01–3–97
Vol. 62 No. 2
Pages 301–592

federal register

Friday
January 3, 1997

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

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

SMALL BUSINESS ADMINISTRATION

13 CFR Part 120

Business Loans

AGENCY: Small Business Administration (SBA).

ACTION: Interim final rule with request for comments.

SUMMARY: Section 103(c) of the Small Business Programs Improvement Act of 1996 (1996 legislation), enacted on September 30, 1996, authorizes SBA to continue its Low Documentation (LowDoc) loan program through lenders with significant experience in making small business loans. The Act requires SBA to promulgate regulations by December 31, 1996. This interim final rule implements this requirement. SBA is soliciting and will consider any comments it receives with respect to this interim final rule in making future adjustments.

DATES: This rule is effective January 3, 1997. Comments may be made by February 3, 1997.

ADDRESSES: Comments should be sent to Jane Palsgrove Butler, Acting Associate Administrator for Financial Assistance, Small Business Administration, 409 Third Street, N.W., Washington, D.C. 20416.

FOR FURTHER INFORMATION CONTACT: Michael J. Dowd, Director, Office of Loan Programs, (202) 205–6570.

SUPPLEMENTARY INFORMATION: Section 103(c) of the 1996 legislation (Pub. L. 104–208) amends section 7(a) of the Small Business Act (15 U.S.C. 636(a)) and authorizes SBA to continue its LowDoc loan program through lenders with significant experience in making small business loans. Under the LowDoc program, SBA may guaranty repayment of up to 80% of a loan of $100,000 or less made to a small business by a participating SBA lender. In the LowDoc program the SBA requires a lender to submit less documentation to support its guaranty request than SBA requires for other loans guaranteed under section 7(a) of the Small Business Act. The 1996 legislation requires SBA to promulgate regulations defining the experience necessary for a lender to be designated as experienced.

SBA believes that an experienced lender should be an SBA qualified lender with significant current activity in making small loans to small businesses. SBA presently qualifies all of its participating lenders pursuant to section 410 of its regulations (13 CFR § 120.410). Once qualified, lenders enter into a guarantee agreement (SBA Form 750) with SBA. A lender's qualification can be revoked for failure to maintain regulatory compliance. SBA is satisfied that this qualification process is satisfactory to assure that only experienced and capable lenders participate in its programs.

SBA presently monitors the activity of lenders which participate in its programs and retains information regarding their SBA activity. In addition, while banking regulators do not require banks and thrift institutions to track or report lending activity with small businesses, they do require banks to report the number of small loans outstanding as of each ''call report'' date. SBA uses this data on commercial/industrial loans and for commercial real estate loans made by banks and thrifts to supplement the information it retains regarding qualified lenders.

SBA has reviewed the activity of its own portfolio of active lenders and that of the lending community at large to determine what constitutes a sufficient number of small loans for purposes of qualification as a LowDoc lender. It also reviewed its own requirements for the origination, servicing and liquidation capabilities of SBA guaranteed lenders. On the basis of that review, SBA is satisfied that a lender should qualify as having significant experience lending to small business concerns if it is: (1) a bank or thrift institution which has executed an SBA Form 750, Loan Guaranty Agreement, and which has at least 20 qualified loans outstanding as of the call report date closest to the date of its fiscal year end, or (2) an institution other than a bank or thrift institution which has executed a SBA Form 750, Loan Guaranty Agreement, and which has at least 20 qualified loans outstanding as of its latest fiscal year end. A qualified loan is one which was initially approved in the amount of $100,000 or less and is classified as a commercial, industrial, or commercial real estate loan for purposes of call reporting.

SBA will consider good cause exceptions to this definition on a case by case basis. Lenders seeking an exception should make their requests directly to the Associate Administrator for Financial Assistance.

Compliance With Regulatory Flexibility Act, Executive Orders 12866, 12612, and 12778, the Unfunded Mandates Act and the Paperwork Reduction Act

SBA certifies that this interim final rule will not have a significant impact on a substantial number of small entities for purposes of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) This rule only affects those banks that make fewer than 20 qualified loans to small business and want to participate in the SBA's LowDoc Loan Program. A qualified loan is one which was initially approved in the amount of $100,000 or less and is classified as a commercial, industrial or commercial real estate loan for purposes of call reporting. Approximately 500 banks out of 10,000 will be affected by this rule.

