider. As a consumer, unless I have the advantage of full knowledge, how am I to have the ability to make an informed choice. By Heartland being allowed to present themselves without necessarily disclosing information regarding other possible Home Health or Hospice choices, my beliefs are there is a possibility of manipulation of consumer by Heartland or any other hospital with this advantage.

In Texas, TAHC Code of Ethics provisions appear to be more stringent than the proposed DOJ referral policy, thus protecting the consumer's right of informed choice. The point of significance is that the client must be provided information, regarding all options of home care service providers, not just hospital's (in which the client is receiving services) home care agency. For a client that had no previous knowledge about home care provider services, it would not be possible for him to make a fully informed decision of choice.

I greatly encourage to reconsider the DOJ's stance and final judgement for United States v. Health Choice of Northwest Missouri, Inc., et al. For the public's protection and to guarantee their right to full informed decision of choice, it would appear beneficial that the judgement follow the guideline of the TAHC Code of Ethics provisions regarding this situation.

If I may be of further assistance to you regarding this issue or if I may provide

further information, please do not hesitate to contact me. Thank you for your time and consideration.

Sincerely yours,

Timothy M. Brown

Gail Kursh,  
Chief, Professions and Intellectual Property  
Section, Health Care Task Force, Dept. of  
Justice Antitrust Division, 600 E St., NW.,  
Room 9300, Washington, DC 20530

To Whom It May Concern: This is in response to the Dept. of Justice proposed judgment for *United States v. Health Choice of Antitrust Missouri, Inc.* Case #95-6171-CV-SJ-6.

As a health care provider (RN) and consumer, it appalls me to know that hospitals may not be required to inform patients about alternatives in the health care market. Because a hospital informs a client of any available home health agencies does not mean the hospital endorses such agencies. Healthy competition is good for the consumer and serves as a check and balance system. Hospital based agencies would usually monopolize the market if this referral policy is permitted and quality care will be compromised.

Also, economically, competition allows the consumer to get the most service for their money. Please do not permit this to change.

Sincerely,

Barbara L. Lenecea

Marblehead Visiting Nurse Association, Inc.  
Widger Road Medical Building, Marblehead,  
MA 01945-2146, Phone (617) 631-1900, FAX  
(617) 631-7944

November 20, 1995.

Ms. Gail Kursh,  
Chief, Professions & Intellectual Property  
Section, Health Care Task Force, Dept. of  
Justice Antitrust Division, 600 E Street,  
NW., Room 9300, Washington, DC 20530

Dear Ms. Kursh: As the CEO of a visiting nurse agency which receives approximately 35% of its referrals from a hospital that has its own home health agency, I can truly speak to the referral policy issue.

At present, the patients being discharged from this hospital are frequently not only not given any choice for a provider of home health services he/she may require, but are refused the opportunity to utilize the services of an agency for whom they voice a preference.

Today, patients in need of care are allowed fewer and fewer choices. It is my belief that patients should not only be asked if they have a preference, but be given the opportunity to verbalize their choice of provider in their service area. Further, it seems logical for representatives of various home health agencies to be physically present in the hospitals, so that the home health plan of care may be established and followed up on in a timely fashion, thus making for a smoother transition for the patient and patient's family.

An equitable referral system is essential to ensure the patient has the freedom of choice and is given every opportunity to exercise his/her right of choice. This is one means by

which the hospital may be held accountable for providing the patient's rights.

It is my hope and the hope of my staff, that the Department of Justice will consider these factors and support the Health Care Fairness Act of 1995 (H.R. 2400).

Sincerely,

Joyce L. Elliott

December 4, 1995.

Gail Kursh,  
Chief, Professions & Intellectual Property,  
Section/Health Care Task Force, Dept. of  
Justice, Antitrust Division, 600 E St.,  
NW., Room 9300, Washington, DC  
20530.

Dear Mrs. Kursh: It greatly distresses me that there would be even slight consideration given to allowing hospital discharge planners the ability, by law, not to give patients choices available to them for home care.

Free standing agencies are not asking for recommendations from discharge planners in terms of the quality work we do. We feel that our work speaks for itself. We do however, expect for patients to be made aware that we exist.

This situation is the closest thing I have ever witnessed of the government actually participating in setting up a monopoly. What has happened to fair competition and patient choice?

Respectfully,

Susan Livvix

Memorial Hospital of Taylor County and  
Memorial Nursing Home

Eugene W. Arnett, President, Medford,  
Wisconsin 54451, Telephone: 715-748-8100,  
Fax: 715-748-8199

December 4, 1995.

Ms. Gail Kursh,  
Chief, Professions & Intellectual Property  
Section/Health Care Task Force,  
Department of Justice—Antitrust  
Division, 600 E Street, NW., Room 9300,  
Washington, DC 20530.

Dear Ms. Kursh: I am in support of the Department of Justice recommended home health, DME, and hospice referral policy as outlined for Heartland Hospital in St. Joseph, Missouri.

Hospitals have internal mechanisms that provide for independent review or evaluation of the services offered. Offering names of other providers during discharge planning could infer the hospital is endorsing that agency.

I also support patient choice; but if the patient has no preference and asks the hospital for guidance, the hospital has an obligation to help that patient. Recommending their own services should not be misconstrued as a monopoly tactic.

Please consider these remarks when making a final judgment for United States.

Sincerely,

Carol A. Ahles,  
Vice President—Administration.

Polyclinic Medical Center™

December 8, 1995.

Ms. Gail Kursh,

Chief, Professions & Intellectual Property  
Section/Health Care Task Force,  
Department of Justice, Antitrust Division,  
600 E Street, NW., Room 93, Washington,  
D.C. 20530

Re: United States v. Health Choice of  
Northwest Missouri, Inc., et al., Case No.  
95-6171-CV-SJ-6.

Dear Ms. Kursh: I am responding to the proposed settlement between the DOJ and Heartland Health System Inc., St. Joseph, Mo.

As the medical director for a large hospital-based home health care and hospice agency, I am very much in favor of the DOJ's recommended home health, DME and hospice referral policy for Heartland Hospital.

As we all know, patients are being sent home from hospitals "quicker and sicker." Home health care and hospice care under the auspices of a hospital becomes the legal responsibility of the hospital. Our agencies are Medicare and Joint Commission certified. Quality of care and issues such as patient outcomes, patient satisfaction, etc. are studied by our hospital Quality Assessment Department, Administration, Professional Activities Committee on the Board of Directors, and the Board of Directors of the hospital. Hospital discharge planners are in an excellent position to know the qualifications of its own departments, but are not in a position to know the qualifications of other area providers.

The recommended policy is a good one and should become permanent.

Respectfully yours,

James F. Crispen,

Medical Director, Professional Home Health  
Care Agency & Professional Hospice Care (A  
Subsidiary of the Polyclinic Medical Center,  
Harrisburg, Pa).

Reavis Health Systems

1980 South Austin Avenue, Georgetown, TX  
78626, (512)930-5877, Fax (512) 863-6506

December 1, 1995.

Ms. Gail Kursh,  
Chief of Professions & Intellectual Property  
Section, Health Care Task Force,  
Department of Justice, Antitrust Division,  
600 East Street NW #9300, Washington,  
DC 20530.

Dear Ms. Kursh: I want to applaud your judgment in the case of United States v. Health Choice of Northwest Missouri, Inc. I thoroughly believe it is imperative that the patient retain the utmost privilege and right of making the choice of a health care provider themselves. It is such a relief to finally have a precedent that sets that stage for higher ethical standards.

It has been my experience that when a health care facility is faced with stiff competition, patients rights are sometimes abused. I feel it is necessary for strict regulations in regard to Hospital-based health facilities and their disbursement of referrals. It is unfortunate the rights of individuals are most frequently abused in the interest of the larger institutions, and the patient so often is not even aware.

I want all patients to be provided with information notifying them they have a

choice in home health agencies. Hospitals should be required to provide the patient with a list of all prospective agencies. I would also like to see a provision that allows all home health agencies to leave educational materials. I do not feel this would make hospitals liable for the care rendered by the respective agencies.

It is time to stop the abuse and provide us all with equal and fair legislation.

Sincerely,

Nancy Reavis,  
CEO, Reavis Health Systems, Inc.

MedCare Systems, Inc.

Grand Rapids 616.452.5700 • FAX  
616.452.8822, Lansing 517.394.4435 • FAX  
517.394.4439

December 6, 1995.

Ms. Gail Kursh,  
Chief, Professional and Intellectual Property/  
Section, Health Care Task Force, Dept. of  
Justice, Antitrust Division, 600 E. St.,  
NW., Room 9300, Washington, D.C.  
20530

Dear Ms. Kursh: I am writing in response to the article in Home Health Line of November 13, 1995. I am concerned as an administrator of a Medicare/Medicaid certified home care agency that the health care industry is not only being allowed but pushed to form mega-systems that violate antitrust values.

In the Grand Rapids area of Michigan where our corporate office is located, we have a hospital merger pending that will monopolize health care in this area, and effectively eliminate the balance of cost control and quality management that competition provides.

We are already seeing this in the home care industry. Because the hospitals have their own home care components, they direct the vast majority of discharges for home care to their own agencies. The protection of patient choice is not effective because the Medicare population is elderly and sometimes forgetful. They need objective support to make educated free choice. Even physicians who could educate their patients regarding special services through outside agencies are intimidated into using a hospital service that may not best meet the patient's needs.

The agency I work for has focused on developing services not previously available in the community. We hire critical care nurses for our cardiovascular program and provide in home telemetry. We have been told by many in the community that our services are the ones they would like to use but they cannot because their hospital administration directs them to use the hospital's program.

We need change, and control over provider driven referrals and care. Why are we putting the control in the financial hands of the biggest provider system in our country, the hospital, that has demonstrated for decades that it does not know how to control cost but instead shifts cost. Hospital based home care agencies are being used for cost shifting.

Small independent health care businesses need to be fostered in the managed care environment so that the true benefits of competition, cost control and quality, will be

realized. We need to educate consumers and allow choice in health care.

Mega-monopoly providers who direct business to their own bottom line are not the answer.

We need to:

- Stop provide driven referral. We are shifting from physician provider driven to mega hospital provider driven.
- Require to rotate referrals for general med/surg cases. This will help educate the public and stimulate competition to the good of patients.
- Require hospitals to allow free standing home care agencies the freedom to visit their patients in the hospital.
- Require the hospital during the discharge planning process to provide patients a list of agencies that provide home care.
- Require mandatory education of hospital discharge planners regarding services available in the community that address specific, special patient needs.
- Allow the educated professional discharge planners to use their own professional, clinical judgement when counseling patients choosing an agency rather than direct to their hospital agency simply because they have been directed to do so.

• Prevent hospital administration from intimidating discharge planners or physicians into making self referrals to their own agency regardless of patient need. The doctor or discharge planner may know another agency that is better qualified to meet the specific patient's needs.

- Provide incentives for creative health care professionals to decrease cost while enhancing quality.

Sincerely,

Carol E. Veenstra

December 6, 1995.

Ms. Gail Kursh,  
Chief, Professions & Intellectual Property  
Section/Health Care Task Force,  
Department of Justice, Antitrust Division,  
600 E. St., Room 9300, Washington, DC  
20530

Dear Ms. Kursh: I am writing in regards to the case United States v. Health Choice of Northwest Missouri, Inc. I am a MSW, LCSW Clinical Social Worker with 20 years experience in health care settings. I would like to comment on this case from the standpoint of patient self-determination, ie choice, and efficiency/cost effectiveness.

First, the proposed changes from the Coalition for Quality Healthcare are unreasonable and place undue burden on the discharge planner to "take care of the vendor," not the patient. Documentation of referrals, daily posting of referrals, rotation system, etc is extra work which does not enhance the care of patients. Also, patient confidentiality precludes having vendor representatives roam the halls looking for clients.

Secondly, the Heartland approach which suggests that a patient should ask TWICE for the names of non-hospital affiliated vendors is disrespectful, time consuming, manipulative and an undue hardship in the patient.

Why can't reason dominate in this ruling? The hospital discharge planners can first discuss the hospital based home care program, then if the patient requests other vendor names/info, the discharge planner can share that info with the patient at that moment.

Obviously this case is between vendors and hospitals. Where is the patient in this and who is looking out for their needs/rights?

Thank you for the opportunity to express my comments.

Sincerely,

Brenda Wilson,  
Lead Social Worker.

Central Hospice Care

1150 Hammond Drive, Suite B-2100, Atlanta,  
GA 30328, (770) 391-9531, Fax (770) 391-  
9732, (800) 581-8000

November 29, 1995.

Gail Kursh,  
Chief, Professional & Intellectual Property  
Section/Health Care Task Force,  
Department of Justice, Antitrust Division,  
600 E Street, N.W., Room 9300,  
Washington, D.C. 20530

Re: Comments on Proposed Final Judgement:  
United States v. Health Choice of  
Northwest Missouri, Inc., et al., Case No.  
95-6171-CV-SJ-6 in the U.S. District  
Court for the Western District Court for  
the Western District of Missouri

Dear Ms. Kursh: As a Hospice provider I have first-hand knowledge of the subject matter the Department of Justice is dealing with in the above referenced matter. I also understand the influence a hospital can exert in a patient's selection of post-hospital ancillary services, including the selection of a hospice care provider. For these reasons I have reviewed and studied the DOJ's recommended home health, DME and hospice referral policy for Heartland Hospital.

In the interest of protecting patient choice (which is guaranteed by both Federal and State laws) as well as maintaining fair competition consistent with the antitrust laws and FTC regulations, I respectfully submit that the final proposed judgement (recommended policy) be modified as such:

- Strengthen limitations on the hospital's ability to refer its patients to its own hospital-based components;
- Require the hospital to provide patients with an updated list of Medicare/Medicaid providers in the community;
- Require the hospital to use a rotation system, which assures equitable referrals to all providers in the area;
- Require the hospital to permit (on their premises, during normal working hours) representatives of freestanding providers—other than their own hospital-based components—to visit their patients who have been admitted for hospitalization; and to expose the patient population to the availability of outside services as well;
- Make the hospital publicly post its daily referrals to both its hospital-based entities and to other providers in the community.

On behalf of our Hospice agency and the patients we serve, we respectfully ask that

you give these comments due consideration. These issues are of even more concern in today's era of health care and provider consolidation.

Sincerely,

Margot Marcus,

*Manager, Central Hospice Care, 1150 Hammond Drive, Suite B-2100, Atlanta, GA 30328.*

Heritage Home Health Inc.

December 4, 1995.

Gail Kursh,

*Chief, Professions & Intellectual Property Section, Health Care Task Force, Department of Justice, Antitrust Division, 600 E. St. N.W., Room 9300, Washington, D.C. 20530*

Re: United States v. Health Choice of Northwest Missouri, Inc. et al., Case No. 95-6171-CV-SJ-6

Dear Gail Kursh: After reading about the case of Heartland Health System Inc. in the Home Health System Line, we would like to respond to you with our concerns as we are in a very similar situation and we would like to request any information, decisions or assistance you can provide us.

We are Heritage Home Health Care, a proprietary freestanding Home Health Agency, and we have 5 branches. The agency is a small corporation owned and operated by myself and my mother.

We opened two branches eight months ago in counties that have a hospital based HHA and to date we have received *zero* referrals. In our other counties, we had received at least 80 to 100 from the hospital by this time. Montana is a CON state and it has established guidelines that allow two HHA in each county so there is the capability for choice. In the two counties with hospital based HHA, there are only two Home Health Agencies, ours and the Hospital based.

Enclosed is some of our correspondence in our efforts to try and promote patient choice or any kind of mechanism to minimize their weighting the individuals decision of a HHA. Presently the hospitals allow the hospital based HHA have an individual review the charts on a daily basis for any patient that would be in need of home health services. We are not allowed the same privilege because of patient confidentiality as our staff are not employees of the hospital. When the hospital Home Health personnel locates a possible referral, they call the Doctor and inform him that they can provide Home Health Services and get the physicians order.

Another concern is that the doctors depend on hospitals for many things, including the privilege of doing surgery, perhaps office space etc. Because a large amount of their revenue comes from their functions at the hospital, some doctors are not going to recommend any other home health agency if the hospital has one. If the doctors did recommend another home health agency, they could loose some of their privileges. The same goes for the patient. The patients will not go against the doctor's and/or hospital's wishes for fear of reprisal. This is especially true when there is only one doctor in town. That doctor could refuse to treat the patient and the patient would have to go out of town

for treatment. This has actually happened in several instances.

Under the Conditions of Participation, at least in the Medicare program as I understand it, the patient must be given a choice in regards to their care giver.

As you can see by our attachments, the hospital not only doesn't give us referrals: it also tries to take the ones we have. We have also been told by people who have been in the hospital that Heritage was never mentioned to them. They were just informed that the hospital would be providing Home Health services when they went home or they stated the doctor has ordered Home Health and the hospital would be sending someone out.

Before we arrived, neither of the hospital agencies offered weekend care or 24 hour on call services. We offer this as part of our normal patient care. Also, we utilize LPNs for home health aids. Now due to competition, they have upgraded their service to include both of these. Without the competition factor, they would never have upgraded their services. If hospitals are permitted to monopolize the Home Health service the way they do now, there will not be any choice as no other home health agency will be able to survive.

In the counties where there are no Hospital based HHAs we have had no problems with them and each have their own mechanism for issuing referrals. The hospitals refer in any of the following manners:

1. Allows the review of the admissions sheets daily.
2. Has a rotation basis if the person does not have a preference after given a choice.
3. If an agency had previously provided services, they will call that agency first or ask the individual if they would like to continue with the agency they had previously used.
4. The discharge planner makes a notation in the medical chart to the doctor such as would you like to order home health.
5. Schedule discharge planning meetings held with ancillary service providers.

Brochures of ancillary services are given to the patient. One of the hospital's provides these brochures in their packet that is given to every one that is admitted.

Is there some sort of mechanism, that could provide statistical data to show how many Home Health referrals are made and to what agency? If there is not, there should be and it should also be public information.

We are a Medicare Certified and State Licensed agency which all home health agencies must be to provide Medicare services. In the last two surveys, we did not have any deficiencies so not only do we meet the required guidelines, but this verifies that we provide quality care.

This is only a small sampling of some of the problems that are occurring. If a judgement is in favor of the hospital based agencies, it would only compound problems for existing Home Health Agencies. Your decision will have a very large impact on the hospital referral processes in the future. I would like very much to converse with you on this subject. Please call me at (406) 443-2186.

Sincerely,

Matthew F. Komac,  
*Administrator.*

Metro Home Health Care Services, Inc.

3200 Greenfield Road, Suite 260, Dearborn, Michigan 48120, Telephone: (313) 336-6303, FAX: (313) 336-7157

November 21, 1995.

Ms. Gail Kursh,

*Chief, Professions & Intellectual Property Section/Health Care Task Force, Department of Justice, Antitrust Division, 600 E Street, NW., Room 9300, Washington, DC 20530.*

Dear Ms. Kursh: Hospitals have cost the Medicare program hundreds of millions of dollars by shifting hospital costs down into their Medicare home health agencies (HHA). These agencies are paid cost, allowing the hospital to profit from shifting expenses to its home care agency.

This encourages the hospital to increase referrals to its HHA because the bigger its hospital based HHA, the more of the hospital's costs are paid for under the Medicare home health agency benefit. The attached will show that and the American Hospital Association advocates its hospitals to maximize Medicare reimbursement this way.

Should the Department of Justice encourage hospitals to make profits off Medicare referrals?

Sincerely,

Richard A. Porter,

*President/Administrator.*

Numerous Enclosures

St. Francis Hospital

2016 South Main Street, Maryville, MO 64468, Phone: (816) 562-2600, Fax: (816) 562-2411

December 26, 1995.

Mr. Edward D. Eliasberg, Jr.

*Professions in Intellectual Property, Bicentennial Building, Room 9422, 600 E. Street NW, Washington, DC 20530*

Dear Mr. Eliasberg: I'm writing this letter relative to the allegations filed against Heartland Health System in St. Joseph, Missouri. There is a group of citizens in the St. Joseph area who refer to their coalition as the Coalition for Quality Health Care. As a part of their information campaign, they are telling people that Heartland Hospital owns rural hospitals in Northwest Missouri, including St. Francis Hospital in Maryville. I'm writing this letter to set the record straight that St. Francis Hospital, Maryville, Missouri, is an independent, not-for-profit corporation whose sole member is SSM Health Care System of St. Louis, Missouri. The sponsoring organization of SSM Health Care System is the Franciscan Sisters of Mary of St. Louis, Missouri. Please understand that St. Francis Hospital is *not* owned, operated, managed, or controlled by Heartland Health System.

If you have any questions in this regard, then please contact me.

Sincerely,  
Ray Brazier,  
President.

To Whom It May Concern: Enclosed are some clippings from the St. Joseph, Missouri newspaper. Perhaps you have already received copies of them, but if not, please read them.

It would be well if some were to come investigate the situation in St. Joseph. I am sure you know a lot about what is going on, but probably there is much you don't know.

What we really need is a hospital that will be in competition with Heartland West. When an individual has surgery, they only keep them for one, two, or three days, regardless of how serious it might be. They are very short of rooms at Heartland East and people often are sent home and called when a room is available. This is ridiculous since Heartland West is setting down there with lots of vacancies. They have spent Millions of dollars to add on at Heartland East but none of the building has helped the room situation. They are trying to get a monopoly on all the doctors in town, but some are not joining them.

Heartland West is to be turned into a center for long term care—mostly older people. On the 5th floor of this institution is a Mental Health area which supposedly is locked at all times. But some of those people could find a way to get off the floor and it would be very dangerous for the older people who might be living there. They closed the emergency room which was convenient to people who do not have cars, etc. and everyone has to go to Heartland East, waiting several hours before being taken care of.

I do not wish to sign this letter, but I do feel the government should step in and straighten things out. They are short of nurses and admittance help and when someone quits they do not replace them. Those going in on emergency or accident have to be taken in the front door of the hospital where every one can see them. 2 young girls were taken there with serious injuries following a car accident. They had to spend the night in the surgery room until rooms were available for them in ICU.

This is just a little about the ways things are and I thought I could add it to your investigation.

Shepherd's Services, Inc.

12970 Pandora Drive, Suite 200, Dallas, TX 75238, (214) 340-3193, (214) 340-3195 Fax  
November 29, 1995.

Gail Kursh,  
Chief, Professions & Intellectual Property  
Section, Health Care Task Force,  
Department of Justice, Antitrust Division,  
600 E. St. NW., Room 9300, Washington,  
DC 20530

Re: United States v. Health Choice of  
Northwest Missouri, Inc. et al., Case No.  
95-6171-CV-SJ-6, District Court for the  
Western District of Missouri

Dear Ms. Kursh: We would like to comment on the proposed final judgment in the above case:

Since we do not have the full pleading, we are not completely aware of the full scope of

this litigation. We are aware, however, of the portion that would effect our home health care agency, and—indeed—the entire home health care industry. We are most concerned about those who are covered by Medicare and Medicaid, or by personal pay. Since HMOs have already restricted the patient's choices by their system of operation, this essential removes options from the hospital as well.

1. We think the system proposed by Heartland Health System, is extremely prejudicial to other home health providers in the community. Since the legislation enabling Medicare and Medicaid is founded on a basic principle that patients have true freedom of choice—and mandates such—any action by a health care provider that intimidates the patient in any way, either overtly or covertly, is contravening the intention of the law.

a. In the initial contact, the hospital is, in essence, questioning the physician's competence in his ability to name a provider. Since the same Patient's Rights extend to the physician, it would be hoped—but often unfulfilled—that the physician or his staff would have educated the patient about freedom of choice.

b. The proposed resolution, written with an extreme bias in favor of Heartland Health System, virtually guarantees no referrals in all but the most exceptional cases. The patient is not advised of his rights under Medicare or Medicaid, but only asked if there is a preferred provider. Since many, if not most, of the patients we have on service were unaware of their rights before they were explained to them, simply asking if a provider is preferred is going to elicit, in most cases, an uneducated answer, not an informed one.

Example:

1. An elderly patient was admitted from our service to a local hospital. The discharge planner of the hospital was told of the patient's relationship to our agency. Upon discharge the patient was advised, while still very disoriented, that home care had been ordered. The planner asked if the patient had a preference. Upon being asked, the patient could remember our Director of Nurse's name and the aide's name, but not our agency name. The planner discharged the patient to the hospital's agency without any attempt to help the patient find us. Our brochure was on the table but was out of sight of the patient. Our name was in the patient's chart. Rather than assisting the patient, the planner simply said they would take care of it. When the agency showed up for a visit, the patient called us to see if we could send the previous nurse and aide were available since they had been so wonderful to her. Finding out what had happened, we asked the agency to transfer the patient. They refused. Following up, we advised the patient of the Medicare rights and the choice of provider clause. The patient, "didn't want to make the hospital angry" and did not change.

c. In the second phase of the proposed process, Heartland can give the patient a full sales pitch, again with no reference to patient rights, and not mention other possible options. Only a very assertive patient would object and ask about other options. Again, the

reasons are many, but ignorance of the system is very high on the list. Since Medicare will not reimburse advertising, the major hospitals, with huge financial reserves from other income sources, have done widespread public relations campaigns. Therefore, they have name recognition with the patients. After all, they are often in a hospital with the same, or similar name. Name recognition and credentials do not necessarily equate with providing quality care, as so many of those covered by HMOs have found to their dismay. In Texas the law prohibits an agency from having to be Joint Commission certified since Medicare certification is equivalent.

Again, in this phase, the patient who would be assertive enough to want additional information to make an informed, intelligent decision, is essentially left to his or her own devices by the abstract referral to the telephone book. No attempt is made to provide the patient reasonable service. If the patient asks for assistance a second time, the planner gives verbal choices. It is widely recognized that, in terms of mental retention verbal presentation which is the least preferred method of communication.

Point of information:

The discharge planner was a disinterested party in terms of who provided the proposed care, and was primarily a patient advocate. For many years, hospitals used one of two methods for making referrals:

1. A rotation between agencies that had signed up with the hospital, or:
2. Agencies provided the hospital information about their services that could be distributed to the patients.

A suitably austere planner could, again, intimidate the patient with lack of assistance and this barrage of noninformation.

Example:

1. A patient who chose our service before admission to a local hospital: Although the patient was committed to service with us, the discharge planner, who was actually an employee of the hospital's home health care agency, refused to discharge the patient to us. Earlier in the afternoon the same social worker had informed us that the patient was not going to be released until the next day. That afternoon the patient was abruptly discharged to the hospital agency. When the patient objected he was told, in essence, the hospital did not know us. If our administrator had not happened to have stopped by while the patient was being transferred to a wheel chair for discharge, he would have been at home under the hospital's service in spite of his objections. This was a very assertive client. You can imagine how much courage it would have taken for someone who was frail and elderly to offer this much resistance.

Note also the language in the proposed final judgment. " \* \* \* the referring person cannot make a recommendation. \* \* \* " This is an extremely restrictive phrase for a legal judgment. A planner will be in violation of the judgment if any other phraseology is used.

2. In clinical professions engaged in such practices as counseling—including social workers covered by their own code of ethics—a client is to be offered three choices

during a referral, and is informed how to make an informed choice about other options. In relationships between home health care, and related services, and hospitals this ethical courtesy not followed. The Texas Association for Home Care (TAHC), of which our agency is a member, is extremely concerned about ethical practices in this area, and recently unanimously passed a Code of Ethics. The Code covers both free standing and hospital based agencies who are members of TAHC. Two points are essential to our cooperative efforts to provide the highest quality of care to our clients:

a. Agencies shall honestly and conscientiously cooperate in providing information about referrals and shall work together to assure comprehensive services to their clients and their families.

b. Member agencies shall not engage in coercive or unreasonably restrictive exclusionary behavior which would restrict or impede consumer choice of provider agencies. A member agency or related entity that provides a screen to clients for home care referrals shall not use that position to influence a client's choice to direct referrals to itself, and shall inform clients of the availability of home care providers and advise clients that they have the right to choose the provider they prefer.

#### Other Observations

1. Following these guidelines would not be excessively restrictive on hospitals. They would allow them access to the patients on an equal footing with other providers. The very fact that the planner is an employee of the hospital places that person in a "position of influence" that is hardly negligible in terms of eliciting preferential responses.

2. In a metropolitan area it is unreasonable to expect the discharge planner to be acquainted with every available agency, nor to serve as a spokesperson for other agencies. The disclaimer, ("no independent review \* \* \*" etc.) is appropriate. As we receive requests for information we attempt to educate the prospective patient. It is reasonable to give basic guidelines on how to select providers of any ancillary services. Again, the goal would be to provide equal footing as outlined in the TAHC Code of Ethics. It is not unreasonable to ask the hospital to provide basic patient rights information to their patients. We utilize several different suppliers of DME equipment. Where a major appliance, for example a particular bed required for the patient's care, we advise them of other options that are available to them.

#### Point of information:

In most cases the patient truly has no preference and follows our recommendation because they trust us.

Recognizing this "position of influence," the hospital will have many patients who do not have a preference. There will be plenty of opportunity for them to admit those patients without prejudicing opportunities for other providers.

#### Recommendations

We believe the following guidelines are patient oriented and equitable for all providers.

1. If a physician orders a specific provider that order should be honored. An order for Ancillary Services is as binding as any other medical order. A nurse does not ask the patient if medical orders are acceptable.

2. If the patient does not express a preference, the patient should be educated about how to make an informed decision rather than summarily making decisions for them.

3. In recommending their own agency, discharge planners should provide available information on other providers. As a minimum the planner should provide the applicable section of the classified section of the telephone book in which alternative providers are listed.

4. If brochures are provided from the hospital agency, brochures from other agencies should also be provided to help the patient in making an informed decision.

Thank you for your time in reviewing and considering our comments and recommendations.

Sincerely,  
Richard G. Copeland,  
*Administrator.*

January 18, 1996.

Gail Kursch.

*Chief, Professions and Intellectual Property Section, Health Care Task Force, Department of Justice, Antitrust Division, 600 East Street NW., Room 9300, Washington, DC 20530.*

Dear Ms. Kursh: I am writing in support of the DOJ's proposed final judgment for United States vs. Health Choice of Northwest Missouri, Inc., Case Number 95-6171-CV-SJ-6.

As a home health care professional, I am very concerned about the protection of patient choice and the quality of health care all patients receive.

The only home care agency of which a hospital can speak with authority and assurance is its own. Recommending other agencies is a liability issue. There is no way hospital administration and discharge planners can be sure of the quality of services provided by other agencies.

If a patient has a request for an agency, other than that recommended by his physician, he simply needs to indicate that preference to the appropriate party. If the patient is interested in other providers, referring them to the yellow pages provides an organized and unbiased information source.

Thank you for the opportunity to voice my opinion.

Respectfully,  
Anne Santora

Ramadan Hand Institute, Lake Butler Hospital

850 E. Main Street, Lake Butler, FL 32054,  
(904) 496-2323

January 19, 1996.

Gail Kursh,

*Chief, Professions and Intellectual Property Section, Health Care Task Force, Department of Justice, Antitrust Division, 600 East Street NW., Room 9300, Washington, DC 20530*

Dear Ms. Kursh: I am writing in support of the DOJ's proposed final judgment for United States vs. Health Choice of Northwest Missouri, Inc., Case Number 95-6171-CV-SJ-6.

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Thank you for the opportunity to voice my opinion.

Respectfully,  
Pamela B. Howard,  
*Hospital Administrator.*

January 18, 1996.

Gail Kursch,

*Chief, Professions and Intellectual Property Section, Health Care Task Force, Department of Justice, Antitrust Division, 600 East Street NW., Room 9300, Washington, DC 20530*

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Thank you for the opportunity to voice my opinion.

Respectfully,  
Patti Hecht

January 18, 1996.

Gail Kursh,

*Chief, Professions and Intellectual Property Section, Health Care Task Force, Department of Justice, Antitrust Division, 600 East Street N.W., Room 9300, Washington, D.C. 20530.*

Dear Ms. Kursh: I am writing in support of the DOJ's proposed final judgment for United

States vs. Health Choice of Northwest Missouri, Inc., Case Number 95-6171-CV-SJ-6.

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The only home care agency of which a hospital can speak with authority and assurance is its own. Recommending other agencies is a liability issue. There is no way hospital administration and discharge planners can be sure of the quality of services provided by other agencies.

If a patient has a request for an agency, other than that recommended by his physician, he simply needs to indicate that preference to the appropriate party. If the patient is interested in other providers, referring them to the yellow pages provides an organized and unbiased information source.

Thank you for the opportunity to voice my opinion.

Respectfully,

Ann Reilly

Athens-Limestone Hospital

700 West Market Street, P.O. Box 999,  
Athens, Alabama 35611, Phone (205) 233-9292.

January 19, 1996.

Ms. Gail Kursh,

*Chief, Professions and Intellectual Property Section, Health Care Task Force, Department of Justice, Antitrust Division, 600 East Street N.W., Room 9300, Washington, D.C. 20530.*

Dear Ms. Kursh: I am writing in support of the DOJ's proposed final judgment for United States vs. Health Choice of Northwest Missouri, Inc., Case Number 95-6171-CV-SJ-6.

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The only home care agency of which a hospital can speak with authority and assurance is its own. Recommending other agencies is a liability issue. There is no way hospital administration and discharge planners can be sure of the quality of services provided by other agencies.

If a patient has a request for an agency, other than that recommended by his physician, he simply needs to indicate that preference to the appropriate party. If the patient is interested in other providers, referring them to the yellow pages provides an organized and unbiased information source.

Thank you for the opportunity to voice my opinion.

Respectfully,

Philip E. Dotson,

*Chief Executive Officer.*

Mississippi Baptist Medical Center

January 29, 1996.

Gail Kursh,

*Chief, Professions and Intellectual Property Section, Health Care Task Force, Department of Justice, 600 East Street NW., Room 9300, Washington, DC 20530.*

Dear Ms. Kursh: I am writing in support of the DOJ's proposed final judgment for United States vs. Health Choice of Northwest Missouri, Inc., Case Number 95-6171-CV-SJ-6.

As a home health care professional, I am very concerned about the protection of patient choice and the quality of health care all patients receive. Also, as a member of NAHC, I am disappointed in its opposition to this DOJ ruling.

The only home care agency of which a hospital can speak with authority and assurance is its own. Recommending other agencies is a liability issue. There is no way hospital administration and discharge planners can be sure of the quality of services provided by other agencies.

If a patient has a request for an agency, other than that recommended by his physician, he simply needs to indicate that preference to the appropriate party. If the patient is interested in other providers, referred them to the yellow pages provides an organized and unbiased information source.

Thank you for the opportunity to voice my opinion.

Respectfully,

Dan Gore,

*Asst. Exec. Dir., Mississippi Baptist Medical Center, Central Mississippi Health Care at Home.*

St. Joseph Convalescent Center

811 North 9th Street, St. Joseph, MO 64501,  
Phone: (816) 233-5164.

February 5, 1996.

Edward D. Eliasberg, Jr.,

*U.S. Department of Justice, Antitrust Division, Bicentennial Building, 600 E Street NW., Washington, DC 20530.*

Re: U.S. v. Health Choice of Northwest Missouri, Inc.

Dear Mr. Edward D. Eliasberg, Jr. I am returning my letter for your record so that you may submit it. If you need any more information I would be happy to cooperate in this matter.

Thank you.

Lisa Smith

U.S. Department of Justice

Antitrust Division, Bicentennial Building,  
600 E Street, NW, Washington, DC 20530

January 18, 1996.

Ms. Lisa Smith

*St. Joseph Convalescent Center, P.O. Box 283, 881 North 9th Street, St. Joseph, MO 64502*

Re: U.S. v. Health Choice of Northwest Missouri, Inc.

Dear Ms. Smith: This is in regard to the enclosed October 4, 1995 letter from you to Gail Kursh. You apparently sent us the letter in order to comment upon the proposed Final Judgment in *United States v. Health Choice of Northwest Missouri, Inc. et al.* You request that the letter be kept confidential.

We are returning your letter because the federal statute that governs the entrance of proposed final judgments in federal government civil antitrust cases, 15 U.S.C. § 16(b)-(h), requires us to publish and file with the Court all comments received. We were not sure you were aware of this provision.

You are, of course, free to resubmit the letter to us if you have no objection to your identity being disclosed. You also can, if you like, submit a redacted or anonymous letter or do nothing at all.

We are trying to finish our statutorily-required response to the comments as expeditiously as possible. We therefore request that you promptly send us any comment you care to submit or resubmit.

Sincerely yours,

Edward D. Eliasberg, Jr.,

*Attorney.*

Enclosure

October 4, 1995.

Gail Kursh,

*Chief, Professions and Intellectual Property Section, Health Care Task Force, Department of Justice, Antitrust Division, 600 E Street, N.W. Room 9300, Washington, D.C. 20530*

Dear Ms. Kursh: We need help now. I have been in this industry since 1984 and have never experienced such shortage of patients for such a long period of time. The trend right now is if you send a resident to the hospital for any reason they are treated and then sent to the skilled unit or acute unit at Heartland West. They are kept for as many days as medicare allows. When we call the social service to check on our patients we are given the run around. Some patients are tentatively placed in another facility that was owned by Heartland, until we called the floor to check on our resident and found out what was going on. They were going to place a dialysis patient with history of noncompliance with diet and fluids and fluctuating blood sugars to a residential care facility. They do not allow us to be a part of the care plan process during their stay. When you try to contact Social Service they no longer have anyone to answer the phone so you must leave a message and they seldom return your call. When they do return your call they either do not know what is going on or they are uncooperative. When you call the resident's physician to check on the patient they do not know what is going on with the resident—they do not make discharge plans the paid Heartland staff and Heartland doctors make these decisions. Today for instance, one of our residents who had been hospitalized recently was to return at 12:30 p.m. At 2:15 p.m. today she had still not returned. We tried to find out what was going on through social service and the floor—they had no idea what was going on—so we went and picked up the resident. We have been told that the resident is asked to sign a paper stating they want to go to Heartland nursing home if they need nursing home care. These elderly patients are not given a choice as to placement outside of Heartland. We talked to the head of social service at Heartland and he didn't even know

what we offered. We have been informed that if social service does try to place outside of Heartland they are reprimanded for this practice. In less they have a group of independent social workers or a group of people to evaluate what they are doing with these elderly people this practice will not change. I have tried to involve many groups at different times and no one wants to help when it comes to Heartland. Heartland owns this town and no one will stand up to them. What they are doing is wrong—the monopoly is wrong. The money that medicare and medicaid pays them is unbelievable. Heartland's nursing home should get the same reimbursement and inspectors with the same rules and regulations that we have to follow. All Heartland West is a very large nursing home. A couple of years ago when we were hearing the rumors about them starting there nursing facility, they had meetings with the nursing home industry denying these rumors. They promised to have meetings with us on quarterly basis to keep us informed of what was going on but there was no plans for a nursing home. That was the last meeting that they ever had. I can not imagine the government allowing something so unfair going on. They say nursing homes cost the government so much money but we can not cost nearly as much as these type of setups. I hope someone can help us. Everyone in health care has felt a large impact due to Heartland Systems. When we talk to people they do not get information about any outside nursing homes. We have taken brochures to Heartland but I feel they are probably never circulated. We used to average 4 or 5 residents admitted from Heartland each month since January 1995. July 26, 1995 was the last new resident that we received from Heartland. On August 23, 1995 we received a new resident who expired within a few days. These are the type of patients we get now hard to take care of, very ill or the patients you can rehab to go home. We have gotten one call on a new resident but she ended up going to skilled because she still had medicare days to use. They make no bones about what they are doing. We call them to check on them on skilled ward and they say they have only been there for a few days and their time is not up they will contact me when it is. They are bleeding medicare and medicaid for all they can. When we tell the social workers what we offer they act like this is the first time they have ever heard of us. They are building a residential facility out by the new hospital also. How can this be possible? They don't need a certificate of need. They are trying to buy other nursing homes in town also. Please try to do something for us.

There are a lot of good nursing homes in this town but how long can we all survive without patients, not very long. This is so unfair and we feel that no one can hear our cries. I have even made trips to the hospital trying to get patients but these fall on deaf ears also. Between the hospital and home health they pretty much control the elderly population in this town and are fully aware of this. Help us know before it is too late. I hope this is kept in the highest confidence for we are struggling now to get patients and if they knew what we are telling you they

would really give us a hard time. Thank you for your time.

Sincerely,  
Lisa Smith

Raulerson Hospital  
January 30, 1996.

Gail Kursh,  
*Chief, Professions and Intellectual Property Section, Health Care Task Force, Department of Justice, Antitrust Division, 600 East Street N.W., Room 9300, Washington DC 20530*

Dear Ms. Kursh: I am writing in support of the DOJ's proposed final judgment for United States vs. Health Choice of Northwest Missouri, Inc., Case Number 95-6171-CV-SJ-6.

As a home health care professional, I am very concerned about the protection of patient choice and the quality of health care all patients receive.

The only home care agency of which a hospital can speak with authority and assurance is its own. Recommending other agencies is a liability issue. There is no way hospital administration and discharge planners can be sure of the quality of services provided by other agencies.

If a patient has a request for an agency, other than that recommended by his physician, he simply needs to indicate their preference to the appropriate party. If the patient is interested in other providers, referring them to the yellow pages provides an organized and unbiased information source.

Thank you for the opportunity to voice my opinion.

Respectfully,  
Frank Irby,  
*Chief Executive Officer.*

Raulerson Home Care  
217 S.W. Park Street, Okeechobee, Florida 34974, (941) 357-0080, (800) 440-2227, Fax (941) 357-1081

January 30, 1996.

Gail Kursh,  
*Chief, Professions and Intellectual Property Section, Health Care Task Force, Department of Justice, Antitrust Division, 600 East Street N.W., Room 9300, Washington DC 20530*

Dear Ms. Kursh: I am writing in support of the DOJ's proposed final judgment for United States vs. Health Choice of Northwest Missouri, Inc., Case Number 95-6171-CV-SJ-6.

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patient is interested in other providers, referring them to the yellow pages provides an organized and unbiased information source.

Thank you for the opportunity to voice my opinion.

Respectfully,  
Lisa G. Smith,  
*Home Health Administrator.*

Missouri Alliance for Home Care  
431 E. McCarty Street, Jefferson City, MO 65101-3103, 573-6342, Fax 573-6343

February 28, 1996.

Honorable Howard Sachs,  
*U.S. District Court, Western District, Western Division, U.S. Court House, 811 Grand Ave., Kansas City, MO 64106*

Re: Proposed Final Judgment: United States v. Health Choice of Northwest Missouri, Inc., et al., Civil No. 95-6171-CV-SJ-6 (W.D.Mo.)

Dear Judge Sachs: The Missouri Alliance for Home Care (MAHC) is responding to the above captioned case concerning the provision of ancillary services that is attached to the Final Consent Judgment against Heartland Health System, Inc.

MAHC is the home care industry trade association in Missouri. Membership includes companies that provide home health, hospice, home infusion therapy, in-home long term care services and home medical equipment. The membership of MAHC is broad-based representing hospital based, as well as, private freestanding companies.

MAHC feels that the final judgment fails in several important areas:

1. It does not meet the letter of the law establishing criteria for fair competition as intended by Medicare and Medicaid.
2. It helps create a monopoly in an area well served by competitive providers.
3. It does not consider patients without adequate health coverage allowing for cherry picking of patients with financial resources.
4. It treats patients as a commodity to be controlled, directed, indeed steered to ancillary services.

5. This decision has national ramifications and should be widely disseminated. A national understanding of this new referral policy and its impact on consumers and providers is crucial. The critical nature of these ramifications further impresses the need to ensure this policy complies with the rules set forth under the Medicare Act, something the Heartland policy does not do.

*MAHC feels the patient should be empowered to make decisions.* They should be informed of the process of arranging for home care services, what alternative providers are available and the financial costs to them depending upon their decision.

At a time when the patient is at their most vulnerable they turn to the physician and hospital to give them and their families help in selecting services to ease the transition to home. Many of these patients may not realize that they have a choice. If hospital personnel or their physician steers their care to hospital based services the patient will probably accept, without question, that referral, thus preventing them the option to exercise their

right to choose. The very act of forcing a patient to ask twice for alternative providers is demeaning to them. We should be servicing the sick by assisting them to a comfortable transition home not manipulating them.

MAHC favors several changes to the judgment:

1. *Patients should be informed and given the power to make a choice.* Patients should be given a patients Bill of Rights to educate themselves. They should understand what choices they will need to make, how to go about making those choices and any limitations of their insurance coverage or payor for those services. If the patient previously had a provider that they wish to continue using that choice should be allowed.

2. *Patients should be given information about alternative providers.* The hospital discharge process should provide each patient requiring any home care service with a list of companies that can provide the services to meet the patient's needs. The hospital should be required to maintain and make available an up-to-date listing of qualified providers. The hospital ancillary services should be on the list in alphabetical order. The patient should be assured that selection of any company other than the hospitals' affiliate will not affect their care at the hospital or prevent them from receiving

future care from the hospital. This list should contain basic information about services available from each provider including how the patient contacts the company and it should be updated quarterly.

3. *The patient's discharge information should be shared.* As the patient discusses options with the competing companies, appropriate discharge information about their medical care and needed services in the home should be shared with the agency the patient selects. All companies should discuss how services will be provided and what costs, if any, the patient will be expected to pay.

4. *Patients have the right to be aware of any financial relationships or incentives between the person making a referral and the provider.* If the patient and the patient's family have no preference, and no desire for written information, then the patient's physician should make the choice of a home care provider. There should be no pressure or incentive on the physician or any of the hospital medical staff to refer patients to the hospital's affiliated services. If there is a financial relationship between the provider and the physician, including but not limited to the physician being an employee of or having a financial interest in the hospital, or the physician's practice being owned by the hospital, this must be disclosed to the patient. Patients have a right to know if the

physician or hospital has a financial interest in the provider or company where they are referred.

This Final Judgment sends a confusing message from the government. Decisions in the past have sought to lower health care costs, indeed, the government has supported competition as a way to decrease costs. Past policy and current Medicare law encourages patient freedom of choice of providers. Legal action by the Department of Justice has been taken in the past to prevent referrals by health care decision makers that have a financial interest in provider companies.

The Final Judgment seems to refute all of these past decisions. Government policy needs to give consistent direction. MAHC encourages you to reconsider your decision regarding the referral policy and to instead insist on a national policy which protects the patient's right to choose and promotes fair market competition among providers.

Sincerely,

Dale E. Smith,

*President, Missouri Alliance for Home Care.*

cc: Gail Kursh, Esq., Chief Professional & Intellectual Property Section, Health Care Task Force, Department of Justice

Jay Nixon, Attorney General of Missouri

[FR Doc. 96-13754 Filed 6-11-96; 8:45 am]

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**United States  
Federal Register**

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Wednesday  
June 12, 1996

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**Part III**

**Environmental  
Protection Agency**

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**40 CFR Parts 60 and 63  
National Emission Standards for  
Hazardous Air Pollutants: Petroleum  
Refineries; Final Rule; Correcting  
Amendments**

**ENVIRONMENTAL PROTECTION AGENCY****40 CFR Parts 60 and 63**

[AD-FRL-5463-1]

RIN 2060-AD9Y

**National Emission Standards for Hazardous Air Pollutants: Petroleum Refineries**

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule; correcting amendments.

**SUMMARY:** This action corrects errors and clarifies regulatory text of the "National Emission Standards for Hazardous Air Pollutants: Petroleum Refineries," which was issued as a final rule on August 18, 1995.

**EFFECTIVE DATE:** June 12, 1996.

**FOR FURTHER INFORMATION CONTACT:** Mr. James Durham, Waste and Chemical Processes Group, Emission Standards Division (MD-13), U.S. Environmental Protection Agency, Research Triangle Park, North Carolina, 27711, telephone number (919) 541-5672.

**SUPPLEMENTARY INFORMATION:** On August 18, 1995 (60 FR 43244), the Environmental Protection Agency (EPA) promulgated in the Federal Register national emission standards for hazardous air pollutants (NESHAP) for petroleum refineries. These regulations were promulgated as subpart CC of 40 CFR part 63. The same notice amended standards of performance in 40 CFR part 60, subpart VV. This document contains corrections to typographical and cross referencing errors in these subparts. A few editorial clarifications are also being made to clarify the intent of certain provisions and correct inconsistencies between different sections of the rule.

**I. Description of Clarifying Changes****A. Compliance Dates**

The compliance dates in § 63.640(h) are being clarified to remove an inconsistency regarding the compliance date for marine tank vessels. Section 63.640(h) stated that refineries have 3 years to comply with the NESHAP unless a case-by-case 1-year extension is granted. However, § 63.651 cross references the marine tank vessel loading rule [40 CFR 63, subpart Y (September 19, 1995; FR 43388)] which allows 4 years to comply without requiring a case-by-case extension. Therefore, it was unclear in the rule published on August 18, whether a compliance extension is required to allow marine tank vessel loading

operations at refineries 4 years to comply. The intent was to be consistent with subpart Y, unless marine tank vessels are used to generate credit in an emissions average. Paragraph (h)(3) is being added to § 63.640 to make it clear that marine tank vessel loading operations have 4 years to comply. However, if marine tank vessels loading is used to generate credits for an emissions average, compliance must be achieved in 3 years unless a case-by-case extension is granted by the regulatory authority as provided in § 63.6(i) of subpart A (the NESHAP general provisions). Because the other emission points at a refinery included in such an emissions average are required to comply within 3 years of promulgation, the emissions average would not balance if the marine tank vessel loading was not controlled by the third year. However, regulatory authorities have the discretion to allow an extension of up to 1 year for full implementation of the emissions average. This decision is best made on a site-specific basis.

A clarification is also being made to the wording of § 63.640(h)(4) which allows Group 1 storage vessels with floating roofs to comply at the next degassing and cleaning activity or within 10 years after promulgation of the rule, whichever is first. The clarification will insert the phrase "after August 18, 1998" after the words "cleaning activity". As explained in the promulgation preamble, the intent of this provision was to allow an extension of up to 10 years for floating roof storage vessels to achieve full compliance, not to require compliance prior to the 3-year compliance time allowed for all other emission points at refineries. As originally worded, this paragraph could have been misinterpreted as requiring storage vessels that were degassed prior to the August 18, 1998 compliance date to come into compliance earlier than the rest of the refinery.

A clarification is also being made to § 63.640(l) regarding compliance times and reports for addition of emission points to existing sources. This paragraph of the promulgated rule is clear regarding addition of miscellaneous process vents, storage vessels, gasoline loading racks, and marine tank vessel loading operations, but did not specifically address equipment leaks. Responses to comments in section 9 (general monitoring, recordkeeping, and reporting comments) of the background information document for the promulgated rule (EPA 453/R-95-015b) clarify that it was not intended that the addition of pumps, valves, and other

components to an existing source subject to the equipment leaks standard trigger new source reporting requirements. The amended paragraph clarifies that equipment leak component additions remain subject to existing source and not new source requirements.

Paragraph (m)(2) of § 63.640 has also been reworded to clarify the timing for of a compliance schedule submittal existing sources when a Group 2 emission point becomes a Group 1 emission point. The intended 180-day time period for submitting the compliance schedule has not been changed, but the intent of the previous wording "within 180 days after the change is made or the information regarding the change is known to the source" has been clarified by the rewording.

**B. Clarification of Exemptions**

Paragraph (d)(3) of § 63.640 is being reworded. This paragraph exempts equipment that is in organic hazardous air pollutant (HAP) service less than 300 hours per year. This exemption applies to the types of equipment listed in the definition of "equipment leaks" in § 63.641. In order to improve clarity, the specific types of equipment to which this exemption applies have been listed in § 63.640(d)(3). The list of equipment being added to this paragraph exactly matches the list already included in the definition of equipment leaks in § 63.641.

An exemption for emission points routed to refinery fuel gas systems is being added to § 63.640(d). This exemption is specified in the definition of "miscellaneous process vent" in § 63.641. Putting this exemption in the applicability section (§ 63.640) makes it clearer that all emissions routed to fuel gas systems are exempt from the rule.

**C. Definitions**

The definitions of "Group 1 gasoline loading rack" and "Group 1 marine tank vessel" are being revised for consistency with 40 CFR part 63 subparts R (the gasoline distribution NESHAP) and Y (the marine tank vessel loading NESHAP). The intent of the refineries NESHAP was to be consistent with subparts R and Y in terms of which loading operations require control. Sections 63.650 and 63.651 of the Refineries NESHAP (subpart CC) cross-reference subparts R and Y for control requirements for loading operations. However, throughput and emissions applicability criteria in subparts R and Y were not correctly incorporated in the Group 1 definitions in § 63.641. The definition of "Group 1 gasoline loading

rack" is being revised to mean a gasoline loading rack classified under SIC 2911 that is part of a bulk gasoline terminal with the capacity to load greater than 75,700 liters per year of gasoline. This is consistent with subpart R. The definition of "Group 1 marine tank vessel" is being revised by changing the emission rate criteria for existing sources from 9.1 megagrams per year of any individual HAP and 13.6 megagrams of any combination of HAPs to 9.1 megagrams per year of any individual HAP and 22.7 megagrams of any combination of HAPs. The revised definition also clarifies that these emission rate cutoffs apply only to existing sources, not to new sources. These clarifications remove inconsistencies between the definitions in § 63.641 of subpart CC and the rules cross-referenced in §§ 63.650 and 63.651.

The definition of storage vessel is being clarified by removing the clause "in organic HAP service". This was a drafting error. The definition was intended to cover vessels storing organic liquids. However, the phrase "in organic liquid service" was used without recognizing that it is a defined term used in the equipment leaks section of the rule to indicate equipment leak components containing or contacting fluid that is at least 5 weight percent organic HAP. The preamble to the final rule (60 FR 43252) and the "Group 1 storage vessel" definitions make it clear that storage vessels with lower percent organic HAP were intended to be regulated. The "Group 1 storage vessel" definition contains the correct organic HAP weight percent cutoffs of 4 percent for existing sources and 2 percent for new sources, which are discussed in the preamble for the final rule.

The definition of "Group 1 miscellaneous process vent" is being revised to clarify that the 20 parts per million by volume cutoff applies to organic HAP rather than volatile organic compounds (VOC). This is consistent with the definition of "miscellaneous process vent", which includes vents containing greater than 20 parts per million by volume organic HAP and with the 20 parts per million organic HAP language in § 63.643. The definitions of "miscellaneous process vent" and "equipment leaks" are also being clarified by specifying that they do not include emissions from wastewater collection and conveyance systems. Air emissions from wastewater systems are regulated under the wastewater provisions in § 63.647 of subpart CC.