SBA certifies that this interim final rule is not a ''significant regulatory action'' under Executive Order 12866. It does not have an annual effect on the economy of $100 million or more and does not adversely affect in a material way the economy or any sector of the economy.

SBA certifies that this interim final rule will not have federalism implications warranting a Federalism Assessment under Executive Order 12612. SBA further certifies that this interim final rule will not add any new reporting or recordkeeping requirements under the Paperwork Reduction Act of 1980, 44 U.S.C., chapter 35. For purposes of Executive Order 12778, SBA certifies that this interim final rule is drafted, to the extent practicable, in accordance with the standards set forth in section 2 of that order.

Because this final rule is required to be promulgated by December 31, 1996, SBA is publishing it without opportunity for prior public comment pursuant to 5 U.S.C. 553(b)(A). However, SBA will consider any comments it receives with respect to

this final rule in making future adjustments.

(Catalog of Federal Domestic Assistance Program No. 59.012)

List of Subjects in 13 CFR Part 120

Loan programs—business, Small businesses.

Accordingly, pursuant to the authority contained in section 5(b)(6) of the Small Business Act (15 U.S.C. 634(b)(6)), SBA amends part 120, chapter I, title 13, Code of Federal Regulations, as follows:

PART 120—BUSINESS LOANS

1. The authority citation for Part 120 continues to read as follows:

Authority: 15 U.S.C. 634(b)(6) and 636(a) and (h).

2. Section 120.410 is amended by removing ''; and'' at the end of paragraph (c), removing the period at the end of paragraph (d) and adding ''; and'' in its place, and adding a new paragraph (e) to read as follows:

§ 120.410 Requirements for all participating Lenders.

* * * * *

(e) In order to make Low Documentation loans, be:

(1) A bank or thrift institution which has executed an SBA Form 750, Loan Guaranty Agreement, and which has at least 20 qualified loans outstanding as of the call report date closest to the date of its fiscal year end, or

(2) An institution other than a bank or thrift institution which has executed an SBA Form 750, Loan Guaranty Agreement, and which has at least 20 qualified loans outstanding as of its latest fiscal year end. For purposes of this paragraph (e), a qualified loan is one which was initially approved in the amount of $100,000 or less and is classified as a commercial, industrial or commercial real estate loan for purposes of call reporting. A lender may request an exception to the requirements of this paragraph (e) from the SBA Associate Administrator for Financial Assistance.

Dated: December 30, 1996.

Philip Lader,

Administrator.

[FR Doc. 97–103 Filed 1–2–97; 8:45 am]

BILLING CODE 8025–01–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 96–NM–280–AD; Amendment 39–9868; AD 96–26–52]

RIN 2120–AA64

Airworthiness Directives; Boeing Model 747 Series Airplanes

AGENCY: Federal Aviation Administration, DOT.

ACTION: Final rule; request for comments.

SUMMARY: This document publishes in the Federal Register an amendment adopting Airworthiness Directive (AD) T96–26–52 that was sent previously to all known U.S. owners and operators of Boeing Model 747 series airplanes by individual telegrams. This AD requires repetitive inspections of the access doors to the midspar/spring beam fuse pins on all engine pylons to detect cracks on the external surface; repetitive inspections of each midspar/spring beam fuse pin to detect if it protrudes beyond its mating nut by a specified distance; and repair of any discrepancy found. This action is prompted by a report indicating that a fuse pin had migrated on an inboard spring beam fitting on the Number 1 engine pylon of a Boeing Model 747–400 airplane. The actions specified by this AD are intended to prevent migration of this fuse pin, which, if not detected and corrected in a timely manner, could result in failure of the engine pylon and consequent separation of the engine from the wing.

DATES: Effective January 8, 1997, to all persons except those persons to whom it was made immediately effective by telegraphic AD T96–26–52, issued December 20, 1996, which contained the requirements of this amendment.

Comments for inclusion in the Rules Docket must be received on or before March 4, 1997.