Definitions of "startup" and "shutdown" are being added for

clarification. These definitions are consistent with definitions in the subpart A General Provisions and the hazardous organics NESHAP (40 CFR 60, subpart F). Under the General Provisions, § 63.6(f)(1) states that emission limits do not apply during startup, shutdown, and malfunction. These definitions make it clear that, for purposes of § 63.6(f)(1) and for the startup, shutdown, and malfunction plan, startup and shutdown refer to startup and shutdown of refinery process units or unit operations such as distillation units rather than to individual components such as pumps. To further clarify this point, the second sentence in the definition of "affected source" has been deleted. This sentence had been interpreted to mean that startup, shutdown, and malfunction plans apply to individual components.

Other minor definition changes are being made to correct typographical errors and improve clarity. For example, in the definition of "emission point", the word "gas" is changed to "gasoline", and a definition of leakless valves is being added to clarify which types of valves are excluded from the monitoring requirements of the rule.

#### *D. Equations*

The term "R" in the equation in § 63.642(g) represents the fraction of emissions from a Group 1 marine tank vessel loading operation after the required level of control has been applied. The phrase "and 0.05 for new offshore loading terminals" is being deleted because offshore loading terminals are not subject to subpart CC. Therefore, this phrase was not relevant to the refineries NESHAP, and would cause confusion.

The EPA is clarifying that the emissions averaging equations for gasoline loading racks assume that all facilities with Group 1 gasoline loading racks must comply with the requirements of subpart R regarding vapor-tightness of gasoline cargo tanks loaded at the facility, regardless of whether emissions averaging is used. Therefore, the emissions credit and debit calculation equations do not include terms for estimating emissions from leakage from gasoline cargo tanks. (Compliance with subpart R vapor-tightness provisions is not a new requirement. There is no change to the regulation language regarding this point.)

#### *E. Recordkeeping and Reporting*

Section 63.642(e) is being revised to state that records shall be maintained in such a manner that they can be readily accessed within 24 hours, rather than be

maintained on-site for 2 years. This change is consistent with the discussion on this issue in section 9 (general monitoring, recordkeeping and reporting comments) of the background information document for this rule. This change was not incorporated in the promulgated rule because of a drafting oversight.

In § 63.654(d), recordkeeping requirement for equipment leaks are being added that require owners or operators to keep a list of valves that are designated as "leakless." These valves are exempt from the valve monitoring requirements. This recordkeeping requirement is consistent with requirements in equipment leak rules cross-referenced in this subpart, such as 40 CFR part 60, subpart VV. The requirement was overlooked when drafting the cross-references to subpart VV. Owners or operators are also required to identify equipment in process units that are subject to the rule that are not considered in organic HAP service, and reciprocating compressors and pumps that are exempt from equipment leak control requirements. These requirements are consistent with the hazardous organic NESHAP recordkeeping and reporting requirements which is cross referenced in the rule.

Section 63.654(h)(1) is being clarified to explicitly state that reports of startup, shutdown, and malfunction required by § 63.10(d)(5) do not apply to Group 2 emission points at refineries, unless they are included in an emission average. This is already stated in table 6, which shows which portions of the NESHAP general provisions apply to subpart CC. Table 6 specifies, in footnote b, that § 63.10(d)(5) does not apply to Group 2 emission points that are not included in an emission average, but it would be clearer to the reader to also state this in § 63.654(h)(1).

In table 4 of 40 CFR part 63, subpart CC, the cross-references to § 63.428 (i) and (j) of 40 CFR part 63, subpart R are being deleted. These records and reports pertain to recordkeeping provisions of subpart R that are applicable to facilities that have calculated emissions from bulk terminals and pipeline breakout stations that fall below a de minimis level and are not subject to 40 CFR part 63, subpart CC. In table 6 of subpart CC, the applicability of § 63.6(h) has been clarified. This requirement is referenced in portions of the HON rule (40 CFR part 63, subpart G) and the general provisions (40 CFR part 63, subpart A) relating to flares that are cross-referenced from subpart CC, and it was incorrectly over-ridden in the table. However, paragraphs relating strictly to

opacity remain over-riden. Paragraphs specifying the timing of the visible emissions testing also remain over-riden because § 63.645(i) has been added to 40 CFR part 63, subpart CC to specify the timing of the visible emissions tests for flares used to comply with subpart CC. The timing in § 63.645(i) is consistent with the date the petroleum refinery notification of compliance status is due, and will avoid requiring a visible emissions report at a separate time specified in § 63.6(h).

In table 3 of 40 CFR part 63, subpart CC, the comments on the recordkeeping and reporting requirements in § 63.182 (b) and (c) are being corrected to be consistent with exemptions allowed in the text.

**II. Cross Referencing and Typographical Errors**

Errors in cross-referencing 40 CFR part 63 subparts G and R, 40 CFR part 60 subpart Kb, and other sections within subpart CC are being corrected. Typographical errors are also being corrected.

**List of Subjects in 40 CFR Parts 60 and 63**

Air pollution control, Hazardous air pollutants, Petroleum refineries, Reporting and recordkeeping requirements.

Dated: April 17, 1996.

Mary D. Nichols,  
Assistant Administrator for Air and Radiation.

For the reasons set out in the preamble, parts 60, and 63 of title 40, chapter I, of the Code of Federal Regulations are amended as follows:

**PART 60—[AMENDED]**

1. The authority citation for part 60 continues to read as follows:

Authority: 42 U.S.C. 7401–7601.

**Subpart VV—[Amended]**

2. Section 60.482–10 is amended by revising paragraph (j) to read as follows:

**§ 60.482–10 Standards: Closed vent systems and control devices.**

\* \* \* \* \*

(j) Any parts of the closed vent system that are designated, as described in paragraph (l)(1) of this section, as unsafe to inspect are exempt from the inspection requirements of paragraphs (f)(1)(i) and (f)(2) of this section if they comply with the requirements specified in paragraphs (j)(1) and (j)(2) of this section:

\* \* \* \* \*

**PART 63—[AMENDED]**

3. The authority citation for part 63 continues to read as follows:

Authority: 42 U.S.C. 7401 *et seq.*

**Subpart CC—[Amended]**

4. Section 63.640 is amended by revising paragraphs (b) and (d), the last sentence of paragraph (f)(5), paragraphs (h)(4), the first sentence of paragraph (h)(5) introductory text, paragraphs (l)(3)(iv), by adding paragraphs (h)(3) and (l)(4), revising paragraphs (m)(2) and (n)(4), as follows:

**§ 63.640 Applicability and designation of affected source.**

\* \* \* \* \*

(b) For process units that are designed and operated as flexible operation units, the applicability of this subpart shall be determined for existing sources based on the expected utilization for the 5 years following promulgation of this subpart and for new sources based on the expected utilization for the first 5 years after startup.

\* \* \* \* \*

(d) The affected source subject to this subpart does not include the emission points listed in paragraphs (d)(1) through (d)(5) of this section.

(1) Stormwater from segregated stormwater sewers;

(2) Spills;

(3) Any pump, compressor, pressure relief device, sampling connection system, open-ended valve or line, valve, or instrumentation system that is intended to operate in organic hazardous air pollutant service, as defined in § 63.641 of this subpart, for less than 300 hours during the calendar year;

(4) Catalytic cracking unit and catalytic reformer catalyst regeneration vents, and sulfur plant vents; and

(5) Emission points routed to a fuel gas system, as defined in § 63.641 of this subpart. No testing, monitoring, recordkeeping, or reporting is required for refinery fuel gas systems or emission points routed to refinery fuel gas systems.

\* \* \* \* \*

(f) \* \* \*

(5) \* \* \*. This determination shall be reported as specified in § 63.654(h)(6)(iii).

\* \* \* \* \*

(h) \* \* \*

(3) Marine tank vessels at existing sources shall be in compliance with this subpart no later than August 18, 1999 unless the vessels are included in an emissions average to generate emission credits. Marine tank vessels used to

generate credits in an emissions average shall be in compliance with this subpart no later than August 18, 1998 unless an extension has been granted by the Administrator as provided in § 63.6(i).

(4) Existing Group 1 floating roof storage vessels shall be in compliance with § 63.646 at the first degassing and cleaning activity after August 18, 1998, or within 10 years after promulgation of the rule, whichever is first.

(5) An owner or operator may elect to comply with the provisions of § 63.648 (c) through (i) as an alternative to the provisions of § 63.648 (a) and (b). \* \* \*

\* \* \* \* \*

(1) \* \* \*

(3) \* \* \*

(iv) Reports and notifications required by § 63.182, or 40 CFR 60.487. The requirements of subpart H of this part are summarized in table 3 of this subpart;

\* \* \* \* \*

(4) If pumps, compressors, pressure relief devices, sampling connection systems, open-ended valves or lines, valves, or instrumentation systems are added to an existing source, they are subject to the equipment leak standards for existing sources in § 63.648. A notification of compliance status report shall not be required for such added equipment.

\* \* \* \* \*

(m) \* \* \*

(2) The compliance schedule shall be submitted within 180 days after the change is made, unless the compliance schedule has been previously submitted to the permitting authority. If it is not possible to determine until after the change is implemented whether the emission point has become Group 1, the compliance schedule shall be submitted within 180 days of the date when the affect of the change is known to the source. The compliance schedule may be submitted in the next Periodic Report if the change is made after the date the Notification of Compliance Status report is due.

\* \* \* \* \*

(n) \* \* \*

(4) After the compliance dates specified in paragraph (h) of this section, a Group 2 storage vessel that is part of a new source and is subject to 40 CFR 60.110b, but is not required to apply controls by 40 CFR 60.110b or 60.112b is required to comply only with this subpart.

\* \* \* \* \*

5. Section 63.641 is amended by revising the definitions of “Affected source”, “Emission point”, the last sentence in “Equipment leak”, “Group 1 gasoline loading rack”, “Group 1

marine tank vessel”, “Group 1 miscellaneous process vent”, the first sentence in the introductory text of “Storage vessel”, and “Temperature monitoring device”, and by adding a definition for “Leakless valve”, “Startup”, and “Shutdown” and by adding a paragraph (13) to the definition for “Miscellaneous process vent” to read as follows:

**§ 63.641 Definitions.**

\* \* \* \* \*

*Affected source* means the collection of emission points to which this subpart applies as determined by the criteria in § 63.640.

\* \* \* \* \*

*Emission point* means an individual miscellaneous process vent, storage vessel, wastewater stream, or equipment leak associated with a petroleum refining process unit; an individual storage vessel or equipment leak associated with a bulk gasoline terminal or pipeline breakout station classified under Standard Industrial Classification code 2911; a gasoline loading rack classified under Standard Industrial Classification code 2911; or a marine tank vessel loading operation located at a petroleum refinery.

*Equipment leak* \* \* \*. Vents from wastewater collection and conveyance systems (including, but not limited to wastewater drains, sewer vents, and sump drains), tank mixers, and sample valves on storage tanks are not equipment leaks.

\* \* \* \* \*

*Group 1 gasoline loading rack* means any gasoline loading rack classified under Standard Industrial Classification code 2911 that is located within a bulk gasoline terminal that has a gasoline throughput greater than 75,700 liters per day. Gasoline throughput shall be the maximum calculated design throughput for the terminal as may be limited by compliance with enforceable conditions under Federal, State, or local law and discovered by the Administrator and any other person.

*Group 1 marine tank vessel* means a vessel at an existing source loaded at any land- or sea-based terminal or structure that loads liquid commodities with vapor pressures greater than or equal to 10.3 kilopascals in bulk onto marine tank vessels, that emits greater than 9.1 megagrams of any individual HAP or 22.7 megagrams of any combination of HAP annually after August 18, 1999, or a vessel at a new source loaded at any land- or sea-based terminal or structure that loads liquid commodities with vapor pressures greater than or equal to 10.3 kilopascals onto marine tank vessels.

*Group 1 miscellaneous process vent* means a miscellaneous process vent for which the total organic HAP concentration is greater than or equal to 20 parts per million by volume, and the total volatile organic compound emissions are greater than or equal to 33 kilograms per day for existing sources and 6.8 kilograms per day for new sources at the outlet of the final recovery device (if any) and prior to any control device and prior to discharge to the atmosphere.

\* \* \* \* \*

*Leakless valve* means a valve that has no external actuating mechanism.

\* \* \* \* \*

*Miscellaneous process vent* \* \* \* (13) Emissions from wastewater collection and conveyance systems including, but not limited to, wastewater drains, sewer vents, and sump drains.

\* \* \* \* \*

*Shutdown* means the cessation of a petroleum refining process unit or a unit operation (including, but not limited to, a distillation unit or reactor) within a petroleum refining process unit for purposes including, but not limited to, periodic maintenance, replacement of equipment, or repair.

*Startup* means the setting into operation of a petroleum refining process unit for purposes of production. Startup does not include operation solely for purposes of testing equipment. Startup does not include changes in product for flexible operation units.

*Storage vessel* means a tank or other vessel that is used to store organic liquids. \* \* \*

*Temperature monitoring device* means a unit of equipment used to monitor temperature and having an accuracy of ±1 percent of the temperature being monitored expressed in degrees Celsius or ±0.5 °C, whichever is greater.

\* \* \* \* \*

6. Section 63.642 is amended by revising paragraphs (e) and (g) as follows:

**§ 63.642 General standards.**

\* \* \* \* \*

(e) Each owner or operator of a source subject to this subpart shall keep copies of all applicable reports and records required by this subpart for at least 5 years except as otherwise specified in this subpart. All applicable records shall be maintained in such a manner that they can be readily accessed within 24 hours. Records may be maintained in hard copy or computer-readable form including, but not limited to, on paper,

microfilm, computer, floppy disk, magnetic tape, or microfiche.

\* \* \* \* \*

(g) The owner or operator of an existing source subject to the requirements of this subpart shall control emissions of organic HAP's to the level represented by the following equation:

$$E_A = 0.02 \sum EPV_1 + \sum EPV_2 + 0.05 \sum ES_1 + \sum ES_2 + \sum EGLR_{1C} + \sum EGLR_2 + (R) \sum EMV_1 + \sum EMV_2 + \sum EWW_{1C} + \sum EWW_2$$

where:

$E_A$  = Emission rate, megagrams per year, allowed for the source.

$0.02 \sum EPV_1$  = Sum of the residual emissions, megagrams per year, from all Group 1 miscellaneous process vents, as defined in § 63.641.

$\sum EPV_2$  = Sum of the emissions, megagrams per year, from all Group 2 process vents, as defined in § 63.641.

$0.05 \sum ES_1$  = Sum of the residual emissions, megagrams per year, from all Group 1 storage vessels, as defined in § 63.641.

$\sum ES_2$  = Sum of the emissions, megagrams per year, from all Group 2 storage vessels, as defined in § 63.641.

$\sum EGLR_{1C}$  = Sum of the residual emissions, megagrams per year, from all Group 1 gasoline loading racks, as defined in § 63.641.

$\sum EGLR_2$  = Sum of the emissions, megagrams per year, from all Group 2 gasoline loading racks, as defined in § 63.641.

(R)  $\sum EMV_1$  = Sum of the residual emissions megagrams per year, from all Group 1 marine tank vessels, as defined in § 63.641.

R = 0.03 for existing sources, 0.02 for new sources.

$\sum EMV_2$  = Sum of the emissions, megagrams per year from all Group 2 marine tank vessels, as defined in § 63.641.

$\sum EWW_{1C}$  = Sum of the residual emissions from all Group 1 wastewater streams, as defined in § 63.641. This term is calculated for each Group 1 stream according to the equation for  $EWW_{1C}$  in § 63.652(h)(6).

$\sum EWW_2$  = Sum of emissions from all Group 2 wastewater streams, as defined in § 63.641.

The emissions level represented by this equation is dependent on the collection of emission points in the source. The level is not fixed and can change as the emissions from each emission point

change or as the number of emission points in the source changes.

\* \* \* \* \*

7. Section 63.644 is amended by revising the last sentence of paragraph (d) as follows:

**§ 63.644 Monitoring provisions for miscellaneous process vents.**

\* \* \* \* \*

(d) \* \* \*. In order to establish the range, the information required in § 63.654(f)(3) shall be submitted in the Notification of Compliance Status report.

\* \* \* \* \*

8. Section 63.645 is amended by revising paragraphs (a) and (h)(2), and by adding paragraph (i), as follows:

**§ 63.645 Test methods and procedures for miscellaneous process vents.**

(a) To demonstrate compliance with § 63.643, an owner or operator shall follow § 63.116 except for § 63.116 (a)(1), (d) and (e) of subpart G of this part except as provided in paragraphs (b) through (d) and paragraph (i) of this section.

\* \* \* \* \*

(h) \* \* \*

(2) Where the recalculated TOC emission rate is greater than 33 kilograms per day for an existing source or greater than 6.8 kilograms per day for a new source, the owner or operator shall submit a report as specified in § 63.654 (f), (g), or (h) and shall comply with the appropriate provisions in § 63.643 by the dates specified in § 63.640.

(i) A compliance determination for visible emissions shall be conducted within 150 days of the compliance date using Method 22 of 40 CFR part 60, Appendix A, to determine visible emissions.

9. Section 63.646 is amended by revising paragraphs (a), (d) introductory text, and (d)(9), and adding (d)(10), as follows:

**§ 63.646 Storage vessel provisions.**

(a) Each owner or operator of a Group 1 storage vessel subject to this subpart shall comply with the requirements of §§ 63.119 through 63.121 except as provided in paragraphs (b) through (l) of this section.

\* \* \* \* \*

(d) References shall apply as specified in paragraphs (d)(1) through (d)(10) of this section.

\* \* \* \* \*

(9) All references to § 63.139(d)(1) in § 63.120(d)(1)(ii) of subpart G are not applicable. For sources subject to this subpart, such references shall mean that 40 CFR 61.355 is applicable.

(10) All references to § 63.139(c) in § 63.120(d)(1)(ii) of subpart G are not applicable. For sources subject to this subpart, such references shall mean that § 63.647 of this subpart is applicable.

\* \* \* \* \*

10. Section 63.648 is amended by revising the first sentences of paragraphs (c)(9) and (c)(10) as follows:

**§ 63.648 Equipment leak standards.**

\* \* \* \* \*

(c) \* \* \*

(9) When complying with the requirements of § 63.168(e)(3)(i), non-repairable valves shall be included in the calculation of percent leaking valves the first time the valve is identified as leaking and non-repairable. \* \* \*

(10) If in phase III of the valve standard any valve is designated as being leakless, the owner or operator has the option of following the provisions of 40 CFR 60.482-7(f). \* \* \*

\* \* \* \* \*

11. Section 63.650 is amended by revising paragraph (a) as follows:

**§ 63.650 Gasoline loading rack provisions.**

(a) Except as provided in paragraphs (b) through (c) of this section, each owner or operator of a gasoline loading rack classified under Standard Industrial Classification code 2911 located within a contiguous area and under common control with a petroleum refinery shall comply with subpart R, §§ 63.421, 63.422 (a) through (c), 63.425 (a) through (c), 63.425 (e) through (h), 63.427 (a) and (b), and 63.428 (b), (c), (g)(1), and (h)(1) through (h)(3).

\* \* \* \* \*

12. Section 63.651 is amended by revising paragraph (a) and adding paragraph (d), as follows:

**§ 63.651 Marine tank vessel loading operation provisions.**

(a) Except as provided in paragraphs (b) through (d) of this section, each owner or operator of a marine tank vessel loading operation located at a petroleum refinery shall comply with the requirements of §§ 63.560 through 63.567.

\* \* \* \* \*

(d) The compliance time of 4 years after promulgation of 40 CFR part 63, subpart Y does not apply. The compliance time is specified in § 63.640(h)(3).

13. Section 63.652 is amended by revising the equation in paragraph (h)(1) introductory text (the definitions to the equation remain unchanged) to read as follows:

**§ 63.652 Emissions averaging provisions.**

\* \* \* \* \*

(h) \* \* \*

(1) \* \* \*

$$\begin{aligned} \text{Credits} = & D \sum_{i=1}^n ((0.02) EPV1_{iu} - EPV1_{iACTUAL}) + D \sum_{i=1}^m (EPV2_{iBASE} - EPV2_{iACTUAL}) + \\ & D \sum_{i=1}^n ((0.05) ES1_{iu} - ES1_{iACTUAL}) + D \sum_{i=1}^m (ES2_{iBASE} - ES2_{iACTUAL}) + \\ & D \sum_{i=1}^n (EGLR1_{ic} - EGLR1_{iACTUAL}) + D \sum_{i=1}^m (EGLR2_{iBASE} - EGLR2_{iACTUAL}) + \\ & D \sum_{i=1}^n ((0.03) EMV1_{iu} - EMV1_{iACTUAL}) + D \sum_{i=1}^m (EMV2_{iBASE} - EMV2_{iACTUAL}) + \\ & D \sum_{i=1}^n (EWW1_{ic} - EWW1_{iACTUAL}) + D \sum_{i=1}^m (EWW2_{iBASE} - EWW2_{iACTUAL}) \end{aligned}$$

\* \* \*

\* \* \* \* \*

14. Section 63.653 is amended by revising paragraph (a)(4) as follows:

**§ 63.653 Monitoring, recordkeeping, and implementation plan for emission averaging.**

(a) \* \* \*

(4) For each gasoline loading rack that is controlled, perform the testing and monitoring procedures specified in §§ 63.425 and 63.427 of subpart R of this part except § 63.425(d) or § 63.427(c).

\* \* \* \* \*

15. Section 63.654 is amended by revising paragraphs (d) introductory text, (d)(3), adding paragraphs (d)(4), (d)(5), and (d)(6), revising the first sentence of paragraph (g)(6)(iii), and revising paragraphs (g)(8)(ii)(B) and (h)(1), as follows:

**§ 63.654 Reporting and recordkeeping requirements.**

\* \* \* \* \*

(d) Each owner or operator subject to the equipment leaks standards in § 63.648 shall comply with the recordkeeping and reporting provisions

in paragraphs (d)(1) through (d)(6) of this section.

\* \* \* \* \*

(3) An owner or operator who determines that a compressor qualifies for the hydrogen service exemption in § 63.648 shall also keep a record of the demonstration required by § 63.648.

(4) An owner or operator must keep a list of identification numbers for valves that are designated as leakless per § 63.648(c)(10).

(5) An owner or operator must identify, either by list or location (area or refining process unit), equipment in organic HAP service less than 300 hours per year within refining process units subject to this subpart.

(6) An owner or operator must keep a list of reciprocating pumps and compressors determined to be exempt from seal requirements as per §§ 63.648 (f) and (i).

\* \* \* \* \*

(g) \* \* \*

(6) \* \* \*

(iii) Periods of startup and shutdown that meet the definition of § 63.641, and malfunction that meet the definition in § 63.2 and periods of performance

testing and monitoring system calibration shall not be considered periods of excess emissions. \* \* \*

(8) \* \* \*

(ii) \* \* \*

(B) The information required to be reported by § 63.428 (h)(1), (h)(2), and (h)(3) for each gasoline loading rack included in an emissions average, unless this information has already been submitted in a separate report;

\* \* \* \* \*

(h) \* \* \*

(1) Reports of startup, shutdown, and malfunction required by § 63.10(d)(5). Records and reports of startup, shutdown, and malfunction are not required if they pertain solely to Group 2 emission points, as defined in § 63.641, that are not included in an emissions average. For purposes of this paragraph, startup and shutdown shall have the meaning defined in § 63.641, and malfunction shall have the meaning defined in § 63.2; and

\* \* \* \* \*

16. Table 3 in the appendices to subpart CC is amended by revising entries 63.182(b) and 63.182 (c) to read as follows:

TABLE 3.—EQUIPMENT LEAK RECORDKEEPING AND REPORTING REQUIREMENTS FOR SOURCES COMPLYING WITH § 63.648 OF SUBPART CC BY COMPLIANCE WITH SUBPART H OF THIS PART <sup>a</sup>

Reference (section of subpart H of this part)	Description	Comment
* * * * *	* * * * *	* * * * *
63.182(b) .....	Initial notification report requirements .....	Not required.
63.182(c) .....	Notification of compliance status report .....	Except in § 63.182(c); change "within 90 days of the compliance dates" to "within 150 days of the compliance dates"; except in §§ 63.182 (c)(2) and (c)(4).
* * * * *	* * * * *	* * * * *

<sup>a</sup> This table does not include all the requirements delineated under the referenced sections. See referenced sections for specific requirements.

\* \* \* \* \*

17. Table 4 in the appendices to subpart CC is revised to read as follows:

TABLE 4.—GASOLINE DISTRIBUTION EMISSION POINT RECORDKEEPING AND REPORTING REQUIREMENTS <sup>a</sup>

Reference (section of subpart R of this part)	Description	Comment
63.428(b) .....	Records of test results for each gasoline cargo tank loaded at the facility.	
63.428(c) .....	Continuous monitoring data recordkeeping requirements.	
63.428(g)(1) .....	Semiannual report loading rack information .....	Required to be submitted with the periodic report required under 40 CFR part 63 subpart CC.
63.428 (h)(1) through (h)(3) .....	Excess emissions report loading rack information.	Required to be submitted with the periodic report required under 40 CFR part 63 subpart CC.

<sup>a</sup>This table does not include all the requirements delineated under the referenced sections. See referenced sections for specific requirements.

\* \* \* \* \*

18. Table 6 in the appendices to subpart CC is amended by revising entries 63.6(h) (1) and (2), 63.6(h) (4) and (5), 63.6(h)(6) and 63.6(h) (7) through (9) to read as follows:

TABLE 6.—GENERAL PROVISIONS APPLICABILITY TO SUBPART CC <sup>a</sup>

Reference	Applies to subpart CC <sup>b</sup>	Comment
63.6(h) (1) and (2) .....	Yes	
63.6(h) (4) and (5) .....	No	Visible emission requirements and timing in subpart CC.
63.6(h)(6) .....	Yes	
63.6(h) (7) through (9) .....	No	Subpart CC does not require opacity standards.

\* \* \* \* \*

19. Table 8 in the appendices to subpart CC is amended by revising the heading of the table, as follows:

TABLE 8.—VALVE MONITORING FREQUENCY FOR PHASE III

\* \* \*

\* \* \* \* \*

[FR Doc. 96-10382 Filed 6-11-96; 8:45 am]

BILLING CODE 6560-50-P

**Federal Register**

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Wednesday  
June 12, 1996

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**Part IV**

**Department of  
Housing and Urban  
Development**

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**Office of the Assistant Secretary for  
Public and Indian Housing; Public and  
Indian Housing Youth Sports Program;  
Announcement of Non-Funding for FY  
1996; Notice**

**DEPARTMENT OF HOUSING AND  
URBAN DEVELOPMENT**

**Office of the Assistant Secretary for  
Public and Indian Housing; Public and  
Indian Housing Youth Sports Program;  
Announcement of Non-Funding for FY  
1996**

[Docket No. FR-4015-N-01]

**AGENCY:** Office of the Assistant  
Secretary for Public and Indian  
Housing, HUD.

**ACTION:** Notice.

**SUMMARY:** This notice announces that HUD will not fund the Youth Sports Program for FY 1996, and corrects a funding error from the FY 1994 Youth Sports competition.

**FOR FURTHER INFORMATION CONTACT:** *For Further Information on the Public and Indian Housing Youth Sports Program, Public Housing Contact:* Marvin Klepper, Crime Prevention and Security Division (CPSD), Office of Community Relations and Involvement (OCRI), Public and Indian Housing, Department of Housing and Urban Development, 451 Seventh Street, S.W., Washington, D.C. 20410, telephone (202) 708-1197. A text telephone (TTY) for speech and hearing impaired individuals is available at (202) 708-0850. (These are not toll-free telephone numbers.)

*For Further Information on the Public and Indian Housing Youth Sports Program for Native American Programs Contact:* Tracy Outlaw, Office of Native American Programs (ONAP), Department of Housing and Urban

Development Room B-133, 451 Seventh Street, S.W., Washington, D.C. 20410, telephone (202) 755-0088. A text telephone (TTY) for speech and hearing impaired individuals is available at (202) 755-0850. (These are not toll-free telephone numbers.)

**SUPPLEMENTARY INFORMATION:** The Youth Sports Program is authorized by Section 520 of the National Affordable Housing Act (NAHA) (approved November 28, 1990, Pub. L. 101-625) (42 U.S.C. 11903a). Section 126(a) of the Housing and Community Development Act of 1992 (HCDA 1992) (Pub. L. 102-550, approved October 28, 1992) amended a section of the Public and Indian Housing Drug Elimination Program at 42 U.S.C. 11909(c) to provide that 5 percent of any amounts made available in any fiscal year for Drug Elimination Program grants shall be available for Youth Sports Program grants.

HUD's Fiscal Year (FY) 1996 appropriations act, The Omnibus Consolidated Rescissions and Appropriations Act of 1996 (Pub. L. 104-134, approved April 26, 1996) appropriated \$290 million for the Drug Elimination Program in FY 1996. This Act also provides that, notwithstanding 42 U.S.C. 11909(c), HUD "may determine not to use any such funds to provide public housing youth sports grants." In FY 1996, the Department will not make funds competitively available for the Public Housing Youth Sports Program. Applications will not be solicited and awards will not be made this fiscal year under the Youth Sports Program.

In addition, this notice corrects a funding error resulting from the FY 1994 Youth Sports NOFA competition. Following an appeal by the Lexington-Fayette Urban County Housing Authority for reconsideration of its FY 1994 Youth Sports score, HUD determined that this application qualified for funding. However, because all FY 1994 and FY 1995 funds have already been awarded, HUD has determined to correct this error by using FY 1996 funds to make the award. Therefore, in accordance with section 102(a)(4)(C) of the Department of Housing and Urban Development Reform Act of 1989 (Pub. L. 101-235, approved December 15, 1989), HUD is hereby publishing the name, address, and amount of that award.

*Program Name:* Youth Sports Program.

*Statute:* Section 520 of the National Affordable Housing Act (NAHA) (approved November 28, 1990, Pub. L. 101-625) (42 U.S.C. 11903a).

*Funding Recipient (Name and Address):* Lexington-Fayette Urban County Housing Authority, 300 New Circle Road, N.W. at Russell Cave Road, Lexington, Kentucky 40505, (502) 281-5054.

*Amount of Award:* \$125,000.

Dated: June 5, 1996.

Kevin Emanuel Marchman,  
*Acting Assistant Secretary for Public and  
Indian Housing.*

[FR Doc. 96-14815 Filed 6-11-96; 8:45 am]

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# Federal Register

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Wednesday  
June 12, 1996

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## Part V

# Department of Housing and Urban Development

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Office of the Secretary; Regulatory  
Waiver Requests Granted; Notice

**DEPARTMENT OF HOUSING AND  
URBAN DEVELOPMENT**

[Docket No. FR-3864-N-06]

**Office of the Secretary; Notice of  
Regulatory Waiver Requests Granted**

**AGENCY:** Office of the Secretary, HUD.

**ACTION:** Public Notice of the Granting of Regulatory Waivers. Request: October 1, 1995 through December 31, 1995.

**SUMMARY:** Under the Department of Housing and Urban Development Reform Act of 1989 (Reform Act), the Department (HUD) is required to make public all approval actions taken on waivers of regulations. This notice is the twentieth in a series, being published on a quarterly basis, providing notification of waivers granted during the preceding reporting period. The purpose of this notice is to comply with the requirements of section 106 of the Reform Act.

**FOR FURTHER INFORMATION CONTACT:** For general information about this Notice, contact Camille E. Acevedo, Assistant General Counsel for Regulations, Room 10276, Department of Housing and Urban Development, 451 Seventh Street, SW, Washington, DC 20410; telephone 202-708-3055; TDD: (202) 708-3259. (These are not toll-free numbers.) For information concerning a particular waiver action, about which public notice is provided in this document, contact the person whose name and address is set out, for the particular item, in the accompanying list of waiver-grant actions.

**SUPPLEMENTARY INFORMATION:** As part of the Housing and Urban Development Reform Act of 1989, the Congress adopted, at HUD's request, legislation to limit and control the granting of regulatory waivers by the Department. Section 106 of the Act (Section 7(q)(3)) of the Department of Housing and Urban Development Act, 42 U.S.C. 3535(q)(3), provides that:

1. Any waiver of a regulation must be in writing and must specify the grounds for approving the waiver;

2. Authority to approve a waiver of a regulation may be delegated by the Secretary only to an individual of Assistant Secretary rank or equivalent rank, and the person to whom authority to waive is delegated must also have authority to *issue* the particular regulation to be waived;

3. Not less than quarterly, the Secretary must notify the public of all waivers of regulations that the Department has approved, by publishing a notice in the Federal Register. These notices (each covering

the period since the most recent previous notification) shall:

a. Identify the project, activity, or undertaking involved;

b. Describe the nature of the provision waived, and the designation of the provision;

c. Indicate the name and title of the person who granted the waiver request;

d. Describe briefly the grounds for approval of the request;

e. State how additional information about a particular waiver grant action may be obtained.

Section 106 also contains requirements applicable to waivers of HUD handbook provisions that are not relevant to the purposes of today's document.

Today's document follows publication of HUD's Statement of Policy on Waiver of Regulations and Directives issued by HUD (56 FR 16337, April 22, 1991). This is the twentieth notice of its kind to be published under Section 106. It updates HUD's waiver-grant activity from October 1, 1995 through December 31, 1995. It also includes waivers granted from July 1, 1995 to September 30, 1995 that were inadvertently omitted from the last report.

For ease of reference, waiver requests granted by departmental officials authorized to grant waivers are listed in a sequence keyed to the section number of the HUD regulation involved in the waiver action. For example, a waiver-grant action involving exercise of authority under 24 CFR 24.200 (involving the waiver of a provision in part 24) would come early in the sequence, while waivers in the Section 8 and Section 202 programs (24 CFR Chapter VIII) would be among the last matters listed. Where more than one regulatory provision is involved in the grant of a particular waiver request, the action is listed under the section number of the first regulatory requirement in title 24 that is being waived as part of the waiver-grant action. (For example, a waiver of both § 811.105(b) and § 811.107(a) would appear sequentially in the listing under § 811.105(b).) Waiver-grant actions involving the same initial regulatory citation are in time sequence beginning with the earliest-dated waiver grant action.

Should the Department receive additional reports of waiver actions taken during the period covered by this report before the next report is published, the next updated report will include these earlier actions, as well as those that occur between January 1, 1996 through March 31, 1996.

Accordingly, information about approved waiver requests pertaining to regulations of the Department is provided in the Appendix that follows this notice.

Dated: May 31, 1996.

Henry G. Cisneros,  
*Secretary.*

**Appendix—Listing of Waivers of  
Regulatory Requirements Granted by  
Officers of the Department of Housing  
and Urban Development October 1,  
1995 Through December 31, 1995**

Note to Reader: The person to be contacted for additional information about these waiver-grant items in this listing is: Mr. James B. Mitchell, Director, Financial Services Division, U.S. Department of Housing and Urban Development, 470 L'Enfant Plaza East, Suite 3119, Washington, D.C. 20024, Phone: (202) 755-7450 x125.

1. *Regulation:* 24 CFR 811.106(d), 811.107(d), of 1977 regulations, 24 CFR 811.107(a)(2), 811.107(b), 811.108(b), and 811.114(b)(3) of 1979 regulations.

*Project/Activity:* The Greene Metropolitan (Ohio) Housing Authority refunding of bonds which financed a Section 8 assisted uninsured project, Xenia Towers Apartments, No. OH10-0001-043.

*Nature of Requirement:* The regulations set conditions under which HUD may grant a Section 11(b) letter of exemption of multifamily housing revenue bonds from Federal income taxation.

*Granted By:* Nicolas P. Retsinas, Assistant Secretary for Housing-Federal Housing Commissioner.

*Date Granted:* November 30, 1995.

*Reasons Waived:* The Part 811 regulations cited above prohibited refundings and restricted use of excess reserve balances to project purposes only. The 1978 Bond reserves will be used to help pay transactions costs. The tax-exempt refunding bond issue of \$2,380,000 at a yield of 6.05 percent will result in debt service savings for deposit into the Project Reserve for Replacements. The Treasury also gains long-term tax revenue benefits through replacement of outstanding tax-exempt coupons of 7.75 percent at the call date in 1995 with tax-exempt bonds at a substantially lower interest rate. The refunding serves the important public purpose of increasing the likelihood that projects will continue to provide housing for low-income families after subsidies expire, a priority HUD objective.

2. *Regulation:* 24 CFR 811.106(d) and 811.107(d) of 1977 regulations, and 24 CFR 811.107(b), 811.108(a)(1), 811.109(a)(2), 811.114(b)(3), 811.114(d), and 811.115(b) of 1979 regulations.

*Project/Activity:* The Los Angeles CRA refunding of bonds which financed an uninsured Section 8 assisted project, Angelus Plaza, Phase 1, HUD Project No. CA16-8021-053.

*Nature of Requirement:* The regulations set conditions under which HUD may grant a Section 11(b) letter of exemption of multifamily housing revenue bonds from Federal income taxation.

*Granted By:* Nicolas P. Retsinas, Assistant Secretary for Housing—Federal Housing Commissioner.

*Date Granted:* November 9, 1995.

*Reasons Waived:* The Part 811 regulations cited above prohibited refundings and required that excess reserve balances be used for project purposes. The issuer has requested HUD permission to release excess reserve balances from the 1978 Trust Indenture for use in providing affordable community services and reimbursing previous partnership contributions to capital costs. Issuance of 1995 refunding bonds of \$33,020,000 will accomplish that. The Project Owner has agreed to extend low-income occupancy in this project for 10 years after expiration of the Housing Assistance Payments Contract and to pay HUD 25 percent of its annual distributions from surplus.

*3. Regulation:* 24 CFR 811.106(d) and 811.107(d) of 1977 regulations.

*Project/Activity:* Burlington, North Carolina HA refunding of bonds issued in 1978, which financed an uninsured Section 8 assisted project: Burlington Homes, HUD Project Number NC19-0003-019.

*Nature of Requirement:* The regulations set conditions under which HUD may grant a Section 11(b) letter of exemption of multifamily housing revenue bonds from Federal income taxation.

*Granted By:* Nicolas P. Retsinas, Assistant Secretary for Housing—FHA Commissioner.

*Date Granted:* December 4, 1995.

*Reasons Waived:* The Part 811 regulations cited above prohibited refundings and required that excess reserve balances be used for project purposes. The issuer has requested HUD permission to release excess reserve balances from the 1978 Trust Indenture for use in construction or acquisition of affordable housing. Issuance of 1995 refunding bonds under Section 103 of the Tax Code will not reduce project debt service nor generate Section 8 savings. The Housing Authority has agreed to extend low-income occupancy in this project for 10 years after expiration of the Housing Assistance Payments Contract in August, 2019.

*4. Regulation:* 24 CFR 811.106(d) and 811.107(d) of 1977 regulations.

*Project/Activity:* Madison County, Illinois HA refunding of bonds which financed two uninsured Section 8 assisted projects: Wood River and Edwardsville Elderly Apartments, HUD Project Numbers IL06-0007-002 and 003.

*Nature of Requirement:* The regulations set conditions under which HUD may grant a Section 11(b) letter of exemption of multifamily housing revenue bonds from Federal income taxation.

*Granted By:* Nicolas P. Retsinas, Assistant Secretary for Housing—FHA Commissioner.

*Date Granted:* December 13, 1995.

*Reasons Waived:* The Part 811 regulations cited above prohibited refundings and required that excess reserve balances be used for project purposes. The issuer has requested HUD permission to release excess reserve balances from the 1977 and 1978 Trust Indentures for use in providing housing for low-income families. Issuance of 1995 refunding bonds under Section 103 of the Tax Code will reduce project debt service and generate Section 8 savings to be used by the Issuer to provide for project repairs and maintenance and correct a revenue shortfall in the Edwardsville project. The Housing Authority has agreed to extend low-income occupancy in this project for 10 years after expiration of the Housing Assistance Payments Contract.

*5. Regulation:* 24 CFR 811.107(a)(2), 811.107(b), 811.108(a)(1), 811.108(a)(3), 811.114(b)(3), 811.114(d), and 811.115(b).

*Project/Activity:* The Springfield, Massachusetts Housing Authority refunding of bonds which financed a Section 8 assisted project, Garand Court Apartments, FHA No. 023-35241.

*Nature of Requirement:* The regulations set conditions under which HUD may grant a Section 11(b) letter of exemption of multifamily housing revenue bonds from Federal income taxation and authorize call of debentures prior to maturity.

*Granted By:* Nicolas P. Retsinas, Assistant Secretary for Housing-Federal Housing Commissioner.

*Date Granted:* October 12, 1995.

*Reasons Waived:* The Part 811 regulations cited above were intended for original bond financing transactions and do not fit the terms of refunding transactions. To credit enhance refunding bonds not fully secured by the FHA mortgage amount, HUD also agrees not to exercise its option under 24 CFR 207.259(e) to call debentures

prior to maturity. This refunding proposal was approved by HUD on August 22, 1995. Refunding bonds have been priced to an average yield of 6.75%. The tax-exempt refunding bond issue of \$4,285,000 at current low-interest rates will save Section 8 subsidy. The Treasury also gains long-term tax revenue benefits through replacement of outstanding tax-exempt coupons of 9.75% at the call date in 1995 with tax-exempt bonds at a substantially lower interest rate. The refunding will also substantially reduce the FHA mortgage interest rate at expiration of the HAP contract, thus reducing FHA mortgage insurance risk. The refunding serves the important public purposes of reducing HUD's Section 8 program costs, improving Treasury tax revenues, (helping reduce the budget deficit), and increasing the likelihood that projects will continue to provide housing for low-income families after subsidies expire, a priority HUD objective.

*6. Regulation:* 24 CFR 811.107(a)(2), 811.107(b), 811.108(a)(1), 811.108(a)(3), 811.114(b)(3), 811.114(d), and 811.115(b).

*Project/Activity:* The LaFollette Housing Development Corporation refunding of bonds which financed a Section 8 assisted project, Westgate Towers Apartments, FHA No. 087-35114.

*Nature of Requirement:* The regulations set conditions under which HUD may grant a Section 11(b) letter of exemption of multifamily housing revenue bonds from Federal income taxation and authorize call of debentures prior to maturity.

*Granted By:* Nicolas P. Retsinas, Assistant Secretary for Housing-Federal Housing Commissioner.

*Date Granted:* November 7, 1995.

*Reasons Waived:* The Part 811 regulations cited above were intended for original bond financing transactions and do not fit the terms of refunding transactions. This refunding proposal was approved by HUD on November 6, 1995. Refunding bonds have been priced to an average yield of 6.36%. The tax-exempt refunding bond issue of \$1,320,000 at current low-interest rates will save Section 8 subsidy. The Treasury also gains long-term tax revenue benefits through replacement of outstanding tax-exempt coupons of 10% at the call date in 1995 with tax-exempt bonds at a substantially lower interest rate. The refunding will also substantially reduce the FHA mortgage interest rate at expiration of the HAP contract, from 10% to 7.25%, thus reducing FHA mortgage insurance risk. The refunding serves the important

public purposes of reducing HUD's Section 8 program costs, improving Treasury tax revenues, (helping reduce the budget deficit), and increasing the likelihood that projects will continue to provide housing for low-income families after subsidies expire, a priority HUD objective.

**7. Regulation:** 24 CFR 811.107(a)(2), 811.107(b), 811.108(a)(1), 811.108(a)(3), 811.114(b)(3), 811.114(d), and 811.115(b).

**Project/Activity:** The Los Angeles CRA refunding of bonds which financed a Section 8 assisted project, Angelus Plaza, Phase 2, FHA No. 122-35520.

**Nature of Requirement:** The regulations set conditions under which HUD may grant a Section 11(b) letter of exemption of multifamily housing revenue bonds from Federal income taxation and authorize call of debentures prior to maturity.

**Granted By:** Nicolas P. Retsinas, Assistant Secretary for Housing-Federal Housing Commissioner.

**Date Granted:** November 9, 1995.

**Reasons Waived:** The Part 811 regulations cited above were intended for original bond financing transactions and do not fit the terms of refunding transactions. To credit enhance refunding bonds not fully secured by the FHA mortgage amount, HUD also agrees not to exercise its option under 24 CFR 207.259(e) to call debentures prior to maturity. This refunding proposal was approved by HUD on October 27, 1995. Refunding bonds have been priced to an average yield of 6.40%. The tax-exempt refunding bond issue of \$15,470,000 at current low-interest rates will save Section 8 subsidy. The Treasury also gains long-term tax revenue benefits through replacement of outstanding tax-exempt coupons of 11% at the call date in 1995 with tax-exempt bonds at a substantially lower interest rate. The refunding will also substantially reduce the FHA mortgage interest rate at expiration of the HAP contract, from 10.55% to 6.77%, and fund a partial mortgage prepayment of \$953,200, thus reducing FHA mortgage insurance risk. The refunding serves the important public purposes of reducing HUD's Section 8 program costs, improving Treasury tax revenues, (helping reduce the budget deficit), and increasing the likelihood that projects will continue to provide housing for low-income families after subsidies expire, a priority HUD objective.

**8. Regulation:** 24 CFR 811.107(a)(2), 811.107(b), 811.114(b)(3), 811.114(d), 811.115(b).

**Project/Activity:** The Atlanta, Georgia Housing Authority refunding of bonds

which financed a Section 8 assisted project, the Capitol Avenue School Conversion Project, FHA No. 061-57001.

**Nature of Requirement:** The regulations set conditions under which HUD may grant a Section 11(b) letter of exemption of multifamily housing revenue bonds from Federal income taxation.

**Granted By:** Nicolas P. Retsinas, Assistant Secretary for Housing-Federal Housing Commissioner.

**Date Granted:** November 30, 1995.

**Reasons Waived:** The Part 811 regulations cited above were intended for original bond financing transactions and do not fit the terms of refunding transactions. This refunding proposal was approved by HUD on November 2, 1995. Refunding bonds have been priced to an average yield of 5.99%. The tax-exempt refunding bond issue of \$1,355,000 at current low-interest rates will make possible reamortization of the bonds concurrent with the FHA mortgage term to prevent a default. The Treasury also gains long-term tax revenue benefits through replacement of outstanding tax-exempt coupons of 8.0% at the call date in 1995 with tax-exempt bonds at a substantially lower interest rate.

**9. Regulation:** 24 CFR 811.107(a)(2), 811.108(a)(1), 811.108(a)(3), 811.114(b)(3), 811.114(d), and 811.115(b).

**Project/Activity:** The Hoboken, New Jersey Housing Authority refunding of bonds which financed a Section 8 assisted project, Project Uplift, FHA No. 031-35220.

**Nature of Requirement:** The regulations set conditions under which HUD may grant a Section 11(b) letter of exemption of multifamily housing revenue bonds from Federal income taxation and authorize call of debentures prior to maturity.

**Granted By:** Nicolas P. Retsinas, Assistant Secretary for Housing-Federal Housing Commissioner.

**Date Granted:** December 13, 1995.

**Reasons Waived:** The Part 811 regulations cited above were intended for original bond financing transactions and do not fit the terms of refunding transactions. To credit enhance refunding bonds not fully secured by the FHA mortgage amount, HUD also agrees not to exercise its option under 24 CFR 207.259(e) to call debentures prior to maturity. This refunding proposal was approved by HUD on October 31, 1995. Refunding bonds have been priced to an average yield of 6.25%. The tax-exempt refunding bond issue of \$2,408,447 at current low-interest rates will save Section 8

subsidy. The Treasury also gains long-term tax revenue benefits through replacement of outstanding tax-exempt coupons of 10.25% at the call date in 1995 with tax-exempt bonds at a substantially lower interest rate. The refunding will also substantially reduce the FHA mortgage interest rate at expiration of the HAP contract, thus reducing FHA mortgage insurance risk. The refunding serves the important public purposes of reducing HUD's Section 8 program costs, improving Treasury tax revenues, (helping reduce the budget deficit), and increasing the likelihood that projects will continue to provide housing for low-income families after subsidies expire, a priority HUD objective.

**10. Regulation:** 24 CFR 811.107(a)(2), 811.107(b), 811.108(a)(1), 811.108(a)(3), 811.114(b)(3), 811.114(d), and 811.115(b).

**Project/Activity:** The South Delta, Mississippi Regional Housing Authority refunding of bonds which financed a Section 8 assisted project, Eastover Apartments, FHA No. 065-35308.

**Nature of Requirement:** The regulations set conditions under which HUD may grant a Section 11(b) letter of exemption of multifamily housing revenue bonds from Federal income taxation and authorize call of debentures prior to maturity.

**Granted By:** Nicolas P. Retsinas, Assistant Secretary for Housing-Federal Housing Commissioner.

**Date Granted:** December 15, 1995.

**Reasons Waived:** The Part 811 regulations cited above were intended for original bond financing transactions and do not fit the terms of refunding transactions. To credit enhance refunding bonds not fully secured by the FHA mortgage amount, HUD also agrees not to exercise its option under 24 CFR 207.259(e) to call debentures prior to maturity. This refunding proposal was approved by HUD on December 8, 1995. Refunding bonds have been priced to an average yield of 6.0%. The tax-exempt refunding bond issue of \$1,310,000 at current low-interest rates will save Section 8 subsidy. The Treasury also gains long-term tax revenue benefits through replacement of outstanding tax-exempt coupons of 10.43% at the call date in 1995 with tax-exempt bonds at a substantially lower interest rate. The refunding will also substantially reduce the FHA mortgage interest rate at expiration of the HAP contract, thus reducing FHA mortgage insurance risk. The refunding serves the important public purposes of reducing HUD's Section 8 program costs, improving Treasury tax revenues, (helping reduce

the budget deficit), and increasing the likelihood that projects will continue to provide housing for low-income families after subsidies expire, a priority HUD objective.

**11. Regulation:** 24 CFR 811.107(a)(2), 811.107(b), 811.108(a)(1), 811.108(a)(3), 811.114(b)(3), 811.114(d), and 811.115(b).

**Project/Activity:** The Jackson, Mississippi Housing Authority refunding of bonds which financed a Section 8 assisted project, Apple Manor Apartments, FHA No. 065-35307.

**Nature of Requirement:** The regulations set conditions under which HUD may grant a Section 11(b) letter of exemption of multifamily housing revenue bonds from Federal income taxation and authorize call of debentures prior to maturity.

**Granted By:** Nicolas P. Retsinas, Assistant Secretary for Housing-Federal Housing Commissioner.

**Date Granted:** December 15, 1995.

**Reasons Waived:** The Part 811 regulations cited above were intended for original bond financing transactions and do not fit the terms of refunding transactions. To credit enhance refunding bonds not fully secured by the FHA mortgage amount, HUD also agrees not to exercise its option under 24 CFR 207.259(e) to call debentures prior to maturity. This refunding proposal was approved by HUD on December 11, 1995. Refunding bonds have been priced to an average yield of 6.37%. The tax-exempt refunding bond issue of \$1,680,000 at current low-interest rates will save Section 8 subsidy. The Treasury also gains long-term tax revenue benefits through replacement of outstanding tax-exempt coupons of 10% at the call date in 1995 with tax-exempt bonds at a substantially lower interest rate. The refunding will also substantially reduce the FHA mortgage interest rate at expiration of the HAP contract, thus reducing FHA mortgage insurance risk. The refunding serves the important public purposes of reducing HUD's Section 8 program costs, improving Treasury tax revenues, (helping reduce the budget deficit), and increasing the likelihood that projects will continue to provide housing for low-income families after subsidies expire, a priority HUD objective.

**12. Regulation:** 24 CFR 811.107(a)(2), 811.107(b), 811.108(a)(1), 811.108(a)(3), 811.114(b)(3), 811.114(d), and 811.115(b).

**Project/Activity:** The South Delta, Mississippi Regional Housing Authority refunding of bonds which financed a Section 8 assisted project, Moorhead Manor Apartments, FHA No. 065-35334.

**Nature of Requirement:** The regulations set conditions under which HUD may grant a Section 11(b) letter of exemption of multifamily housing revenue bonds from Federal income taxation and authorize call of debentures prior to maturity.

**Granted By:** Nicolas P. Retsinas, Assistant Secretary for Housing-Federal Housing Commissioner.

**Date Granted:** December 15, 1995.

**Reasons Waived:** The Part 811 regulations cited above were intended for original bond financing transactions and do not fit the terms of refunding transactions. To credit enhance refunding bonds not fully secured by the FHA mortgage amount, HUD also agrees not to exercise its option under 24 CFR 207.259(e) to call debentures prior to maturity. This refunding proposal was approved by HUD on December 11, 1995. Refunding bonds have been priced to an average yield of 6.25%. The tax-exempt refunding bond issue of \$1,375,000 at current low-interest rates will save Section 8 subsidy. The Treasury also gains long-term tax revenue benefits through replacement of outstanding tax-exempt coupons of 10.5% at the call date in 1995 with tax-exempt bonds at a substantially lower interest rate. The refunding will also substantially reduce the FHA mortgage interest rate at expiration of the HAP contract, thus reducing FHA mortgage insurance risk. The refunding serves the important public purposes of reducing HUD's Section 8 program costs, improving Treasury tax revenues, (helping reduce the budget deficit), and increasing the likelihood that projects will continue to provide housing for low-income families after subsidies expire, a priority HUD objective.

**13. Regulation:** 24 CFR 811.114(d), 811.115(b), 811.117.

**Project/Activity:** The D.C. Housing Finance Agency refunding of bonds which financed a Section 8 assisted project, Capitol Hill Towers, FHA No. 000-35208.

**Nature of Requirement:** The regulations set conditions under which HUD may grant a Section 11(b) letter of exemption of multifamily housing revenue bonds from Federal income taxation and authorize call of debentures prior to maturity.

**Granted By:** Nicolas P. Retsinas, Assistant Secretary for Housing-Federal Housing Commissioner.

**Date Granted:** November 9, 1995.

**Reasons Waived:** The Part 811 regulations cited above were intended for original bond financing transactions and do not fit the terms of refunding transactions under § 103 of the Tax

Code. This refunding proposal was approved by HUD on September 18, 1995. Refunding bonds have been priced to an average yield of 6.13%. The tax-exempt refunding bond issue of \$7,360,000 at current low-interest rates will save Section 8 subsidy. The Treasury also gains long-term tax revenue benefits through replacement of outstanding tax-exempt coupons of 8.5% at the call date in 1995 with tax-exempt bonds at a substantially lower interest rate. The refunding serves the important public purposes of reducing HUD's Section 8 program costs, improving Treasury tax revenues, (helping reduce the budget deficit), and increasing the likelihood that projects will continue to provide housing for lower-income families after subsidies expire, a priority HUD objective.

**Note to Reader:** The person to be contacted for additional information about these waiver-grant items in this listing is: Debbie Ann Wills, Field Management Officer, U.S. Department of Housing and Urban Development, Office of Community Planning and Development, 451 7th Street, S.W., Washington, D.C. 20410-7000, Telephone: (202) 708-2565.