ADDRESSES: Submit comments in triplicate to the Federal Aviation Administration (FAA), Transport Airplane Directorate, ANM–103, Attention: Rules Docket No. 96–NM–280–AD, 1601 Lind Avenue, SW., Renton, Washington 98055–4056.

Service information pertaining to this rulemaking action may be obtained from Boeing Commercial Airplane Group, P.O. Box 3707, Seattle, Washington 98124–2207. This information may be examined at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington.

FOR FURTHER INFORMATION CONTACT: Tamara L. Dow, Aerospace Engineer, Airframe Branch, ANM–120S, FAA, 1601 Lind Avenue, SW., Renton, Washington 98055–4056, telephone (206) 227–2771; fax (206) 227–1181.

SUPPLEMENTARY INFORMATION: On December 20, 1996, the FAA issued telegraphic AD T96–26–52, which is applicable to certain Boeing Model 747 series airplanes.

That action was prompted by a report indicating that a fuse pin had migrated ⅝ inch out of an inboard spring beam fitting on the Number 1 engine pylon of a Boeing Model 747–400 series airplane. In addition, the mating nut to this pin had backed off approximately 3/10 inch from full engagement with the pin. The discrepant fuse pin was detected after maintenance personnel observed that the access door (part number 65B94112–43) to this fuse pin protruded outward from its adjacent pylon structure.

At the time this discrepancy was found, the airplane had accumulated 12,446 total hours time-in-service, and accomplished 1,439 total landings. Prior to delivery of this airplane in June 1994, the manufacturer had installed fuse pins in the spring beam fitting that are made of 15–5 corrosion resistant steel (''third generation pins''). These pins replaced existing pins made of 4330 or 4340 steel.

Migration of the fuse pin, if not detected and corrected in a timely manner, could result in failure of the engine pylon and consequent separation of the engine from the wing.

Other Relevant Rulemaking

The FAA previously had issued AD 95–13–05 [amendment 39–9285 (60 FR 33333, dated June 28, 1995; as corrected at 60 FR 35452, July 7, 1995)], which applies to certain Boeing Model 747 series airplanes equipped with Rolls Royce Model RB211 series engines. The FAA also had issued AD 95–13–06 [amendment 39–9286 (60 FR 33338, June 28, 1995; as corrected at 60 FR 37500, July 20, 1995)], which applies to certain Model 747 series airplanes equipped with General Electric Model CF6–80C2 series engines or Pratt & Whitney Model PW4000 series engines. These AD's, which are almost identical, require modification of the nacelle strut and wing structure of the applicable airplanes. Among the actions required by both AD's is the installation of a mechanical secondary retention to prevent the fuse pins for the midspar/spring beam fittings from migrating.

At the time the discrepancy described above was discovered, the nacelle strut and wing modification had not yet been accomplished on the incident airplane;

consequently, the secondary retention device had not yet been installed either. (The secondary retention device has been installed during production of airplanes beginning at line number 1047.)

Explanation of Requirements of the Rule

Since the unsafe condition described is likely to exist or develop on other airplanes of the same type design, the FAA issued Telegraphic AD T96–26–52 to prevent migration of this fuse pin, subsequent failure of the engine pylon, and consequent separation of the engine from the wing. The AD requires repetitive detailed visual inspections of the access doors to the midspar/spring beam fuse pins on all engine pylons to detect cracks on the external surface, and repair, if necessary. In addition, the AD requires repetitive detailed visual inspections of each midspar/spring beam fuse pin to detect if it protrudes beyond its mating nut by a specified distance, and repair, if necessary. These inspections are to be repeated until the terminating modifications currently required by AD 95–13–05 or AD 95–13–06, as applicable, are accomplished.

Since it was found that immediate corrective action was required, notice and opportunity for prior public comment thereon were impracticable and contrary to the public interest, and good cause existed to make the AD effective immediately by individual telegrams issued on December 20, 1996, to all known U.S. owners and operators of Boeing Model 747 series airplanes. These conditions still exist, and the AD is hereby published in the Federal Register as an amendment to section 39.13 of the Federal Aviation Regulations (14 CFR 39.13) to make it effective to all persons.