**14. Regulation:** 24 CFR 92.219(b)(1).

**Project/Activity:** The State of Maryland requested a waiver of the match requirements cited at 24 CFR 92.219(b)(1).

**Nature of Requirement:** The regulations at 24 CFR 92.219(b)(1) cite specific requirements for how match is determined in the HOME program.

**Granted By:** Andrew Cuomo, Assistant Secretary for Community Planning & Development.

**Date Granted:** August 28, 1995.

**Reasons Waived:** It was determined that the proposed matching contribution, the State's Rental Allowance Program, was substantially equivalent to HOME match requirements and good cause was found to grant the waiver.

**15. Regulation:** 24 CFR 92.251(a) & 24 CFR 92.206(a)(2)(i).

**Project/Activity:** The State of Oklahoma requested a waiver, on behalf of Okfuskee County, to permit rehabilitation which utilizes HOME funds, to not bring a unit into compliance with HQS.

**Nature of Requirement:** 24 CFR 92.251(a) provides that housing assisted with HOME funds meet, at a minimum, HUD housing quality standards (HQS), and provides other minimum standards for substantial rehabilitation and new construction. 24 CFR 92.206(a)(2)(i) of the HOME regulations requires that properties rehabilitated with HOME Program funds minimally meet the

housing quality standards at 24 CFR 882.109.

*Granted By:* Andrew Cuomo, Assistant Secretary for Community Planning & Development.

*Date Granted:* August 18, 1995.

*Reasons Waived:* The waiver was granted because the State and the County had outlined their extensive efforts to complete the rehabilitation of a specific unit. The owner of the unit would not grant either entity access to the property to complete the rehabilitation. Therefore, it was determined that there was good cause to grant the waiver.

**16. Regulation:** 24 CFR 92.252(a)(2)(i).

*Project/Activity:* Mercer County a HOME recipient, on behalf of Lawrence Township New Jersey, requested a waiver of the HOME program regulations at 24 CFR 92.252(a)(2)(i) to permit Section 811 project rents, which exceed the low HOME rents, to prevail for a project partially assisted with HOME funds.

*Nature of Requirement:* The regulations at 24 CFR 92.252(a)(2)(i) state, "to obtain the maximum monthly rent that may be charged for a unit that is subject to this limitation, the owner or participating jurisdiction multiplies the annual adjusted income of the tenant family by 30 percent and divides by 12, and if applicable, subtracts a monthly allowance for any utilities and services to be paid by the tenant."

*Granted By:* Andrew Cuomo, Assistant Secretary for Community Planning & Development.

*Date Granted:* August 18, 1995.

*Reasons Waived:* The application of § 92.252(a)(2)(i) of the HOME regulations for the Section 811 project would create an undue hardship for the Township because a handicapped housing project would not be developed in the jurisdiction, and thus adversely affect the purposes of the Housing and Community Development Act.

**17. Regulation:** 24 CFR 92.254(a)(3).

*Project/Activity:* The Kentucky Housing Authority requested a waiver of 24 CFR 92.254(a)(3) of the HOME regulations to increase the rental period from three to five years.

*Nature of Requirement:* 24 CFR 92.254(a)(3) which requires a home to be purchased within 36 months if a lease-purchase agreement is used in conjunction with a homebuyer program.

*Granted By:* Andrew Cuomo, Assistant Secretary for Community Planning & Development.

*Date Granted:* September 6, 1995.

*Reason Waived:* HUD determined that increasing the rental period in this case from three to five years will provide tenants the necessary time to succeed in

the required life skills program and become responsible and reliable homeowners.

**18. Regulation:** 24 CFR 92.258.

*Project/Activity:* The State of North Dakota requested a waiver of 24 CFR 92.258 of the HOME regulations to waive the 30 year affordability period for low-income homebuyers receiving HOME assistance.

*Nature of Requirement:* 24 CFR 92.258 provides a limitation on the use of HOME funds with FHA mortgage insurance for a period of time equal to the term of the HUD insured mortgage.

*Granted By:* Andrew Cuomo, Assistant Secretary for Community Planning & Development.

*Date Granted:* August 28, 1995.

*Reasons Waived:* The application of § 92.258 of the HOME regulations to the State's program would create an undue hardship for North Dakota and its potential homeowners, and adversely affect the purposes of the Act.

**19. Regulation:** 24 CFR 92.258.

*Project/Activity:* Suffolk County, New York requested a waiver of 24 CFR 92.258 of the HOME regulations to waive the 30 year affordability period for low-income homebuyers receiving HOME assistance.

*Nature of Requirement:* 24 CFR 92.258 provides a limitation on the use of HOME funds with FHA mortgage insurance for a period of time equal to the term of the HUD insured mortgage.

*Granted By:* Andrew Cuomo, Assistant Secretary for Community Planning & Development.

*Date Granted:* September 6, 1995.

*Reasons Waived:* The application of § 92.258 of the HOME regulations to the county program would create an undue hardship for Suffolk County and its potential homeowners, and adversely affect the purposes of the Act.

**20. Regulation:** 24 CFR 291.400.

*Project/Activity:* The Anoka County Community Action Program requested a waiver of the 24 month residency for a tenant in a single family property leased under the single family property disposition homeless program.

*Nature of Requirement:* The regulations at 24 CFR 291.400 prohibit a non-profit organization or a community participating in the Single Family Property Disposition Leasing Program from extending a lease to the same tenant for a period beyond 24 months.

*Granted By:* Andrew Cuomo, Assistant Secretary for Community Planning & Development.

*Date Granted:* August 16, 1995.

*Reasons Waived:* The waiver will allow a formerly homeless family more time to find permanent housing.

**21. Regulation:** 24 CFR 291.400.

*Project/Activity:* The Anoka County Community Action Program requested a waiver of the 24 month residency for three tenants in single family properties leased under the single family property disposition homeless program.

*Nature of Requirement:* The regulations at 24 CFR 291.400 prohibit a non-profit organization or a community participating in the Single Family Property Disposition Leasing Program from extending a lease to the same tenant for a period beyond 24 months.

*Granted By:* Andrew Cuomo, Assistant Secretary for Community Planning & Development.

*Date Granted:* September 6, 1995.

*Reasons Waived:* The waiver will allow three formerly homeless families more time to find permanent housing.

**22. Regulation:** 24 CFR 511.76(h).

*Project/Activity:* The City of Salisbury, North Carolina requested a waiver of program closeout requirements of the Rental Rehabilitation program.

*Nature of Requirement:* The regulations at 24 CFR 511.76(h) cite when proceeds received from Rental Rehabilitation loans become program income.

*Granted By:* Andrew Cuomo, Assistant Secretary for Community Planning & Development.

*Date Granted:* July 3, 1995.

*Reasons Waived:* The North Carolina Housing Finance Agency (NCHFA), the Rental Rehabilitation grantee, had not yet met the requirements for program closeout. However, the City of Salisbury, as a subrecipient of the State, had closed out all of its RRP grants and was receiving program income from them. The waiver allowed the City to use its program income to provide affordable rental housing to low income residents.

**23. Regulation:** 24 CFR 570.200(h) & 570.200(a)(5).

*Project/Activity:* The City of San Angelo, Texas requested a waiver of 24 CFR 570.200(h) & 570.200(a)(5) regarding reimbursement of pre-agreement costs for the renovation of a building to be used as a one-stop public health facility.

*Nature of Requirement:* Under the regulations a locality is precluded from obligating CDBG funds before grant award.

*Granted By:* Andrew Cuomo, Assistant Secretary for Community Planning & Development.

*Date Granted:* July 28, 1995.

*Reasons Waived:* HUD determined that failure to grant the waiver would cause hardship and adversely affect the

purposes of the Act. The waiver of the limitations on pre-agreement costs at 24 CFR 570.200(h) & 570.200(a)(5) will permit the renovation of the building which will be used for a public health facility.

**24. Regulation:** 24 CFR 570.200(h) & 570.200(a)(5) 24 CFR 570.207(b)(4).

**Project/Activity:** The City of Albany Georgia requested a waiver of 24 CFR 570.200(h) & 570.200(a)(5) to facilitate the obligation of disaster recovery funds by permitting the City to reimburse real property owners for expenses incurred on or after the disaster date. The City of Albany Georgia also requested a waiver of 24 CFR 570.207(b)(4) to permit it to carry out a household assistance program for victims of the disaster.

**Nature of Requirement:** Under the regulations a locality is precluded from obligating CDBG funds before grant award. Also 24 CFR 570.207(b)(4) prohibits income payments to households or individuals.

**Granted By:** Andrew Cuomo, Assistant Secretary for Community Planning & Development.

**Date Granted:** July 31, 1995.

**Reasons Waived:** HUD determined that failure to grant the waiver would cause hardship and adversely affect the purposes of the Act. The waiver of the limitations on pre-agreement costs at 24 CFR 570.200(h) & 570.200(a)(5) will permit the City to implement a plan to reimburse property owners for expenses incurred prior to the effective date of its CDBG emergency supplemental grant. The second waiver will allow a household assistance program for those suffering personal property damage caused by the tropical storm Alberto.

**25. Regulation:** 24 CFR 570.200(h) & 570.200(a)(5).

**Project/Activity:** The City of Davenport, Iowa requested a waiver of 24 CFR 570.200(h) & 570.200(a)(5) regarding reimbursement of pre-agreement costs to permit the City to complete an acquisition activity.

**Nature of Requirement:** Under the regulations a locality is precluded from obligating CDBG funds before grant award.

**Granted By:** Andrew Cuomo, Assistant Secretary for Community Planning & Development.

**Date Granted:** August 18, 1995.

**Reasons Waived:** HUD determined that failure to grant the waiver would cause hardship and adversely affect the purposes of the Act. The waiver of the limitations on pre-agreement costs at 24 CFR 570.200(h) & 570.200(a)(5) will permit the city to fund the acquisition, by a non-profit organization, of a youth center to serve local youth and function as a community policing outpost, with

FY 1996, FY 1997 and FY 1998 CDBG funds.

**26. Regulation:** 24 CFR 570.200(h) & 570.200(a)(5).

**Project/Activity:** Sacramento, California requested a waiver of 24 CFR 570.200(h) & 570.200(a)(5) regarding reimbursement of pre-agreement costs to permit the City to carry out street improvements in a low and moderate income area in one year instead of in two phases.

**Nature of Requirement:** Under the regulations a locality is precluded from obligating CDBG funds before grant award.

**Granted By:** Andrew Cuomo, Assistant Secretary for Community Planning & Development.

**Date Granted:** September 6, 1995.

**Reasons Waived:** HUD determined that failure to grant the waiver would cause hardship and adversely affect the purposes of the Act. The waiver of the limitations on pre-agreement costs at 24 CFR 570.200(h) & 570.200(a)(5) will permit the reimbursement of local funds, for street improvements to a low and moderate income area, with FY 1996 and FY 1997 CDBG funds.

**27. Regulation:** 24 CFR 570.200(h) & 570.200(a)(5).

**Project/Activity:** Clark County, Nevada requested a waiver of 24 CFR 570.200(h) & 570.200(a)(5) regarding reimbursement of pre-agreement costs for the development of a public facility to provide recreational facilities for at-risk youth.

**Nature of Requirement:** Under the regulations a locality is precluded from obligating CDBG funds before grant award.

**Granted By:** Andrew Cuomo, Assistant Secretary for Community Planning & Development.

**Date Granted:** September 18, 1995.

**Reasons Waived:** HUD determined that failure to grant the waiver would cause hardship and adversely affect the purposes of the Act. The waiver of the limitations on pre-agreement costs at 24 CFR 570.200(h) & 570.200(a)(5) will permit the City to develop a facility that will provide recreational programs to neighborhood youth. In addition, the Police Department has a neighborhood office there as do various county social service agencies.

**28. Regulation:** 24 CFR 576.21.

**Project/Activity:** Monmouth County, New Jersey requested a waiver of the Emergency Shelter Grants regulations at 24 CFR 576.21.

**Nature of Requirement:** The County requested a waiver of the expenditure limitation of ESG funds on essential services.

**Granted By:** Andrew Cuomo, Assistant Secretary for Community Planning & Development.

**Date Granted:** July 10, 1995.

**Reasons Waived:** Under the Stewart B. McKinney Homeless Assistance Act, amended by the National Affordable Housing Act the 30 cap percent cap on essential services may be waived if the grantee "demonstrates that the other eligible activities under the program are already being carried out in the locality with other resources". The County provided a letter that demonstrated that other categories of ESG activities will be carried out locally with other resources, therefore, it was determined that the waiver was appropriate.

**29. Regulation:** 24 CFR 576.21.

**Project/Activity:** The State of Michigan requested a waiver of the Emergency Shelter Grants regulations at 24 CFR 576.21.

**Nature of Requirement:** The State requested a waiver of the expenditure limitation of ESG funds on essential services.

**Granted By:** Andrew Cuomo, Assistant Secretary for Community Planning & Development.

**Date Granted:** July 10, 1995.

**Reasons Waived:** Under the Stewart B. McKinney Homeless Assistance Act, amended by the National Affordable Housing Act, the 30 cap percent cap on essential services may be waived if the grantee "demonstrates that the other eligible activities under the program are already being carried out in the locality with other resources". The State demonstrated that other eligible activities will be carried out with other funds.

**30. Regulation:** 24 CFR 576.21.

**Project/Activity:** The municipality of Caguas, Puerto Rico requested a waiver of the Emergency Shelter Grants regulations at 24 CFR 576.21.

**Nature of Requirement:** The municipality requested a waiver of the ESG expenditure limitation on essential services.

**Granted By:** Andrew Cuomo, Assistant Secretary for Community Planning & Development.

**Date Granted:** July 10, 1995.

**Reasons Waived:** Under the Stewart B. McKinney Homeless Assistance Act, amended by the National Affordable Housing Act, the 30 cap percent cap on essential services may be waived if the grantee "demonstrates that the other eligible activities under the program are already being carried out in the locality with other resources". The municipality provided a letter that demonstrated that other categories of ESG activities will be carried out locally with other resources,

therefore, it was determined that the waiver was appropriate.

**31. Regulation:** 24 CFR 576.21.

**Project/Activity:** The State of Massachusetts requested a waiver of the Emergency Shelter Grants regulations at 24 CFR 576.21.

**Nature of Requirement:** The State requested a waiver of the ESG expenditure limitation on essential services.

**Granted By:** Andrew Cuomo, Assistant Secretary for Community Planning & Development.

**Date Granted:** July 21, 1995.

**Reasons Waived:** Under the Stewart B. McKinney Homeless Assistance Act, amended by the National Affordable Housing Act, the 30 cap percent cap on essential services may be waived if the grantee "demonstrates that the other eligible activities under the program are already being carried out in the locality with other resources". The State provided a letter that demonstrated that other categories of ESG activities will be carried out locally with other resources, therefore, it was determined that the waiver was appropriate.

**32. Regulation:** 24 CFR 576.21.

**Project/Activity:** Mt. Vernon City, New York requested a waiver of the Emergency Shelter Grants regulations at 24 CFR 576.21.

**Nature of Requirement:** The City requested a waiver of the ESG expenditure limitation on essential services.

**Granted By:** Andrew Cuomo, Assistant Secretary for Community Planning & Development.

**Date Granted:** August 28, 1995.

**Reasons Waived:** Under the Stewart B. McKinney Homeless Assistance Act, amended by the National Affordable Housing Act, the 30 cap percent cap on essential services may be waived if the grantee "demonstrates that the other eligible activities under the program are already being carried out in the locality with other resources". The City provided a letter that demonstrated that other categories of ESG activities will be carried out locally with other resources, therefore, it was determined that the waiver was appropriate.

**33. Regulation:** 24 CFR 576.21.

**Project/Activity:** The City of Ft. Wayne, Indiana requested a waiver of the Emergency Shelter Grants regulations at 24 CFR 576.21.

**Nature of Requirement:** The City requested a waiver of the ESG expenditure limitation on essential services.

**Granted By:** Andrew Cuomo, Assistant Secretary for Community Planning & Development.

**Date Granted:** September 6, 1995.

**Reasons Waived:** Under the Stewart B. McKinney Homeless Assistance Act, amended by the National Affordable Housing Act, the 30 cap percent cap on essential services may be waived if the grantee "demonstrates that the other eligible activities under the program are already being carried out in the locality with other resources". The City provided a letter that demonstrated that other categories of ESG activities will be carried out locally with other resources, therefore, it was determined that the waiver was appropriate.

**34. Regulation:** 24 CFR 578.335(e).

**Project/Activity:** The State of California on behalf of the California Department of Housing and Community Development requested a waiver of 24 CFR 578.335(e) of the conflict of interest regulations to allow two board members on a homeless advisory board to perform work for a permanent housing project.

**Nature of Requirement:** 24 CFR 578.335(e) provides the regulations on conflict of interest for program participants.

**Granted By:** Andrew Cuomo, Assistant Secretary for Community Planning & Development.

**Date Granted:** August 14, 1995.

**Reasons Waived:** A determination was made that undue hardship would result from applying the requirement and would adversely affect the purposes of the permanent housing for the handicapped homeless program.

**35. Regulation:** 24 CFR 582.803(a)(i).

**Project/Activity:** The Fort Collins Housing Authority requested a waiver to accept as residents, three persons who were assisted under the Section 8 Certificate program, into a 12 unit SRO projects.

**Nature of Requirement:** The regulations at 24 CFR 882.803(a)(i) state that housing is not eligible for SRO assistance if it is, or has been within 12 months before the owner submits a proposal to the public housing agency, (PHA), subsidized under any Federal Housing program.

**Granted By:** Andrew Cuomo, Assistant Secretary for Community Planning & Development.

**Date Granted:** September 6, 1995.

**Reasons Waived:** It was determined that the financial feasibility of the project was based on twelve units receiving rental assistance. The Assistant Secretary determined that granting the waiver was the most effective way of developing the project.

**36. Regulation:** 24 CFR 882.408(b).

**Project/Activity:** The Housing Authority of the City of San Francisco requested a waiver which would allow the Housing Authority to utilize a gross

rent for one of its Shelter Plus Care projects that would exceed the applicable Fair Market Rent (FMR) by 12 percent.

**Nature of Requirement:** The SRO regulations at 24 CFR 882.408(b) state that, a public housing agency may approve initial gross rents which exceed the applicable FMR by up to 10 percent for all units of a given size in specified areas. The Department is waiving the provisions of 24 CFR 882.408(b) which only allow pre-agreement exception rents to be approved on an area-wide basis and which only allow the exception rent to exceed the moderate rehabilitation FMR by 10 percent.

**Granted By:** Andrew Cuomo, Assistant Secretary for Community Planning & Development.

**Date Granted:** July 28, 1995.

**Reasons Waived:** It was determined that the City had taken all reasonable actions to reduce the gross rents to within the applicable FMR. So in order for project development to proceed the gross rent was increased beyond the FMR by 12 percent.

**37. Regulation:** 24 CFR 882.808(a)(3)(4) & (b)(2).

**Project/Activity:** The Housing Authority of Portland Oregon requested a waiver which would allow the owners of four SRO structures to maintain separate waiting lists rather than receive tenant referrals from the Housing Authority's waiting list for SRO projects.

**Nature of Requirement:** The SRO regulations at 24 CFR 882.808(a)(3)(4) & (b)(2) state that, a public housing agency waiting list must be used for tenant referrals to SRO projects.

**Granted By:** Andrew Cuomo, Assistant Secretary for Community Planning & Development.

**Date Granted:** July 20, 1995.

**Reasons Waived:** The March 15, 1993, Interim Rule for the SRO program stated that the PHA waiting list requirement was being eliminated. Due to a technical error this new policy was not implemented. Since the Department plans on publishing a technical amendment which includes this policy, the waiver was granted.

Note to Reader: The person to be contacted for additional information about these waiver-grant items in this listing is: Linda Campbell, Director, Marketing and Leasing Management, U.S. Department of Housing and Urban Development, Office of Public and Assisted Housing Operations, Room 4206, 451 7th Street, S.W., Washington, D.C. 20410-7000, Telephone: (202) 708-0744 X4020.

**38. Regulation:** 24 CFR 913.105.

**Project/Activity:** A request was made by the Houston, TX, Housing Authority

(HHA), to admit Low-Income families other than Very Low Income families in two post 10/1/81 scattered site projects.

*Nature of Requirement:* No Low-Income Family other than a Very Low-Income Family shall, after July 1, 1984, be approved for admission to any unit in a Public Housing program for which initial occupancy began on or after October 1, 1981, except with the prior approval of HUD.

*Granted By:* Kevin Emmanuel Marchman, Deputy Assistant Secretary for Distressed and Troubled Housing Recovery.

*Date Granted:* October 30, 1995.

*Reason Waived:* The authorization to admit Low-Income Families who are not Very Low-Income Families was granted to address the HHA's need to achieve occupancy by a broad range of income families throughout the housing administered by the Authority.

*39. Regulation:* 24 CFR 913.107(a).

*Project/Activity:* A request was made by the Housing Authority of the City of Robert Lee, TX (HARL), to permit the establishment of ceiling rents at the statutory minimum for its entire inventory of 42 units.

*Nature of Requirement:* The total tenant payment a public housing agency (PHA) must charge shall be the highest of the following, rounded to the nearest dollar: (1) 30 percent of monthly adjusted income; (2) 10 percent of monthly income; or (3) if the family receives welfare assistance from a public agency and a part of such payments, adjusted in accordance with the family's actual housing costs, is specifically designated by such agency to meet the Family's housing costs, the monthly portion of such payments which is so designated.

*Granted By:* Kevin Emmanuel Marchman, Deputy Assistant Secretary for Distressed and Troubled Housing Recovery.

*Date Granted:* October 27, 1995.

*Reason Waived:* The HARL has a long history of vacancy problems. The HARL has experienced frequent turnover and refusals by applicants as 30% of their adjusted monthly income would be higher than the rents in the private market. In order to prevent turnovers due to rent increases and to attract applicants to vacant units, the HARL was allowed to establish ceiling rents.

*40. Regulation:* 24 CFR 913.107(a).

*Project/Activity:* A request was made by the Housing Authority of Warren, MN (HAW), to permit the establishment of ceiling rents at the statutory minimum for its 34 0-bedroom and 36 1-bedroom units.

*Nature of Requirement:* The total tenant payment a public housing agency

(PHA) must charge shall be the highest of the following, rounded to the nearest dollar: (1) 30 percent of monthly adjusted income; (2) 10 percent of monthly income; or (3) if the family receives welfare assistance from a public agency and a part of such payments, adjusted in accordance with the family's actual housing costs, is specifically designated by such agency to meet the Family's housing costs, the monthly portion of such payments which is so designated.

*Granted By:* Kevin Emmanuel Marchman, Deputy Assistant Secretary for Distressed and Troubled Housing Recovery.

*Date Granted:* October 30, 1995.

*Reason Waived:* The HAW has experienced frequent turnover and refusals by applicants as 30% of their adjusted monthly income would be higher than the rents in the private markets. The waiver was granted to enable HAW to address this problem and to assist HAW in achieving a broad range of income in its developments by allowing them to attract persons in the higher "income limit" bracket.

*41. Regulation:* 24 CFR 913.107(a).

*Project/Activity:* A request was made by the Vermilion County, IL, Housing Authority (VCHA), to permit the establishment of ceiling rents at all of its family developments.

*Nature of Requirement:* The total tenant payment a public housing agency (PHA) must charge shall be the highest of the following, rounded to the nearest dollar: (1) 30 percent of monthly adjusted income; (2) 10 percent of monthly income; or (3) if the family receives welfare assistance from a public agency and a part of such payments, adjusted in accordance with the family's actual housing costs, is specifically designated by such agency to meet the Family's housing costs, the monthly portion of such payments which is so designated.

*Granted By:* Kevin Emmanuel Marchman, Deputy Assistant Secretary for Distressed and Troubled Housing Recovery.

*Date Granted:* November 13, 1995.

*Reason Waived:* The establishment of ceiling rents for VCHA will assist families living in VCHA's developments who work or desire to work to better themselves without being penalized by having to pay rents which are higher than those on the private market. This waiver will allow working families to be examples to other residents.

*42. Regulation:* 24 CFR 913.107(a).

*Project/Activity:* A request was made by the Nelson, Nebraska, Housing Authority to permit the establishment of

ceiling rents for its 20 one-bedroom units.

*Nature of Requirement:* The total tenant payment a public housing agency (PHA) must charge shall be the highest of the following, rounded to the nearest dollar: (1) 30 percent of monthly adjusted income; (2) 10 percent of monthly income; or (3) if the family receives welfare assistance from a public agency and a part of such payments, adjusted in accordance with the family's actual housing costs, is specifically designated by such agency to meet the Family's housing costs, the monthly portion of such payments which is so designated.

*Granted By:* Kevin Emmanuel Marchman, Deputy Assistant Secretary for Distressed and Troubled Housing Recovery.

*Date Granted:* November 15, 1995.

*Reason Waived:* The NHA has had a sustained vacancy problem for several years. Seven of the 20 one-bedroom rooms are typically vacant at one time. The waiver was granted to enable NHA to address its vacancy problem by improving its marketability to potential applicants and to retain more wage-earning, low-income applicants who might otherwise choose to obtain housing on the private market.

*43. Regulation:* 24 CFR 913.107(a).

*Project/Activity:* A request was made by the Quincy, IL, Housing Authority (QHA), to permit the establishment of ceiling rents at the Section 8 FMR for all of their family developments.

*Nature of Requirement:* The total tenant payment a public housing agency (PHA) must charge shall be the highest of the following, rounded to the nearest dollar: (1) 30 percent of monthly adjusted income; (2) 10 percent of monthly income; or (3) if the family receives welfare assistance from a public agency and a part of such payments, adjusted in accordance with the family's actual housing costs, is specifically designated by such agency to meet the Family's housing costs, the monthly portion of such payments which is so designated.

*Granted By:* Kevin Emmanuel Marchman, Deputy Assistant Secretary for Distressed and Troubled Housing Recovery.

*Date Granted:* December 1, 1995.

*Reason Waived:* The establishment of ceiling rents at QHA will encourage more residents to seek employment without the penalty of an increase in rent. It will aid residents making the transition from welfare to employment, or who have obtained higher-paying jobs. These residents can then serve as role models to others in the development.

**44. Regulation:** 24 CFR 913.107(a).

**Project/Activity:** A request was made by the Housing Authority of Green Bay, Wisconsin (HAGB), to permit the establishment of ceiling rents at the Section 8 FMR for all of its developments.

**Nature of Requirement:** The total tenant payment a public housing agency (PHA) must charge shall be the highest of the following, rounded to the nearest dollar: (1) 30 percent of monthly adjusted income; (2) 10 percent of monthly income; or (3) if the family receives welfare assistance from a public agency and a part of such payments, adjusted in accordance with the family's actual housing costs, is specifically designated by such agency to meet the Family's housing costs, the monthly portion of such payments which is so designated.

**Granted By:** Kevin Emmanuel Marchman, Deputy Assistant Secretary for Distressed and Troubled Housing Recovery.

**Date Granted:** December 1, 1995.

**Reason Waived:** The HAGB has experienced turnover due to families moving out when their rents began to exceed those on the private market. The establishment of ceiling rents would aid residents who are making the transition from welfare to employment, or who have obtained higher-paying jobs. In order to prevent turnovers due to rent increases and to attract applicants to vacant units, the HAGB was allowed to establish ceiling rents.

**45. Regulation:** 24 CFR 913.107(a).

**Project/Activity:** A request was made by the Housing Authority of Granite City, Illinois (HAGC), to permit the establishment of ceiling rents authority-wide at the statutory minimum.

**Nature of Requirement:** The total tenant payment a public housing agency (PHA) must charge shall be the highest of the following, rounded to the nearest dollar: (1) 30 percent of monthly adjusted income; (2) 10 percent of monthly income; or (3) if the family receives welfare assistance from a public agency and a part of such payments, adjusted in accordance with the family's actual housing costs, is specifically designated by such agency to meet the Family's housing costs, the monthly portion of such payments which is so designated.

**Granted By:** Kevin Emanuel Marchman, Deputy Assistant Secretary for Distressed and Troubled Housing Recovery.

**Date Granted:** December 4, 1995.

**Reason Waived:** The HAGC has experienced vacancy problems due to families moving out when they become employed and rents begin to exceed

those on the private market. The establishment of ceiling rents will prevent turnovers due to rent increases and encourage working families to remain in public housing and become role models for other residents. It will aid in the transition from welfare to employment.

**46. Regulation:** 24 CFR 913.107(a).

**Project/Activity:** A request was made by the Cuyahoga Metropolitan Housing Authority (CMHA), Cleveland, OH, to permit the establishment of authority-wide ceiling rents at the statutory minimum as part of its Hope VI Revitalization Plan.

**Nature of Requirement:** The total tenant payment a public housing agency (PHA) must charge shall be the highest of the following, rounded to the nearest dollar: (1) 30 percent of monthly adjusted income; (2) 10 percent of monthly income; or (3) if the family receives welfare assistance from a public agency and a part of such payments, adjusted in accordance with the family's actual housing costs, is specifically designated by such agency to meet the Family's housing costs, the monthly portion of such payments which is so designated.

**Granted By:** Kevin Emanuel Marchman, Deputy Assistant Secretary for Distressed and Troubled Housing Recovery.

**Date Granted:** December 7, 1995.

**Reason Waived:** Consistent with the latitude established in Article X of the HOPE VI agreement, CMHA was allowed to establish ceiling rents to address problems associated with severely distressed public housing developments. CMHA has experienced vacancy problems caused by an exodus of working families who leave when their rents exceed those on the private market. These residents make excellent role models for others in the development. The waiver will also assist CMHA to achieve a broad range of income and improve its marketability to potential applicants.

**47. Regulation:** 24 CFR 913.107(a).

**Project/Activity:** A request was made by the Winona, MN, Housing and Redevelopment Authority (WHRA) to permit the establishment of ceiling rents at the FMR for two of its developments.

**Nature of Requirement:** The total tenant payment a public housing agency (PHA) must charge shall be the highest of the following, rounded to the nearest dollar: (1) 30 percent of monthly adjusted income; (2) 10 percent of monthly income; or (3) if the family receives welfare assistance from a public agency and a part of such payments, adjusted in accordance with the family's actual housing costs, is

specifically designated by such agency to meet the Family's housing costs, the monthly portion of such payments which is so designated.

**Granted By:** Kevin Emmanuel Marchman, Deputy Assistant Secretary for Distressed and Troubled Housing Recovery.

**Date Granted:** December 13, 1995.

**Reason Waived:** The WHRA has experienced vacancy problems due to families moving out when their rents exceed those on the private market. Ceiling rents will permit WHRA to give higher income residents the opportunity to transition from welfare to employment and to plan for homeownership in the future. Working families will also serve as role models in the development.

**Note to Reader:** The person to be contacted for additional information about these waiver-grant items in this listing is: Sonia L. Burgos, Crime Prevention and Security Division, Office of Community Relations and Involvement, U.S. Department of Housing and Urban Development, Room 4116, 451 7th Street, S.W., Washington, D.C. 20410-7000, Telephone: (202) 708-1197.

**48. Regulation:** 24 CFR 961.10(b)(6).

**Project/Activity:** Kingsport Housing Authority (KHA), Kingsport, Tennessee.

**Nature of Requirement:** 24 CFR 961.10(b)(6), prohibits the use of Public Housing Drug Elimination Program (PHDEP) grant funds for the purchase of a vehicle.

**Granted By:** Kevin Emanuel Marchman, Deputy Assistant Secretary, Distressed and Troubled Housing.

**Date Granted:** October 20, 1995.

**Reason Waived:** The housing authority stated it intends to use a vehicle to support a variety of drug elimination activities. The authority has shown good cause and demonstrated compliance with applicable regulatory requirements and it was found there was good cause to grant a waiver of 24 CFR 961 to purchase a vehicle.

**49. Regulation:** 24 CFR 961.10(b)(6).

**Project/Activity:** Housing Authority of the City of Bainbridge, Georgia.

**Nature of Requirement:** 24 CFR 961.10(b)(6), prohibits the local Field Office from granting a waiver of a regulation.

**Granted By:** Michael B. Janis, General Deputy Assistant Secretary.

**Date Granted:** December 1, 1995.

**Reason Waived:** To extend PHDEP grant #GA06DEP0640192 and reprogram PHDEP funds. The authority has shown good cause and demonstrated compliance with applicable regulatory requirements and it was found there was good cause to grant a waiver of 24 CFR 961.

**50. Regulation:** 24 CFR 961.10(b)(6).

*Project/Activity:* Richmond, Virginia Redevelopment and Housing Authority.

*Nature of Requirement:* CFR 961.10(b)(6), limits drugs prevention, intervention and treatment programs to reduce the use of drugs.

*Granted By:* Michael B. Janis, General Deputy Assistant Secretary.

*Date Granted:* October 5, 1995.

*Reason Waived:* To facilitate drug prevention, intervention and treatment efforts, to include outreach to community resources and youth activities, and facilitate bringing these resources onto the premises, or providing resident referrals to treatment programs or transportation to out-

patient treatment programs away from the premises.

*51. Regulation:* 24 CFR 990.108(b)(2)(iv).

*Project/Activity:* Mobile Housing Board, Mobile, AL. In determining the operating subsidy eligibility, a request was made for funding more than one site in a project approved for non-dwelling use to promote an anti-drug program.

*Nature of Requirement:* The operating subsidy calculation limits funding for units removed from the dwelling rental inventory for economic self-sufficiency or anti-drug programs to one site per project.

*Granted By:* Kevin Emanuel Marchman, Deputy Assistant Secretary for Distressed and Troubled Housing Recovery

*Date Granted:* December 18, 1995.

*Reason Waived:* To take into account the size of developments in a housing authority when determining the number of sites funded in a project. Because this was a large project, a second site was approved to be used as office space for probation officers carrying out contract services under Drug Elimination Program grants.

[FR Doc. 96-14814 Filed 6-11-96; 8:45 am]

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# Federal Register

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Wednesday  
June 12, 1996

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## Part VI

# Department of Education

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34 CFR Part 600, et al.  
William D. Ford Federal Direct Loan  
Program; Final Rule

**DEPARTMENT OF EDUCATION****34 CFR Parts 600, 668, and 685**

RIN 1840-AC18

**William D. Ford Federal Direct Loan Program; Institutional Eligibility Under the Higher Education Act of 1965, as Amended; Student Assistance General Provisions**

AGENCY: Department of Education.

ACTION: Final Regulations.

**SUMMARY:** This document contains corrections and other technical changes to the William D. Ford Federal Direct Loan (Direct Loan) Program final regulations published in the Federal Register on December 1, 1994 (59 FR 61664). These regulations apply to loans under the Federal Direct Stafford/Ford Loan Program, the Federal Direct Unsubsidized Stafford/Ford Loan Program, the Federal Direct PLUS Program, and the Federal Direct Consolidation Loan Program, collectively referred to as the Direct Loan Program. The Secretary also corrects minor technical errors and omissions in the Institutional Eligibility regulations contained in 34 CFR Part 600, Subpart A, and the Student Assistance General Provisions regulations contained in 34 CFR Part 668, Subpart B.

**EFFECTIVE DATE:** These regulations take effect July 12, 1996.

**FOR FURTHER INFORMATION CONTACT:** Ms. Meredith Merrill, Program Specialist, U.S. Department of Education, 600 Independence Avenue, S.W. (ROB-3, Room 3053), Washington, DC 20202-5400. Telephone: (202) 708-9406. Individuals who use a telecommunications device for the Deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1-800-877-8339 between 8 a.m. and 8 p.m., Eastern time, Monday through Friday.

**SUPPLEMENTARY INFORMATION:** The following regulations are amended to clarify the regulations and to correct errors and omissions in the text of the Direct Loan Program final regulations published on December 1, 1994 (59 FR 61664), the Institutional Eligibility regulations, 34 CFR Part 600, and the Student Assistance General Provisions regulations, 34 CFR Part 668.

**The Direct Loan Program**

Section 685.102 has been amended to correct a typographical error in a reference to the Federal Family Education Loan (FFEL) Program and to include a reference to grace period, which was inadvertently omitted in the

description of a Direct Subsidized Consolidation Loan under the definition of the Federal Direct Consolidation Loan Program. In order to reflect a statutory change made by the Higher Education Technical Amendments of 1993, Public Law 103-208, this section also has been amended to clarify that a borrower may make satisfactory repayment arrangements on a defaulted Direct Loan for the purposes of regaining title IV eligibility only one time.

Section 685.200 has been amended to accurately reflect the requirement that a student must be enrolled or accepted for enrollment on at least a half-time basis in order to be eligible to receive a Direct Loan. Paragraph (c) of this section has been amended to clarify the definition of "satisfactory repayment arrangement" for the purpose of consolidating a defaulted loan. Further, this section has been amended to correct a grammatical error in the text and an error in a cross-reference to another section in Part 685.

Section 685.202 clarifies the interest rate calculations for Direct Subsidized and Direct Unsubsidized Loans. The 2.5 percentage point adjustment on the interest rate for in-school, grace, and deferment periods only applies to loans first disbursed on or after July 1, 1995. For loans disbursed prior to July 1, 1995, the interest rate calculation for all periods is based on a 3.1 percentage point adjustment.

Paragraphs (b)(1) through (5) of § 685.202 clarify that the Secretary does not capitalize all interest that has accrued on a borrower's principal balance. Instead, the Secretary only capitalizes the amount of interest that accrues on the loan amount that the borrower has not paid.

Paragraph (b)(2) of § 685.202 is amended to clarify that, when a borrower enters repayment, the Secretary will capitalize the unpaid interest that accrued during the in-school and grace periods on a Direct Unsubsidized Consolidation Loan that is eligible for a grace period.

Paragraph (b)(3) of § 685.202 also clarifies the Secretary's intent that the limit on the amount of interest that is capitalized under the Income Contingent Repayment and Alternative Repayment plans does not apply during periods of deferment for unsubsidized loans and does not apply during periods of forbearance for any Direct Loan.

Section 685.204 has been amended to clarify that a Direct Loan borrower who has an outstanding balance on a FFEL Program loan made prior to July 1, 1993, at the time he or she applies for a first Direct Loan, will remain eligible for the FFEL Program deferments on all Direct Loans until all loans with those

deferments are fully repaid, even if the borrower repays the FFEL Program loans in full before the Direct Loans are paid in full.

Section 685.204 also has been amended to add language that reflects the existing policy in the Direct Loan Program that a borrower who has defaulted on the repayment of a Direct Loan generally is not eligible for a deferment. However, comparable to § 682.210(a)(8) in the FFEL Program, § 685.204(e) allows a borrower who has defaulted on a Direct Loan to be eligible for a deferment if the borrower contacts the Direct Loan Servicing Center and makes payment arrangements satisfactory to the Secretary.

Section 685.205 has been corrected to state that a borrower, not the endorser, must be the recipient of a national service educational award in order to qualify for forbearance.

Section 685.212 has been amended to clarify which payments the Secretary returns to a borrower when a loan is discharged. Once the Secretary receives acceptable documentation that a borrower is eligible for a specific discharge, any payments received during the period between the date the borrower met the eligibility requirements and the date the discharge was approved will be returned to the person who sent the payment. Furthermore, any payments received after the date the discharge was approved will be returned to the person who sent the payment.

Section 685.214 has been amended to conform with the technical corrections made in § 685.301.

Section 685.215 has been amended to specify which loans under subpart II of part A of title VII of the Public Health Service Act may be consolidated into a Direct Consolidation Loan. Paragraph (d) of this section is amended to reflect terminology consistent with the definitions in § 685.102(b). This section also has been amended to specify that the limit on collection costs charged to a borrower who consolidates a defaulted loan applies only to defaulted Direct Loans and FFEL Program loans.

Section 685.301 clarifies that, although certain circumstances allow for a late disbursement of a loan, a school must originate a loan while the student meets the borrower eligibility requirements in § 685.200. The terminology in this section has been changed to reflect that schools certify loan information in the Direct Loan Program by means of the origination process.

Section 685.301 also has been amended to clarify that a Direct Loan may be disbursed in a single installment

prior to the midpoint of the loan period if the date of the scheduled disbursement coincides with the beginning of the next scheduled term for which the school has an anticipated disbursement date. For example, a borrower at a term-based school that uses quarter hours would be allowed to receive the first and second Direct Loan disbursements in a single installment at the beginning of the second quarter even though this may occur prior to the midpoint of the loan period.

Section 685.303 has been amended to clarify that a school must determine whether or not a student has continuously maintained eligibility before Direct PLUS proceeds are disbursed to the parent borrower. Paragraph (d) of this section has been amended to clarify that a school may not make a late disbursement to a borrower that exceeds the student's cost of attendance for the period of enrollment completed by the student. Further, paragraph (d) clarifies that a school may not make a late disbursement if the student's last recorded date of attendance is earlier than the 30th day of the period of enrollment if the loan was subject to the 30-day delayed disbursement requirements for first-year, first-time borrowers. These requirements are the same as in the FFEL Program.

Section 685.305 has been amended to clarify those procedures a school must follow for determining the withdrawal date for a student who did not return for the next scheduled term following a summer break. This section also is amended to correct an error in the cross-reference to the Student Assistance General Provisions regulations.

#### Institutional Eligibility

Section 600.5 has been amended to correct a technical error which references the manner in which certified public accountants must examine the accuracy of a proprietary institution's calculations regarding the 85 percent rule contained in § 600.5(a)(8). Paragraph (e) of this section was mistakenly amended in the Federal Register of November 29, 1994, to reference an accountant performing an "agreed-upon procedures attestation engagement." This paragraph has been corrected to accurately reflect the Secretary's intent that a certified public accountant must engage in an "examination" level attestation agreement under which he or she examines management's assertions that it satisfied the 85 percent requirement.

#### General Provisions

Section 668.15 has been amended to clarify that the audit described in paragraph (e)(1) also may be performed by State auditors if they meet the independence requirements of *Government Auditing Standards*.

#### Waiver of Proposed Rulemaking

In accordance with the Administrative Procedure Act, 5 U.S.C. 553, it is the practice of the Secretary to offer interested parties the opportunity to comment on proposed regulations. However, the regulatory changes in this document are necessary to correct minor technical errors and omissions in the Direct Loan Program final regulations published on December 1, 1994, the Institutional Eligibility regulations, 34 CFR Part 600, and the Student Assistance General Provisions regulations, 34 CFR Part 668. The changes in this document do not establish any new substantive rules. Therefore, the Secretary has determined that publication of a proposed rule is unnecessary and contrary to the public interest under 5 U.S.C. 553(b)(B).

#### Executive Order 12866

These final regulations have been reviewed in accordance with Executive Order 12866. Under the terms of the order, the Secretary has assessed the potential costs and benefits of this regulatory action.

The potential costs associated with these final regulations are those resulting from statutory requirements and those determined by the Secretary as necessary for administering these programs effectively and efficiently. Burdens specifically associated with information collection requirements, if any, are identified and explained elsewhere in this preamble under the heading Paperwork Reduction Act of 1995.

In assessing the potential costs and benefits—both quantitative and qualitative—of these final regulations, the Secretary has determined that the benefits of the regulations justify the costs.

The Secretary has also determined that this regulatory action does not unduly interfere with State, local, and tribal governments in the exercise of their governmental functions.

#### Paperwork Reduction Act of 1995

These regulations have been examined under the Paperwork Reduction Act of 1995 and have been found to contain no information collection requirements.

#### Regulatory Flexibility Act Certification

The Secretary certifies that these regulations will not have significant economic impact on a substantial number of small entities. Small entities affected by these regulations are small institutions of higher education. These regulations contain technical amendments designed to clarify and correct current regulations. The changes will not have a significant economic impact on the institutions affected.

#### Assessment of Educational Impact

The Secretary has determined that the regulations in this document would not require transmission of information that is being gathered by or is available from any other agency or authority of the United States.

#### List of Subjects

##### 34 CFR Parts 600 and 668

Administrative practice and procedure, Colleges and universities, Consumer protection, Education, Grant programs-education, Loan programs-education, Reporting and recordkeeping requirements, Student Aid.

##### 34 CFR Part 685

Administrative practice and procedure, Colleges and universities, Education, Loan programs-education, Reporting and recordkeeping requirements, Student Aid, Vocational education.

(Catalog of Federal Domestic Assistance Numbers: 84.007 Federal Supplemental Education Opportunity Grant Program; 84.032 Federal Stafford Loan Program; 84.032 Federal PLUS Program; 84.032 Federal Supplemental Loans for Students Program; 84.033 Federal Work Study Program; 84.038 Federal Perkins Loan Program; 84.063 Federal Pell Grant Program; 84.069 Federal State Student Incentive Grant Program; 84.268 William D. Ford Federal Direct Loan Program; and 84.272 National Early Intervention Scholarship and Partnership Program.)

Dated: June 3, 1996.

Richard W. Riley,  
Secretary of Education.

The Secretary amends Parts 600, 668, and 685 of title 34 of the Code of Federal Regulations as follows:

#### **PART 685—WILLIAM D. FORD FEDERAL DIRECT LOAN PROGRAM**

1. The authority citation for Part 685 is revised to read as follows:

Authority: 20 U.S.C. 1087a *et seq.*, unless otherwise noted.

#### **§ 685.102 [Amended]**

2. In § 685.102, paragraph (a)(3), introductory text, after the word "Loan"

remove the word "Program"; in paragraph (b), in the definition of "Federal Direct Consolidation Loan Program", in paragraph (1), add " , grace," after "in-school"; in the definition of "Satisfactory repayment arrangement", at the end of paragraph (1), add a new sentence to read, "A borrower may only obtain the benefit of this paragraph with respect to renewed eligibility once."

3. In § 685.200, paragraph (a)(1)(i), add " , or accepted for enrollment, on at least a half-time basis" after the word "enrolled"; in paragraph (b)(7)(iii), remove the word "is" after the word "history"; and paragraph (c) is revised to read as follows:

**§ 685.200 Borrower eligibility.**

\* \* \* \* \*

(c) *Defaulted FFEL Program and Direct Loan borrowers.* Except as noted in § 685.215(d)(1)(ii)(F), in the case of a student or parent borrower who is currently in default on an FFEL Program or a Direct Loan Program Loan, the borrower shall make satisfactory repayment arrangements, as described in paragraph (2) of the definition of that term under § 685.102(b), on the defaulted loan.

\* \* \* \* \*

4. In § 685.202, paragraph (a)(1)(i), before the first sentence, add, "*Loans first disbursed prior to July 1, 1995.*"; remove the words, "in repayment" and add, in their place, "during all periods"; paragraph (a)(1)(ii) is revised; in paragraph (b)(1), add the word "unpaid" before the word "accrued"; in paragraph (b)(2), add "or a Direct Unsubsidized Consolidation Loan that qualifies for a grace period" after "Direct Unsubsidized Loan", add the word "unpaid" before the word "interest"; in paragraph (b)(3), remove the word "For" and add "Notwithstanding § 685.208(g)(5) and § 685.209(d)(3), for" at the beginning of the sentence, add the word "unpaid" after the words "capitalizes the"; in paragraph (b)(4), add the word "unpaid" after the word "capitalizes", remove the words, "payable by the borrower"; in paragraph (b)(5), add the word "unpaid" after the word "capitalize", and remove the words "payable by the borrower" to read as follows:

**§ 685.202 Charges for which Direct Loan Program borrowers are responsible.**

- (a) \* \* \*
- (1) \* \* \*

(ii) *Loans first disbursed on or after July 1, 1995.*

(A) *During the in-school, grace, and deferment periods.* The interest rate during any twelve-month period

beginning on July 1 and ending on June 30 is determined on the June 1 immediately preceding that period. The interest rate is equal to the bond equivalent rate of 91-day Treasury bills auctioned at the final auction held prior to that June 1 plus 2.5 percentage points, but does not exceed 8.25 percent.

(B) *During all other periods.* The interest rate during any twelve-month period beginning on July 1 and ending on June 30 is determined on the June 1 immediately preceding that period. The interest rate is equal to the bond equivalent rate of 91-day Treasury bills auctioned at the final auction held prior to that June 1 plus 3.1 percentage points, but does not exceed 8.25 percent.

\* \* \* \* \*

5. In § 685.204, in paragraph (b), remove "paragraph (d)" and add, in its place, "paragraphs (d) and (e)"; in paragraph (d) introductory text, add "borrower's first" before "Direct Loan", and add new paragraph (e) to read as follows:

**§ 685.204 Deferment.**

\* \* \* \* \*

(e) A borrower whose loan is in default is not eligible for a deferment, unless the borrower has made payment arrangements satisfactory to the Secretary.

**§ 685.205 [Amended]**

6. In § 685.205, paragraph (a)(4), remove the words, "or endorser".

7. In § 685.212, paragraph (f) is revised to read as follows:

**§ 685.212 Discharge of a loan obligation.**

\* \* \* \* \*

(f) *Payments received after eligibility for discharge.* Upon receipt of acceptable documentation and approval of the discharge request, the Secretary returns to the sender, or, for a discharge based on death, the borrower's estate, those payments received after the date that the eligibility requirements for discharge were met but prior to the date the discharge was approved. The Secretary also returns any payments received after the date the discharge was approved.

\* \* \* \* \*

**§ 685.214 [Amended]**

8. In § 685.214, paragraph (a)(1)(iii), before "in the occupation," remove the word "certified" and add, in its place, the word, "originated"; in paragraph (c)(1)(iii)(B), remove the word "certified" and add, in its place, the word, "originated".

9. In § 685.215, paragraph (b)(19), add "and Loans for Disadvantaged Students (LDS) made under subpart II of part A of title VII of the Public Health Service Act" after "(HPSL)"; paragraph (b)(21) is removed; paragraph (b)(22) is redesignated as (b)(21); in redesignated paragraph (b)(21), remove the word "Loans" and add, at the beginning of the paragraph, the words "Nursing loans"; in paragraph (c)(3) remove "(22)" and add, in its place, "(21)"; paragraph (d)(1)(ii)(E) is revised; and, in paragraph (f)(1)(iii), add "Direct Loan or FFEL Program" before the word "loan" to read as follows:

**§ 685.215 Consolidation.**

- \* \* \* \* \*
- (d) \* \* \*
- (1) \* \* \*
- (ii) \* \* \*

(E) In default but has made satisfactory repayment arrangements, as defined in paragraph (2) of that term under § 685.102(b), on the defaulted loan; or

\* \* \* \* \*

10. In § 685.301, in the section heading, remove the word "Certification" and add, in its place, "Origination"; paragraph (a)(1) is revised; in paragraph (a)(3) introductory text, remove the word "certify" and add, in its place, "originate"; in paragraph (a)(4)(ii), remove the word "certifies" and add, in its place, "originates"; in paragraph (b)(2)(iv), add "or if the date of the first disbursement coincides with the beginning of the second or subsequent semester, quarter, or similar division of the loan period for which the loan was made," after "made" to read as follows:

**§ 685.301 Origination of a loan by a Direct Loan Program school.**

- (a) \* \* \*

(1) A school participating in the Direct Loan Program shall ensure that any information it provides to the Secretary in connection with loan origination is complete and accurate. A school shall originate a Direct Loan while the student meets the borrower eligibility requirements of § 685.200. Except as provided in 34 CFR Part 668, subpart E, a school may rely in good faith upon statements made in the application by the student.

\* \* \* \* \*

11. In § 685.303, paragraph (b)(2)(i), add " , or a parent in the case of a PLUS Loan," after "student", remove the words "whom the school determines" and add, in their place, "if the school determines the student"; remove "or" at the end of paragraph (d)(3)(i), remove the period at the end of paragraph

(d)(3)(ii), and add, in its place, a semi-colon, and add new paragraphs (d)(3)(iii) and (iv) to read as follows:

**§ 685.303 Processing loan proceeds.**

\* \* \* \* \*

- (d) \* \* \*
- (3) \* \* \*

(iii) A late disbursement to a borrower if the student's last recorded day of attendance is earlier than the 30th day of the period of enrollment for which the loan is intended if the loan was subject to the delayed disbursement under § 685.303(b)(4); or

(iv) A late disbursement that, including all prior disbursements, exceeds a student's documented educational costs for the period of enrollment completed by the student before the student ceased to be enrolled at the school on at least a half-time basis.

\* \* \* \* \*

12. Section 685.305 is revised to read as follows:

**§ 685.305 Determining the date of a student's withdrawal.**

(a) Except as provided in paragraph (b) of this section, a school shall follow the procedures in 34 CFR 668.22(j) for determining the student's date of withdrawal.

(b) For a student who does not return for the next scheduled term following a summer break, which includes any summer term(s) in which classes are offered but students are not generally required to attend, a school shall follow the procedures in 34 CFR 668.22(j) for

determining the student's date of withdrawal except that the school must determine the student's date of withdrawal no later than 30 days after the start of the next scheduled term.

(c) The school shall use the date determined under paragraph (a) or (b) of this section for the purpose of reporting to the Secretary the student's date of withdrawal and for determining when a refund must be paid under § 685.306.

(Authority: 20 U.S.C. 1087 *et seq.*)

**PART 600—INSTITUTIONAL ELIGIBILITY UNDER THE HIGHER EDUCATION ACT OF 1965, AS AMENDED**

1. The authority citation for Part 600 continues to read as follows:

Authority: 20 U.S.C. 1088, 1091, 1094, 1099b, 1099c, and 1141, unless otherwise noted.

2. Section 600.5 is amended by revising paragraph (e) to read as follows:

**§ 600.5 Proprietary institution of higher education.**

\* \* \* \* \*

(e)(1) An institution shall substantiate the required calculations in paragraph (a)(8) of this section by having the certified public accountant who prepares its audited financial statement required under 34 CFR 668.15 report on the accuracy of its determination that the percentage of its revenues derived from title IV, HEA program funds is not more than 85 percent of its revenues.

(2) The certified public accountant's report shall be based on performing an

examination-level "attestation engagement" in accordance with the American Institute of Certified Public Accountants (AICPA's) Statement on Standards for Attestation Engagements #3, *Compliance Attestation*, and the certified public accountant shall include that attestation report with the audit report referenced in paragraph (e)(1) of this section.

(3) The certified public accountant's attestation report shall indicate whether the institution's determination that the percentage of its revenues derived from title IV, HEA program funds is not more than 85 percent of its revenues, is accurate, i.e. fairly presented in all material respects.

\* \* \* \* \*

**PART 668—STUDENT ASSISTANCE GENERAL PROVISIONS**

1. The authority citation for Part 668 continues to read as follows:

Authority: 20 U.S.C. 1085, 1088, 1091, 1092, 1099c, and 1141, unless otherwise noted.

**§ 668.15 [Amended]**

2. In § 668.15, paragraph (e)(1), in the second sentence, remove, "certified public accountant" and add, in its place, "auditor"; remove "generally accepted auditing standards" and add, in its place, "*Government Auditing Standards*".

[FR Doc. 96-14820 Filed 6-11-96; 8:45 am]

BILLING CODE 4000-01-P

Even Start  
Family Literacy  
Program  
Women's Prison  
Project

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Wednesday  
June 12, 1996

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**Part VII**

**Department of  
Education**

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**Even Start Family Literacy Program  
Women's Prison Project; Notice Inviting  
Applications**

**DEPARTMENT OF EDUCATION**

[CFDA NO.: 84.313A]

**Even Start Family Literacy Program Women's Prison Project; Notice Inviting Applications for a New Award With Fiscal Year (FY) 1995 Funds**

*Note to Applicants:* This notice is a complete application package. Together with the statute authorizing the program and the Education Department General Administrative Regulations (EDGAR), the notice contains all of the information, application forms, and instructions needed to apply for a grant under this competition.

*Purpose of Program:* The Even Start Family Literacy Program Women's Prison grant is designed to help break the cycle of poverty and illiteracy and improve the educational opportunities of low-income families with mothers in prison by integrating early childhood education, adult literacy or adult basic education, and parenting education into a unified family literacy program of high quality. This project, which must be located in a prison that houses women and their preschool-aged children, will serve women inmates and their children, birth through age seven. (For the purposes of this program, the Secretary considers a prison to be a correctional institution that houses inmates, most of whom are incarcerated in the institution for at least one year.)

*Eligible Applicants:* A prison (other than a Federal prison) that houses women and their preschool-aged children, an institution of higher education, local educational agency, hospital, or other public or private organization or entity. (A Federal prison may not apply for these Federal funds. However, another eligible entity may apply for a grant to operate this family literacy program in a Federal prison.)

*Deadline for Transmittal of Applications:* August 7, 1996.

*Deadline for Intergovernmental Review:* October 7, 1996.

*Available Funds:* \$200,000 (for the entire project period).

*Number of Awards:* 1.

*Project Period:* 24 months.

*Applicable Regulations:* The EDGAR as follows:

(1) 34 CFR Part 74 (Administration of Grants and Agreements with Institutions of Higher Education, Hospitals, and other Non-profit Organizations), for applicants that are institutions of higher education, hospitals, or other public or private organizations that are not State educational agencies, local educational agencies, or Indian tribes and tribal organizations.

(2) 34 CFR Part 75 (Direct Grant Programs).

(3) 34 CFR Part 77 (Definitions that Apply to Department Regulations).

(4) 34 CFR Part 79 (Intergovernmental Review of Department of Education Programs and Activities).

(5) 34 CFR Part 80 (Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments), for applicants that are State or local governments, or federally recognized Indian tribal governments.

(6) 34 CFR Part 81 (General Education Provisions Act—Enforcement).

(7) 34 CFR Part 82 (New Restrictions on Lobbying).

(8) 34 CFR Part 85 (Governmentwide Debarment and Suspension (Nonprocurement) and Governmentwide Requirements for Drug-Free Workplace (Grants)).

*Description of Program:* Under the authority of section 1202(a)(2) of the Elementary and Secondary Education Act (ESEA), the Assistant Secretary of Elementary and Secondary Education will award one Even Start Family Literacy grant to an eligible applicant to plan and implement a family literacy program of high quality, that integrates adult literacy or adult basic education (including, as appropriate, English as a second language), parenting education, and early childhood education, in a prison that houses women and their preschool-aged children. This family literacy project will serve female inmates and their children birth through age seven. The children are eligible participants in the project whether or not they reside in the prison. Some project activities may be located outside the prison. The Secretary intends to award this grant for a 24-month period.

*Eligible participants.* Eligible participants are—

1. Female prison inmates who participate in the project with one or more of their eligible children, and who—
  - Are eligible for participation in an adult basic education program under the Adult Education Act; or
  - Are within the State's compulsory school attendance age range; and
2. The child or children, from birth through age seven, of an individual described in paragraph 1 (whether or not the child resides in the prison).

(Note: Family members of eligible participants described in paragraphs one and two, above, also may participate in Even Start Family Literacy Program activities when appropriate to serve Even Start purposes. In addition, under section 1206(b)(2) of the ESEA, participants remain eligible for Even Start Family Literacy services until all

eligible participants in a family become ineligible for participation. For example, in the case of a participating family in which the mother becomes ineligible due to educational advancement, the family would remain eligible until the participating children reach age eight.)

*Federal and local funding.* The Even Start Family Literacy Program Women's Prison grant funding comprises both a Federal portion of funds (Federal share) and a portion contributed by the eligible applicant (local project share). The Federal share of the project may not exceed—

- 90 percent of the total cost of the program in the first year; and
- 80 percent of the total cost of the program in the second year.

The local share of the project may be provided in cash or in kind and may be obtained from any source, including other Federal programs funded by the ESEA.

*Indirect costs.* Funds under this grant may not be used for the indirect costs of an Even Start Family Literacy Program Women's Prison grant project.

*National Evaluation:* The Secretary suggests that each applicant budget for evaluation activities as follows: a project with an estimated cost of up to \$120,000 should designate \$5,000 for this purpose; a project with an estimated cost of over \$120,000 should designate \$10,000 for these activities. These funds will be used for expenditures related to the collection and aggregation of data required for the Department's national evaluation. The Secretary also recommends that projects budget for the cost of travel to Washington, DC, and two nights' lodging for the project director and the project evaluator, for their participation in annual evaluation meetings.

*Waiver of Reporting Requirement:* Under the EDGAR, an applicant generally must submit an annual performance report to the Department. (See 34 CFR 74.51, 75.720, and 80.40.) However, in the interest of reducing burden at the local level, the Secretary has determined that a performance report is unnecessary until the end of the 24-month project period, and therefore waives the requirement for a performance report at the end of the first year. This waiver is in accordance with the Secretary's authority under these regulations.

*Invitational Priority:* Under 34 CFR 75.105(c)(1) and section 1202(a)(2) of the ESEA (20 U.S.C. 6362(a)(2)), the Secretary is particularly interested in applications that meet the following invitational priority. However, an applicant that meets this invitational priority does not receive competitive or

absolute preference over other applications:

The applicant's proposed project includes the following:

(1) A recruitment and intake procedure for participants that involves extensive participant preparation for the family literacy program and an established agreement with the participants to participate for a specified minimum length of time sufficient to meet the program's purposes.

(2) An intensity of services in parenting education, adult literacy or adult basic education, and early childhood education.

(3) Active involvement of participants in planning and implementing the project.

(4) Integration with other educational and related activities offered to inmates at the prison.

(5) An approach that has been successful in providing academic or family literacy programs in the past.

**Selection Criteria:** (a)(1) The Secretary uses the following selection criteria to evaluate applications for grants under this competition.

(2) The maximum composite score for all of these criteria is 100 points.

(3) The maximum score for each criterion is indicated in parentheses.

(b) *The Criteria.*—(1) *Meeting the purposes of the authorizing statute.* (20 points) The Secretary reviews each application to determine how well the project will meet the purpose of the Even Start Family Literacy Program Women's Prison Grant, which under sections 1201 and 1202(a)(2) of the ESEA is to help break the cycle of poverty and illiteracy by awarding a grant for a project that—

- Improves the educational opportunities of low-income families with mothers in prison by integrating early childhood education, adult literacy or adult basic education, and parenting education into a unified family literacy program;

- Is implemented through cooperative projects that build on existing community resources to create a new range of services for women inmates and their children through age seven;

- Promotes achievement of the National Education Goals; and

- Assists children and women in prison to achieve to challenging State content standards and challenging State student performance standards.

(2) *Extent of need for the project.* (20 points) The Secretary reviews each application to determine the extent to which the project meets specific needs recognized in the authorizing statute, including consideration of—

(i) The needs addressed by the project;

(ii) How the applicant identified those needs;

(iii) How those needs will be met by the project; and

(iv) The benefits to be gained by meeting those needs.

(Note: The Secretary invites applicants to address such factors as the following: the number of women in the prison who need Even Start services, the average educational level of female inmates with eligible children, the lack of availability of comprehensive family literacy services for that population, other resources that will be used to benefit project participants, and any other factors that the applicant considers relevant to the extent of need for the project.)

(3) *Plan of Operation.* (30 points) The Secretary reviews each application to determine the quality of the plan of operation for the project, including—

(i) The quality of the design of the project;

(ii) The extent to which the plan of management is effective and ensures proper and efficient administration of the project;

(iii) How well the objectives of the project relate to the purposes of the program;

(iv) The quality of the applicant's plan to use its resources and personnel to achieve each objective; and

(v) How the applicant will ensure that project participants who are otherwise eligible to participate are selected without regard to race, color, national origin, gender, age, or handicapping condition.

(Note: Concerning the design of the project, an eligible applicant must propose a project that incorporates, at a minimum, the following program elements required by section 1205 of the ESEA:

- Identification and recruitment of eligible participants most in need of services provided under the Even Start Family Literacy Program, as indicated by a low level of adult literacy or English language proficiency of the eligible mother and other need-related indicators.

- Screening and preparation of mothers and children to enable those mothers to participate fully in the Even Start activities and services provided by the project, including testing, referral to necessary counseling (which may include drug and alcohol counseling), other necessary developmental and support services, and related services.

- Design that accommodates the participants' work schedules and other responsibilities, including the provision of support services, when those support services are unavailable from other sources, but are necessary for participation in the Even Start activities provided by the project, such as—

- Scheduling and locating of services to allow joint participation by mothers and children;

- Child care for the period that mothers participate in project activities; and

- Transportation, if necessary, to enable mothers and their children to participate in the project.

- High-quality instructional programs that promote adult literacy and empower the mothers to support the educational growth of their children, developmentally appropriate early childhood educational services, and preparation of children for success in regular school programs.

- Special training of project staff, including child care staff, to develop the skills necessary to work with mothers and young children in the full range of instructional services offered through the Even Start Family Literacy Program.

- Operation on a year-round basis, including the provision of some program services, instructional or enrichment, during the summer months.

- As appropriate, coordination with programs assisted under other parts of Title I and other programs under the ESEA, any relevant programs under the Adult Education Act, the Individuals with Disabilities Education Act, and the Job Training Partnership Act, the Head Start program, volunteer literacy programs, and other relevant programs.

- Ensuring that the program will serve those eligible participants most in need of the activities and services provided by the project.

- An independent evaluation of the project.)

(4) *Quality of key personnel.* (5 points)

(i) The Secretary reviews each application to determine the quality of key personnel the applicant plans to use on the project, including—

(A) The qualifications of the project director (if one is to be used);

(B) The qualifications of each of the other key personnel to be used in the project;

(C) The time that each person referred to in paragraphs (b)(4)(i) (A) and (B) will commit to the project; and

(D) How the applicant, as part of its nondiscriminatory employment practices, will ensure that its personnel are selected for employment without regard to race, color, national origin, gender, age, or handicapping condition.

(ii) To determine personnel qualifications under paragraphs (b)(4)(i) (A) and (B), the Secretary considers—

(A) Experience and training in fields related to the objectives of the project; and

(B) Any other qualifications that pertain to the quality of the project.

(5) *Staff training.* (10 points) The Secretary reviews each application to determine how well the project provides special staff training, including child care staff, to develop the skills necessary to work with parents and young children in the full range of instructional services offered under the Even Start Family Literacy Program.

(6) *Budget and cost effectiveness.* (2 points) The Secretary reviews each application to determine the extent to which—

(i) The budget is adequate to support the project; and  
(ii) Costs are reasonable in relation to the objectives of the project.

(7) *Evaluation plan.* (10 points) The Secretary reviews each application to determine the quality of the evaluation plan for the project, including the extent to which the applicant's methods of evaluation—

(i) Are appropriate to the project; and  
(ii) To the extent possible, are objective and produce data that are quantifiable.

(Cross-reference: See 34 CFR 75.590 Evaluation by the grantee.)

(8) *Adequacy of resources.* (3 points) The Secretary reviews each application to determine the adequacy of the resources that the applicant plans to devote to the project, including facilities, equipment, and supplies.

*Intergovernmental Review of Federal Programs:* This program is subject to the requirements of Executive Order 12372 (Intergovernmental Review of Federal Programs) and the regulations in 34 CFR Part 79.

The objective of the Executive Order is to foster an intergovernmental partnership and to strengthen federalism by relying on State and local processes for State and local government coordination and review of proposed Federal financial assistance.

Applicants must contact the appropriate State Single Point of Contact to find out about, and to comply with, the State's process under Executive Order 12372. Applicants proposing to perform activities in more than one State should immediately contact the Single Point of Contact for each of those States and follow the procedure established in each State under the Executive Order. If you want to know the name and address of any State Single Point of Contact, see the list published in the Federal Register on August 10, 1995 (60 FR 40980).

In States that have not established a process or chosen a program for review, State, areawide, regional, and local entities may submit comments directly to the Department.

Any State Process Recommendation and other comments submitted by a State Single Point of Contact and any comments from State, areawide, regional, and local entities must be mailed or hand-delivered by the date indicated in this notice to the following address: The Secretary, E.O. 12372—CFDA #84.313A, U.S. Department of Education, Room 6213, 600

Independence Avenue, SW, Washington, DC 20202.

Proof of mailing will be determined on the same basis as applications (see 34 CFR 75.102). Recommendations or comments may be hand-delivered until 4:30 p.m. (Washington, DC time) on the date indicated in this notice.

PLEASE NOTE THAT THE ABOVE ADDRESS IS NOT THE SAME ADDRESS AS THE ONE TO WHICH THE APPLICANT SUBMITS ITS COMPLETED APPLICATION. *DO NOT SEND APPLICATIONS TO THE ABOVE ADDRESS. INSTRUCTIONS FOR TRANSMITTAL OF APPLICATIONS:*

(a) If an applicant wants to apply for a grant, the applicant shall—

(1) Mail the original and two copies of the application on or before the deadline date to: U.S. Department of Education, Application Control Center, Attention: Patricia McKee (CFDA #84.313A), Compensatory Education Programs, Room 3633, Regional Office Building #3, 7th and D Streets, SW, Washington, DC 20202-4725 or

(2) Hand deliver the original and two copies of the application by 4:30 p.m. (Washington, DC time) on or before the deadline date to: U.S. Department of Education, Application Control Center, Attention: Patricia McKee (CFDA #84.313A), Compensatory Education Programs, Room 3633, Regional Office Building #3, 7th and D Streets, SW, Washington, DC

(b) An applicant must show one of the following as proof of mailing:

(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.

(c) If any application is mailed 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.

Notes: (1) The U.S. Postal Service does not uniformly provide a date postmark. Before relying on this method, an applicant should check with its local post office.

(2) The Application Control Center will mail a Grant Application Receipt Acknowledgement to each applicant. If an applicant fails to receive the notification of application receipt within 15 days from the date of mailing the application, the applicant should call the U.S. Department of Education Application Control Center at (202) 708-9494.

(3) The applicant *must* indicate on the envelope and—if not provided by the

Department—in Item 10 of the Application for Federal Assistance (Standard Form 424) the CFDA number—and suffix letter, if any—of the competition under which the application is being submitted.

*Application Instructions and Forms:* The appendix to this application is divided into three parts plus a statement regarding estimated public reporting burden and various assurances and certifications. These parts and additional materials are organized in the same manner that the submitted application should be organized and submitted. The parts and additional materials are as follows:

Part I: Application for Federal Assistance (Standard Form 424 (Rev. 4-88)) and instructions.

Part II: Budget Information—Non-Construction Programs (ED Form No. 524) and instructions.

Part III: Application Narrative. *Additional Materials:* Estimated Public Reporting Burden

Assurances—Non-Construction Programs (Standard Form 424B).

Certifications Regarding Lobbying; Debarment, Suspension, and Other Responsibility Matters; and Drug-Free Workplace Requirements (ED 80-0013).

Certification regarding Debarment, Suspension, Ineligibility and Voluntary Exclusion—Lower Tier Covered Transactions (ED 80-0014, 9/90) and instructions.

(Note: ED 80-0014 is intended for the use of grantees and should not be transmitted to the Department.)

Disclosure of Lobbying Activities (Standard Form LLL) (if applicable) and instructions. This document has been marked to reflect statutory changes. See the notice published by the Office of Management and Budget at 61 FR 1413 (January 19, 1996).

Notice to all Applicants (Section 427 of the General Education Provisions Act).

An applicant may submit information on photostatic copies of the application, budget forms, assurances, and certifications. However, the application form, assurances, and certifications must each have an original signature. A grant may not be awarded unless a completed application form, including the signed assurances and certifications, have been received.

*For Further Information Contact:* Patricia McKee, Compensatory Education Programs, Office of Elementary and Secondary Education, U.S. Department of Education, 600 Independence Avenue, SW, Room 4400 Portals Building, Washington, DC 20202-6132. Telephone (202) 260-0991. 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.

Information about the Department's funding opportunities including copies of application notices for discretionary grant competitions, can be viewed on

the Department's electronic bulletin board (ED Board), telephone (202) 260-9950; or on the Internet Gopher Server at GOPHER.ED.GOV (under Announcements, Bulletins, and Press Releases); or on the World Wide Web (at <http://www.ed.gov/money.html>). However, the official application notice for discretionary grant competition is

the notice published in the Federal Register.

Program Authority: 20 U.S.C. 6362(a)(2).

Dated: June 6, 1996.

Gerald N. Tirozzi,

*Assistant Secretary, Elementary and Secondary Education.*

**BILLING CODE 4000-01-P**

**APPLICATION FOR FEDERAL ASSISTANCE**

<b>1. TYPE OF SUBMISSION:</b> <i>Application</i> <input type="checkbox"/> Construction <input checked="" type="checkbox"/> Non-Construction  <i>Preapplication</i> <input type="checkbox"/> Construction <input type="checkbox"/> Non-Construction		<b>2. DATE SUBMITTED</b>	Applicant Identifier
		<b>3. DATE RECEIVED BY STATE</b>	State Application Identifier
		<b>4. DATE RECEIVED BY FEDERAL AGENCY</b>	Federal Identifier
<b>5. APPLICANT INFORMATION</b>			
Legal Name:		Organizational Unit:	
Address (give city, county, state, and zip code):		Name and telephone number of the person to be contacted on matters involving this application (give area code)	
<b>6. EMPLOYER IDENTIFICATION NUMBER (EIN):</b> [ ] [ ] - [ ] [ ] [ ] [ ] [ ] [ ] [ ] [ ]		<b>7. TYPE OF APPLICANT: (enter appropriate letter in box)</b> <input type="checkbox"/> <ul style="list-style-type: none"> <li>A. State</li> <li>B. County</li> <li>C. Municipal</li> <li>D. Township</li> <li>E. Interstate</li> <li>F. Intermunicipal</li> <li>G. Special District</li> <li>H. Independent School Dist.</li> <li>I. State Controlled Institution of Higher Learning</li> <li>J. Private University</li> <li>K. Indian Tribe</li> <li>L. Individual</li> <li>M. Profit Organization</li> <li>N. Other (Specify): _____</li> </ul>	
<b>8. TYPE OF APPLICATION:</b> <input checked="" type="checkbox"/> New <input type="checkbox"/> Continuation <input type="checkbox"/> Revision If Revision, enter appropriate letter(s) in box(es): <input type="checkbox"/> <input type="checkbox"/> A. Increase Award    B. Decrease Award    C. Increase Duration D. Decrease Duration    Other (specify): _____		<b>9. NAME OF FEDERAL AGENCY:</b> U.S. Department of Education	
<b>10. CATALOG OF FEDERAL DOMESTIC ASSISTANCE NUMBER:</b> [ 8 ] [ 4 ] - [ 3 ] [ 1 ] [ 3A ] TITLE: Even Start Family Literacy Program Women's Prison Project		<b>11. DESCRIPTIVE TITLE OF APPLICANT'S PROJECT:</b>	
<b>12. AREAS AFFECTED BY PROJECT (cities, counties, states, etc.):</b>			
<b>13. PROPOSED PROJECT:</b>		<b>14. CONGRESSIONAL DISTRICTS OF:</b>	
Start Date	Ending Date	a. Applicant	b. Project
<b>15. ESTIMATED FUNDING:</b>		<b>16. IS APPLICATION SUBJECT TO REVIEW BY STATE EXECUTIVE ORDER 12372 PROCESS?</b>	
a. Federal	\$ .00	a. YES. THIS PREAPPLICATION/APPLICATION WAS MADE AVAILABLE TO THE STATE EXECUTIVE ORDER 12372 PROCESS FOR REVIEW ON: DATE _____	
b. Applicant	\$ .00	b. NO. <input type="checkbox"/> PROGRAM IS NOT COVERED BY E.O. 12372	
c. State	\$ .00	<input type="checkbox"/> OR PROGRAM HAS NOT BEEN SELECTED BY STATE FOR REVIEW	
d. Local	\$ .00		
e. Other	\$ .00		
f. Program Income	\$ .00	<b>17. IS THE APPLICANT DELINQUENT ON ANY FEDERAL DEBT?</b>	
g. TOTAL	\$ .00	<input type="checkbox"/> Yes    If "Yes," attach an explanation. <input type="checkbox"/> No	
<b>18. TO THE BEST OF MY KNOWLEDGE AND BELIEF. ALL DATA IN THIS APPLICATION/PREAPPLICATION ARE TRUE AND CORRECT, THE DOCUMENT HAS BEEN DULY AUTHORIZED BY THE GOVERNING BODY OF THE APPLICANT AND THE APPLICANT WILL COMPLY WITH THE ATTACHED ASSURANCES IF THE ASSISTANCE IS AWARDED</b>			
a. Typed Name of Authorized Representative		b. Title	c. Telephone number
d. Signature of Authorized Representative		e. Date Signed	

Previous Editions Not Usable

Standard Form 424 (REV 4-88)  
Prescribed by OMB Circular A-102

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## INSTRUCTIONS FOR THE SF 424

This is a standard form used by applicants as a required facesheet for preapplications and applications submitted for Federal assistance. It will be used by Federal agencies to obtain applicant certification that States which have established a review and comment procedure in response to Executive Order 12372 and have selected the program to be included in their process, have been given an opportunity to review the applicant's submission.

- | Item: | Entry:   | Item: | Entry:   |
|-------|--|-------|--|
| 1.    | Self-explanatory.  | 12.   | List only the largest political entities affected (e.g., State, counties, cities).   |
| 2.    | Date application submitted to Federal agency (or State if applicable) & applicant's control number (if applicable).  | 13.   | Self-explanatory.  |
| 3.    | State use only (if applicable).  | 14.   | List the applicant's Congressional District and any District(s) affected by the program or project.  |
| 4.    | If this application is to continue or revise an existing award, enter present Federal identifier number. If for a new project, leave blank.  | 15.   | Amount requested or to be contributed during the first funding/budget period by each contributor. Value of in-kind contributions should be included on appropriate lines as applicable. If the action will result in a dollar change to an existing award, indicate <i>only</i> the amount of the change. For decreases, enclose the amounts in parentheses. If both basic and supplemental amounts are included, show breakdown on an attached sheet. For multiple program funding, use totals and show breakdown using same categories as item 15. |
| 5.    | Legal name of applicant, name of primary organizational unit which will undertake the assistance activity, complete address of the applicant, and name and telephone number of the person to contact on matters related to this application.   | 16.   | Applicants should contact the State Single Point of Contact (SPOC) for Federal Executive Order 12372 to determine whether the application is subject to the State intergovernmental review process.  |
| 6.    | Enter Employer Identification Number (EIN) as assigned by the Internal Revenue Service.  | 17.   | This question applies to the applicant organization, not the person who signs as the authorized representative. Categories of debt include delinquent audit disallowances, loans and taxes.  |
| 7.    | Enter the appropriate letter in the space provided.  | 18.   | To be signed by the authorized representative of the applicant. A copy of the governing body's authorization for you to sign this application as official representative must be on file in the applicant's office. (Certain Federal agencies may require that this authorization be submitted as part of the application.)  |
| 8.    | Check appropriate box and enter appropriate letter(s) in the space(s) provided:<br>— "New" means a new assistance award.<br>— "Continuation" means an extension for an additional funding/budget period for a project with a projected completion date.<br>— "Revision" means any change in the Federal Government's financial obligation or contingent liability from an existing obligation. |       |  |
| 9.    | Name of Federal agency from which assistance is being requested with this application.   |       |  |
| 10.   | Use the Catalog of Federal Domestic Assistance number and title of the program under which assistance is requested.  |       |  |
| 11.   | Enter a brief descriptive title of the project. If more than one program is involved, you should append an explanation on a separate sheet. If appropriate (e.g., construction or real property projects), attach a map showing project location. For preapplications, use a separate sheet to provide a summary description of this project.  |       |  |

 <p style="text-align: center;"><b>U.S. DEPARTMENT OF EDUCATION</b> <b>BUDGET INFORMATION</b> <b>NON-CONSTRUCTION PROGRAMS</b></p>		<p>OMB Control No. 1875-0102</p> <p>Expiration Date: 9/30/98</p>				
<p>Name of Institution/Organization</p>		<p>Applicants requesting funding for only one year should complete the column under "Project Year 1." Applicants requesting funding for multi-year grants should complete all applicable columns. Please read all instructions before completing form.</p>				
<p><b>SECTION A - BUDGET SUMMARY</b> <b>U.S. DEPARTMENT OF EDUCATION FUNDS</b></p>						
Budget Categories	Project Year 1 (a)	Project Year 2 (b)	Project Year 3 (c)	Project Year 4 (d)	Project Year 5 (e)	Total (f)
1. Personnel						
2. Fringe Benefits						
3. Travel						
4. Equipment						
5. Supplies						
6. Contractual						
7. Construction						
8. Other						
9. Total Direct Costs (lines 1-8)						
10. Indirect Costs						
11. Training Stipends						
12. Total Costs (lines 9-11)						



Public reporting burden for this collection of information is estimated to vary from 13 to 22 hours per response, with an average of 17.5 hours, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to the U.S. Department of Education, Information Management and Compliance Division, Washington, D.C. 20202-4651; and the Office of Management and Budget, Paperwork Reduction Project 1875-0102, Washington, D.C. 20503.

## INSTRUCTIONS FOR ED FORM NO. 524

### General Instructions

This form is used to apply to individual U.S. Department of Education discretionary grant programs. Unless directed otherwise, provide the same budget information for each year of the multi-year funding request. Pay attention to applicable program specific instructions, if attached.

### Section A - Budget Summary U.S. Department of Education Funds

All applicants must complete Section A and provide a breakdown by the applicable budget categories shown in lines 1-11.

Lines 1-11, columns (a)-(e):

For each project year for which funding is requested, show the total amount requested for each applicable budget category.

Lines 1-11, column (f):

Show the multi-year total for each budget category. If funding is requested for only one project year, leave this column blank.

Line 12, columns (a)-(e):

Show the total budget request for each project year for which funding is requested.

Line 12, column (f):

Show the total amount requested for all project years. If funding is requested for only one year, leave this space blank.

## Instructions for ED Form 524 (cont.)

Section B - Budget Summary  
Non-Federal Funds

If you are required to provide or volunteer to provide matching funds or other non-Federal resources to the project, these should be shown for each applicable budget category on lines 1-11 of Section B.

Lines 1-11, columns (a)-(e):

For each project year for which matching funds or other contributions are provided, show the total contribution for each applicable budget category.

Lines 1-11, column (f):

Show the multi-year total for each budget category. If non-Federal contributions are provided for only one year, leave this column blank.

Line 12, columns (a)-(e):

Show the total matching or other contribution for each project year.

Line 12, column (f):

Show the total amount to be contributed for all years of the multi-year project. If non-Federal contributions are provided for only one year, leave this space blank.

Section C - Other Budget Information

Pay attention to applicable program specific instructions, if attached.

1. Provide an itemized budget breakdown, by project year, for each budget category listed in Sections A and B.
2. If applicable to this program, enter the type of indirect rate (provisional, predetermined, final or fixed) that will be in effect during the funding period. In addition, enter the estimated amount of the base to which the rate is applied, and the total indirect expense.
3. If applicable to this program, provide the rate and base on which fringe benefits are calculated.
4. Provide other explanations or comments you deem necessary.

### Instructions for Part III—Application Narrative

Before preparing the Application Narrative, an applicant should read carefully the description of the program, the information about the invitational priority, and the selection criteria the Secretary uses to evaluate applications.

The narrative should encompass each function or activity for which funds are being requested and should—

1. Begin with an Abstract; that is, a summary of the proposed project;
2. Describe the proposed project in light of the invitational priority and each of the selection criteria, in the order in which the criteria are listed in this application package;
3. Provide the following in response to the attached "Notice to all Applicants": (1) a reference to the portion of the application in which information appears as to how the applicant is addressing steps to promote equitable access and participation, or (2)

a separate statement that contains that information;

4. For any applicant *other* than the State educational agency (SEA), include a copy of the signed set of assurances specified in section 14306(a) of the ESEA (20 USC 8856(a)) that the applicant has filed with its SEA for this grant application; and

5. Include any other pertinent information that might assist the Secretary in reviewing the application.

The Secretary strongly requests that the applicant limit the Application Narrative to no more than 20 double-spaced, typed pages on one side only, although the Secretary will consider applications of greater length. The Department has found that successful applications for similar programs generally meet this page limit.

### Instructions for Estimated Public Reporting Burden

According to the Paperwork Reduction Act of 1995, no persons are required to respond to a collection of

information unless it displays a valid OMB control number. The valid OMB control number for this information collection is 1810-0592. The time required to complete this information collection is estimated to average 15 hours per response, including the time to review instructions, search existing data resources, gather the data needed, and complete and review the information collection. *If you have any comments concerning the accuracy of the time estimate(s) or suggestions for improving this form, please write to: U.S. Department of Education, Washington, D.C. 20202-4651. If you have comments or concerns regarding the status of your individual submission of this form, write directly to: Patricia McKee, Compensatory Education Programs, Office of Elementary and Secondary Education, U.S. Department of Education, 600 Independence Avenue, SW, Room 4400, Portals Building, Washington, DC 20202-6132.*

BILLING CODE 4000-01-P

OMB Approval No. 0348-0040

**ASSURANCES — NON-CONSTRUCTION PROGRAMS**

**Note:** Certain of these assurances may not be applicable to your project or program. If you have questions, please contact the awarding agency. Further, certain Federal awarding agencies may require applicants to certify to additional assurances. If such is the case, you will be notified.

As the duly authorized representative of the applicant I certify that the applicant:

1. Has the legal authority to apply for Federal assistance, and the institutional, managerial and financial capability (including funds sufficient to pay the non-Federal share of project costs) to ensure proper planning, management and completion of the project described in this application.
2. Will give the awarding agency, the Comptroller General of the United States, and if appropriate, the State, through any authorized representative, access to and the right to examine all records, books, papers, or documents related to the award; and will establish a proper accounting system in accordance with generally accepted accounting standards or agency directives.
3. Will establish safeguards to prohibit employees from using their positions for a purpose that constitutes or presents the appearance of personal or organizational conflict of interest, or personal gain.
4. Will initiate and complete the work within the applicable time frame after receipt of approval of the awarding agency.
5. Will comply with the Intergovernmental Personnel Act of 1970 (42 U.S.C. §§ 4728-4763) relating to prescribed standards for merit systems for programs funded under one of the nineteen statutes or regulations specified in Appendix A of OPM's Standards for a Merit System of Personnel Administration (5 C.F.R. 900, Subpart F).
6. Will comply with all Federal statutes relating to nondiscrimination. These include but are not limited to: (a) Title VI of the Civil Rights Act of 1964 (P.L. 88-352) which prohibits discrimination on the basis of race, color or national origin; (b) Title IX of the Education Amendments of 1972, as amended (20 U.S.C. §§ 1681-1683, and 1685-1686), which prohibits discrimination on the basis of sex; (c) Section 504 of the Rehabilitation Act of 1973, as amended (29 U.S.C. § 794), which prohibits discrimination on the basis of handicaps; (d) the Age Discrimination Act of 1975, as amended (42 U.S.C. §§ 6101-6107), which prohibits discrimination on the basis of age; (e) the Drug Abuse Office and Treatment Act of 1972 (P.L. 92-255), as amended, relating to nondiscrimination on the basis of drug abuse; (f) the Comprehensive Alcohol Abuse and Alcoholism Prevention, Treatment and Rehabilitation Act of 1970 (P.L. 91-616), as amended, relating to nondiscrimination on the basis of alcohol abuse or alcoholism; (g) §§ 523 and 527 of the Public Health Service Act of 1912 (42 U.S.C. 290 dd-3 and 290 ee-3), as amended, relating to confidentiality of alcohol and drug abuse patient records; (h) Title VIII of the Civil Rights Act of 1968 (42 U.S.C. § 3601 et seq.), as amended, relating to nondiscrimination in the sale, rental or financing of housing; (i) any other nondiscrimination provisions in the specific statute(s) under which application for Federal assistance is being made; and (j) the requirements of any other nondiscrimination statute(s) which may apply to the application.
7. Will comply, or has already complied, with the requirements of Titles II and III of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (P.L. 91-646) which provide for fair and equitable treatment of persons displaced or whose property is acquired as a result of Federal or federally assisted programs. These requirements apply to all interests in real property acquired for project purposes regardless of Federal participation in purchases.
8. Will comply with the provisions of the Hatch Act (5 U.S.C. §§ 1501-1508 and 7324-7328) which limit the political activities of employees whose principal employment activities are funded in whole or in part with Federal funds.
9. Will comply, as applicable, with the provisions of the Davis-Bacon Act (40 U.S.C. §§ 276a to 276a-7), the Copeland Act (40 U.S.C. § 276c and 18 U.S.C. §§ 874), and the Contract Work Hours and Safety Standards Act (40 U.S.C. §§ 327-333), regarding labor standards for federally assisted construction subagreements.

Standard Form 424B (4-88)  
Prescribed by OMB Circular A-102

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10. Will comply, if applicable, with flood insurance purchase requirements of Section 102(a) of the Flood Disaster Protection Act of 1973 (P.L. 93-234) which requires recipients in a special flood hazard area to participate in the program and to purchase flood insurance if the total cost of insurable construction and acquisition is \$10,000 or more.
11. Will comply with environmental standards which may be prescribed pursuant to the following: (a) institution of environmental quality control measures under the National Environmental Policy Act of 1969 (P.L. 91-190) and Executive Order (EO) 11514; (b) notification of violating facilities pursuant to EO 11738; (c) protection of wetlands pursuant to EO 11990; (d) evaluation of flood hazards in floodplains in accordance with EO 11988; (e) assurance of project consistency with the approved State management program developed under the Coastal Zone Management Act of 1972 (16 U.S.C. §§ 1451 et seq.); (f) conformity of Federal actions to State (Clear Air) Implementation Plans under Section 176(c) of the Clear Air Act of 1955, as amended (42 U.S.C. § 7401 et seq.); (g) protection of underground sources of drinking water under the Safe Drinking Water Act of 1974, as amended, (P.L. 93-523); and (h) protection of endangered species under the Endangered Species Act of 1973, as amended, (P.L. 93-205).
12. Will comply with the Wild and Scenic Rivers Act of 1968 (16 U.S.C. §§ 1271 et seq.) related to protecting components or potential components of the national wild and scenic rivers system.
13. Will assist the awarding agency in assuring compliance with Section 106 of the National Historic Preservation Act of 1966, as amended (16 U.S.C. 470), EO 11593 (identification and protection of historic properties), and the Archaeological and Historic Preservation Act of 1974 (16 U.S.C. 469a-1 et seq.).
14. Will comply with P.L. 93-348 regarding the protection of human subjects involved in research, development, and related activities supported by this award of assistance.
15. Will comply with the Laboratory Animal Welfare Act of 1966 (P.L. 89-544, as amended, 7 U.S.C. 2131 et seq.) pertaining to the care, handling, and treatment of warm blooded animals held for research, teaching, or other activities supported by this award of assistance.
16. Will comply with the Lead-Based Paint Poisoning Prevention Act (42 U.S.C. §§ 4801 et seq.) which prohibits the use of lead based paint in construction or rehabilitation of residence structures.
17. Will cause to be performed the required financial and compliance audits in accordance with the Single Audit Act of 1984.
18. Will comply with all applicable requirements of all other Federal laws, executive orders, regulations and policies governing this program.

SIGNATURE OF AUTHORIZED CERTIFYING OFFICIAL	TITLE	
APPLICANT ORGANIZATION		DATE SUBMITTED

## CERTIFICATIONS REGARDING LOBBYING; DEBARMENT, SUSPENSION AND OTHER RESPONSIBILITY MATTERS; AND DRUG-FREE WORKPLACE REQUIREMENTS

Applicants should refer to the regulations cited below to determine the certification to which they are required to attest. Applicants should also review the instructions for certification included in the regulations before completing this form. Signature of this form provides for compliance with certification requirements under 34 CFR Part 82, "New Restrictions on Lobbying," and 34 CFR Part 85, "Government-wide Debarment and Suspension (Nonprocurement) and Government-wide Requirements for Drug-Free Workplace (Grants)." The certifications shall be treated as a material representation of fact upon which reliance will be placed when the Department of Education determines to award the covered transaction, grant, or cooperative agreement.

### 1. LOBBYING

As required by Section 1352, Title 31 of the U.S. Code, and implemented at 34 CFR Part 82, for persons entering into a grant or cooperative agreement over \$100,000, as defined at 34 CFR Part 82, Sections 82.105 and 82.110, the applicant certifies that:

- (a) No Federal appropriated funds have been paid or will be paid, by or on behalf of the undersigned, to any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with the making of any Federal grant, the entering into of any cooperative agreement, and the extension, continuation, renewal, amendment, or modification of any Federal grant or cooperative agreement;
- (b) If any funds other than Federal appropriated funds have been paid or will be paid to any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with this Federal grant or cooperative agreement, the undersigned shall complete and submit Standard Form - LLL, "Disclosure Form to Report Lobbying," in accordance with its instructions;
- (c) The undersigned shall require that the language of this certification be included in the award documents for all subawards at all tiers (including subgrants, contracts under grants and cooperative agreements, and subcontracts) and that all subrecipients shall certify and disclose accordingly.

### 2. DEBARMENT, SUSPENSION, AND OTHER RESPONSIBILITY MATTERS

As required by Executive Order 12549, Debarment and Suspension, and implemented at 34 CFR Part 85, for prospective participants in primary covered transactions, as defined at 34 CFR Part 85, Sections 85.105 and 85.110 --

A. The applicant certifies that it and its principals:

- (a) Are not presently debarred, suspended, proposed for debarment, declared ineligible, or voluntarily excluded from covered transactions by any Federal department or agency;
- (b) Have not within a three-year period preceding this application been convicted of or had a civil judgment rendered against them for commission of fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a public (Federal, State, or local) transaction or contract under a public transaction; violation of Federal or State antitrust statutes or commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, or receiving stolen property;
- (c) Are not presently indicted for or otherwise criminally or civilly charged by a governmental entity (Federal, State, or local) with commission of any of the offenses enumerated in paragraph (1)(b) of this certification; and

(d) Have not within a three-year period preceding this application had one or more public transactions (Federal, State, or local) terminated for cause or default; and

B. Where the applicant is unable to certify to any of the statements in this certification, he or she shall attach an explanation to this application.

### 3. DRUG-FREE WORKPLACE (GRANTEES OTHER THAN INDIVIDUALS)

As required by the Drug-Free Workplace Act of 1988, and implemented at 34 CFR Part 85, Subpart F, for grantees, as defined at 34 CFR Part 85, Sections 85.605 and 85.610 --

A. The applicant certifies that it will or will continue to provide a drug-free workplace by:

- (a) Publishing a statement notifying employees that the unlawful manufacture, distribution, dispensing, possession, or use of a controlled substance is prohibited in the grantee's workplace and specifying the actions that will be taken against employees for violation of such prohibition;
- (b) Establishing an on-going drug-free awareness program to inform employees about--
  - (1) The dangers of drug abuse in the workplace;
  - (2) The grantee's policy of maintaining a drug-free workplace;
  - (3) Any available drug counseling, rehabilitation, and employee assistance programs; and
  - (4) The penalties that may be imposed upon employees for drug abuse violations occurring in the workplace;
- (c) Making it a requirement that each employee to be engaged in the performance of the grant be given a copy of the statement required by paragraph (a);
- (d) Notifying the employee in the statement required by paragraph (a) that, as a condition of employment under the grant, the employee will--
  - (1) Abide by the terms of the statement; and
  - (2) Notify the employer in writing of his or her conviction for a violation of a criminal drug statute occurring in the workplace no later than five calendar days after such conviction;
- (e) Notifying the agency, in writing, within 10 calendar days after receiving notice under subparagraph (d)(2) from an employee or otherwise receiving actual notice of such conviction. Employers of convicted employees must provide notice, including position title, to: Director, Grants and Contracts Service, U.S. Department of Education, 400 Maryland Avenue, S.W. (Room 3124, GSA Regional Office

Building No. 3), Washington, DC 20202-4571. Notice shall include the identification number(s) of each affected grant;

(f) Taking one of the following actions, within 30 calendar days of receiving notice under subparagraph (d)(2), with respect to any employee who is so convicted--

(1) Taking appropriate personnel action against such an employee, up to and including termination, consistent with the requirements of the Rehabilitation Act of 1973, as amended; or

(2) Requiring such employee to participate satisfactorily in a drug abuse assistance or rehabilitation program approved for such purposes by a Federal, State, or local health, law enforcement, or other appropriate agency;

(g) Making a good faith effort to continue to maintain a drug-free workplace through implementation of paragraphs (a), (b), (c), (d), (e), and (f).

B. The grantee may insert in the space provided below the site(s) for the performance of work done in connection with the specific grant:

Place of Performance (Street address, city, county, state, zip code)

\_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_

Check  if there are workplaces on file that are not identified here.

**DRUG-FREE WORKPLACE  
(GRANTEES WHO ARE INDIVIDUALS)**

As required by the Drug-Free Workplace Act of 1988, and implemented at 34 CFR Part 85, Subpart F, for grantees, as defined at 34 CFR Part 85, Sections 85.605 and 85.610 --

A. As a condition of the grant, I certify that I will not engage in the unlawful manufacture, distribution, dispensing, possession, or use of a controlled substance in conducting any activity with the grant; and

B. If convicted of a criminal drug offense resulting from a violation occurring during the conduct of any grant activity, I will report the conviction, in writing, within 10 calendar days of the conviction, to: Director, Grants and Contracts Service, U.S. Department of Education, 400 Maryland Avenue, S.W. (Room 3124, GSA Regional Office Building No. 3), Washington, DC 20202-4571. Notice shall include the identification number(s) of each affected grant.

As the duly authorized representative of the applicant, I hereby certify that the applicant will comply with the above certifications.

NAME OF APPLICANT	PR/AWARD NUMBER AND/OR PROJECT NAME
PRINTED NAME AND TITLE OF AUTHORIZED REPRESENTATIVE	
SIGNATURE	DATE

## Certification Regarding Debarment, Suspension, Ineligibility and Voluntary Exclusion – Lower Tier Covered Transactions

This certification is required by the Department of Education regulations implementing Executive Order 12549, Debarment and Suspension, 34 CFR Part 85, for all lower tier transactions meeting the threshold and tier requirements stated at Section 85.110.

### Instructions for Certification

1. By signing and submitting this proposal, the prospective lower tier participant is providing the certification set out below.
2. The certification in this clause is a material representation of fact upon which reliance was placed when this transaction was entered into. If it is later determined that the prospective lower tier participant knowingly rendered an erroneous certification, in addition to other remedies available to the Federal Government, the department or agency with which this transaction originated may pursue available remedies, including suspension and/or debarment.
3. The prospective lower tier participant shall provide immediate written notice to the person to which this proposal is submitted if at any time the prospective lower tier participant learns that its certification was erroneous when submitted or has become erroneous by reason of changed circumstances.
4. The terms "covered transaction," "debarred," "suspended," "ineligible," "lower tier covered transaction," "participant," "person," "primary covered transaction," "principal," "proposal," and "voluntarily excluded," as used in this clause, have the meanings set out in the Definitions and Coverage sections of rules implementing Executive Order 12549. You may contact the person to which this proposal is submitted for assistance in obtaining a copy of those regulations.
5. The prospective lower tier participant agrees by submitting this proposal that, should the proposed covered transaction be entered into, it shall not knowingly enter into any lower tier covered transaction with a person who is debarred, suspended, declared ineligible, or voluntarily excluded from participation in this covered transaction, unless authorized by the department or agency with which this transaction originated.
6. The prospective lower tier participant further agrees by submitting this proposal that it will include the clause titled "Certification Regarding Debarment, Suspension, Ineligibility, and Voluntary Exclusion—Lower Tier Covered Transactions," without modification, in all lower tier covered transactions and in all solicitations for lower tier covered transactions.
7. A participant in a covered transaction may rely upon a certification of a prospective participant in a lower tier covered transaction that it is not debarred, suspended, ineligible, or voluntarily excluded from the covered transaction, unless it knows that the certification is erroneous. A participant may decide the method and frequency by which it determines the eligibility of its principals. Each participant may, but is not required to, check the Nonprocurement List.
8. Nothing contained in the foregoing shall be construed to require establishment of a system of records in order to render in good faith the certification required by this clause. The knowledge and information of a participant is not required to exceed that which is normally possessed by a prudent person in the ordinary course of business dealings.
9. Except for transactions authorized under paragraph 5 of these instructions, if a participant in a covered transaction knowingly enters into a lower tier covered transaction with a person who is suspended, debarred, ineligible, or voluntarily excluded from participation in this transaction, in addition to other remedies available to the Federal Government, the department or agency with which this transaction originated may pursue available remedies, including suspension and/or debarment.

### Certification

- (1) The prospective lower tier participant certifies, by submission of this proposal, that neither it nor its principals are presently debarred, suspended, proposed for debarment, declared ineligible, or voluntarily excluded from participation in this transaction by any Federal department or agency.
- (2) Where the prospective lower tier participant is unable to certify to any of the statements in this certification, such prospective participant shall attach an explanation to this proposal.

NAME OF APPLICANT	PR/AWARD NUMBER AND/OR PROJECT NAME
PRINTED NAME AND TITLE OF AUTHORIZED REPRESENTATIVE	
SIGNATURE	DATE



**INSTRUCTIONS FOR COMPLETION OF SF-LLL, DISCLOSURE OF LOBBYING ACTIVITIES**

This disclosure form shall be completed by the reporting entity, whether subawardee or prime Federal recipient, at the initiation or receipt of a covered Federal action, or a material change to a previous filing, pursuant to title 31 U.S.C. section 1352. The filing of a form is required for each payment or agreement to make payment to any lobbying entity for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with a covered Federal action. ~~Use the SF-LLL-A Continuation Sheet for additional information if the space on the form is inadequate.~~ Complete all items that apply for both the initial filing and material change report. Refer to the implementing guidance published by the Office of Management and Budget for additional information.

1. Identify the type of covered Federal action for which lobbying activity is and/or has been secured to influence the outcome of a covered Federal action.
2. Identify the status of the covered Federal action.
3. Identify the appropriate classification of this report. If this is a followup report caused by a material change to the information previously reported, enter the year and quarter in which the change occurred. Enter the date of the last previously submitted report by this reporting entity for this covered Federal action.
4. Enter the full name, address, city, state and zip code of the reporting entity. Include Congressional District, if known. Check the appropriate classification of the reporting entity that designates if it is, or expects to be, a prime or subaward recipient. Identify the tier of the subawardee, e.g., the first subawardee of the prime is the 1st tier. Subawards include but are not limited to subcontracts, subgrants and contract awards under grants.
5. If the organization filing the report in item 4 checks "Subawardee", then enter the full name, address, city, state and zip code of the prime Federal recipient. Include Congressional District, if known.
6. Enter the name of the Federal agency making the award or loan commitment. Include at least one organizational level below agency name, if known. For example, Department of Transportation, United States Coast Guard.
7. Enter the Federal program name or description for the covered Federal action (item 1). If known, enter the full Catalog of Federal Domestic Assistance (CFDA) number for grants, cooperative agreements, loans, and loan commitments.
8. Enter the most appropriate Federal identifying number available for the Federal action identified in item 1 (e.g., Request for Proposal (RFP) number; Invitation for Bid (IFB) number; grant announcement number; the contract, grant, or loan award number; the application/proposal control number assigned by the Federal agency). Include prefixes, e.g., "RFP-DE-90-001."
9. For a covered Federal action where there has been an award or loan commitment by the Federal agency, enter the Federal amount of the award/loan commitment for the prime entity identified in item 4 or 5.
10. (a) Enter the full name, address, city, state and zip code of the lobbying entity registrant under the Lobbying Disclosure Act of 1995 engaged by the reporting entity identified in item 4 to influence the covered Federal action.  
(b) Enter the full names of the individual(s) performing services, and include full address if different from 10 (a). Enter Last Name, First Name, and Middle Initial (MI).
- ~~11. Enter the amount of compensation paid or reasonably expected to be paid by the reporting entity (item 4) to the lobbying entity (item 10). Indicate whether the payment has been made (actual) or will be made (planned). Check all boxes that apply. If this is a material change report, enter the cumulative amount of payment made or planned to be made.~~
- ~~12. Check the appropriate box(es). Check all boxes that apply. If payment is made through an in-kind contribution, specify the nature and value of the in-kind payment.~~
- ~~13. Check the appropriate box(es). Check all boxes that apply. If other, specify nature.~~
- ~~14. Provide a specific and detailed description of the services that the lobbyist has performed, or will be expected to perform, and the date(s) of any services rendered. Include all preparatory and related activity, not just time spent in actual contact with Federal officials. Identify the Federal official(s) or employee(s) contacted or the officer(s), employee(s), or Member(s) of Congress that were contacted.~~
- ~~15. Check whether or not a SF-LLL-A Continuation Sheet(s) is attached.~~
16. The certifying official shall sign and date the form, print his/her name, title, and telephone number.

Public reporting burden for this collection of information is estimated to average 30 minutes per response, including time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding the burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to the Office of Management and Budget, Paperwork Reduction Project (0348-0046), Washington, D.C. 20503

### Notice to All Applicants

Thank you for your interest in this program. The purpose of this enclosure is to inform you about a new provision in the Department of Education's General Education Provisions Act (GEPA) that applies to applicants for new grant awards under Department programs. This provision is section 427 of GEPA, enacted as part of the Improving America's Schools Act of 1994 (Pub. L. 103-382).

#### *To Whom Does This Provision Apply?*

Section 427 of GEPA affects applicants for new discretionary grant awards under this program. **ALL APPLICANTS FOR NEW AWARDS MUST INCLUDE INFORMATION IN THEIR APPLICATIONS TO ADDRESS THIS NEW PROVISION IN ORDER TO RECEIVE FUNDING UNDER THIS PROGRAM.**

#### *What Does This Provision Require?*

Section 427 requires each applicant for funds (other than an individual person) to include in its application a description of the steps the applicant proposes to take to ensure equitable access to, and participation in, its federally-assisted program for students, teachers, and other program beneficiaries with special needs.

This section allows applicants discretion in developing the required description. The statute highlights six types of barriers that can impede equitable access or participation that you may address: gender, race, national origin, color, disability, or age. Based on local circumstances, you can determine whether these or other barriers may prevent your students, teachers, etc.

from equitable access or participation. Your description need not be lengthy; you may provide a clear and succinct description of how you plan to address those barriers that are applicable to your circumstances. In addition, the information may be provided in a single narrative, or, if appropriate, may be discussed in connection with related topics in the application.

Section 427 is not intended to duplicate the requirements of civil rights statutes, but rather to ensure that, in designing their projects, applicants for Federal funds address equity concerns that may affect the ability of certain potential beneficiaries to fully participate in the project and to achieve to high standards. Consistent with program requirements and its approved application, an applicant may use the Federal funds awarded to it to eliminate barriers it identifies.

#### *What are Examples of How an Applicant Might Satisfy the Requirement of This Provision?*

The following examples may help illustrate how an applicant may comply with section 427.

- (1) An applicant that proposes to carry out an adult literacy project serving, among others, adults with limited English proficiency, might describe in its application how it intends to distribute a brochure about the proposed project to such potential participants in their native language.
- (2) An applicant that proposes to develop instructional materials for classroom use might describe how it will make the materials available on audio tape or in braille for students who are blind.

(3) An applicant that proposes to carry out a model science program for secondary students and is concerned that girls may be less likely than boys to enroll in the course, might indicate how it tends to conduct "outreach" efforts to girls, to encourage their enrollment.

We recognize that many applicants may already be implementing effective steps to ensure equity of access and participation in their grant programs, and we appreciate your cooperation in responding to the requirements of this provision.

#### Estimated Burden Statement

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## OFFICE OF UNITED STATES TRADE REPRESENTATIVE

### Trade Representative, Office of United States

Uruguay Round Agreement Act (URAA):

Tariff-rate quota amount determinations--

Leaf tobacco; comments due by 6-19-96; published 6-5-96

## TRANSPORTATION DEPARTMENT

### Coast Guard

Drawbridge operations:

Oregon; comments due by 6-17-96; published 4-17-96

Ports and waterways safety:

Long Beach Harbor, CA; safety zone; comments due by 6-17-96; published 5-17-96

Regattas and marine parades:

Kennewick, Washington, Columbia Unlimited Hydroplane Races; comments due by 6-20-96; published 5-6-96

Swim Buzzards Bay Day; comments due by 6-20-96; published 5-6-96

## TRANSPORTATION DEPARTMENT

### Federal Aviation Administration

Air carriers certification and operations:

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Extension of comment period; comments due by 6-19-96; published 3-20-96

Airworthiness directives:

Airbus; comments due by 6-17-96; published 5-8-96

Aviat Aircraft Inc.; comments due by 6-21-96; published 5-2-96

Beech; comments due by 6-17-96; published 5-13-96

Diamond Aircraft Industries; comments due by 6-17-96; published 4-29-96

Gulfstream; comments due by 6-17-96; published 5-8-96

Hamilton Standard; comments due by 6-17-96; published 4-16-96

Mooney Aircraft Corp.; comments due by 6-17-96; published 4-22-96

Class E airspace; comments due by 6-20-96; published 5-13-96

## TRANSPORTATION DEPARTMENT

### Federal Highway Administration

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Design standards for highways--

Geometric design of highways and streets; comments due by 6-21-96; published 4-22-96

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### Research and Special Programs Administration

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## TREASURY DEPARTMENT

### Fiscal Service

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## TREASURY DEPARTMENT

### Internal Revenue Service

Income taxes and employment taxes and collection of income taxes at source:

Federal tax deposits by electronic funds transfer; cross-reference; comments due by 6-19-96; published 3-21-96

## TREASURY DEPARTMENT

Marketable book-entry Treasury bills, notes, and bonds; sale and issue; uniform offering circular; amendments; comments due by 6-19-96; published 5-20-96