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–280–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, 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:

96–26–52 Boeing: Amendment 39–9868. Docket 96–NM–280–AD.

Applicability: Model 747 series airplanes having line numbers 1 through 1046, inclusive; certificated in any category; that meet all of the following criteria:

- equipped with Pratt & Whitney Model PW4000 series engines, or General Electric Model CF6–80C2 series engines, or Rolls Royce Model RB211 series engines;
- on which fuse pins having part numbers 310U2301–101, –116, –117, or –120 (''third generation'' fuse pins) are installed at the midspar/spring beam fittings of the engine pylon; and
- on which the modification of the nacelle strut and wing structure in accordance with Boeing Alert Service Bulletin 747–54A2156 or Boeing Alert Service Bulletin 747–54A2157, as applicable, has not been accomplished.

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 (c) 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 failure of the engine pylon and consequent separation of the engine from the wing, due to migration of the fuse pins installed at the midspar/spring beam fittings of the pylon, accomplish the following:

(a) Within 15 days after the receipt of this AD, accomplish the requirements of paragraphs (a)(1) and (a)(2) of this AD.

(1) Perform a detailed visual inspection of the access doors to each midspar/spring beam fuse pin on each engine pylon to detect cracks on the external surface of the doors.

(i) If no cracking is detected during the inspection, repeat that inspection at intervals not to exceed 150 landings or 1,000 hours time-in-service, whichever occurs first.

(ii) If any cracking is detected during the inspection, prior to further flight, repair in accordance with a method approved by the Manager, Seattle Aircraft Certification Office

(ACO), FAA, Transport Airplane Directorate. Thereafter, repeat the inspection at intervals not to exceed 150 landings or 1,000 hours time-in-service, whichever occurs first.

(2) Gain access through the aft fairing doors of each engine pylon to each midspar/spring beam fuse pin and its mating, self-locking nut, and perform a detailed visual inspection of each fuse pin to verify that at least one thread of the fuse pin protrudes beyond its mating, self-locking nut.

(i) If no discrepancy is detected during the inspection, repeat that inspection at intervals not to exceed 150 landings or 1,000 hours time-in-service, whichever occurs first.

(ii) If the inspection reveals that at least one thread does not protrude beyond its mating, self-locking nut, prior to further flight, repair in accordance with a method approved by the Manager, Seattle ACO, FAA, Transport Airplane Directorate. Thereafter, repeat the inspection at intervals not to exceed 150 landings or 1,000 hours time-in-service, whichever occurs first.

(b) Accomplishment of the modification of the nacelle strut and wing structure in accordance with Boeing Alert Service Bulletin 747–54A2156, Revision 2, dated December 21, 1995, or earlier revisions (for airplanes equipped with General Electric Model CF6–80C2 series engines, or Pratt & Whitney PW4000 series engines); or Boeing Alert Service Bulletin 747–54A2157, Revision 2, dated November 14, 1996, or earlier revisions (for airplanes with Rolls Royce Model RB211 series engines); as applicable; constitutes terminating action for the repetitive detailed visual inspections required by paragraphs (a)(1) and (a)(2) of this AD.

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

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

(d) 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.

(e) This amendment becomes effective on January 8, 1997, to all persons except those persons to whom it was made immediately effective by telegraphic AD T96–26–52, issued on December 20, 1996, which contained the requirements of this amendment.

Issued in Renton, Washington, on December 23, 1996.

S. R. Miller,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 97–114 Filed 1–2–97; 8:45 am]

BILLING CODE 4910–13–U

14 CFR Part 39

[Docket No. 96–NM–277–AD; Amendment 39–9870; AD 96–26–06]

RIN 2120–AA64

Airworthiness Directives; Boeing Model 747 Series Airplanes

AGENCY: Federal Aviation Administration, DOT.

ACTION: Final rule; request for comments.

SUMMARY: This amendment adopts a new airworthiness directive (AD) that is applicable to certain Boeing Model 747 series airplanes. This action requires a one-time inspection to detect damage of the sleeving and wire bundles of the boost pumps of the numbers 1 and 4 main fuel tanks, and of the auxiliary tank jettison pumps (if installed); replacement of any damaged sleeving with new sleeving; and repair or replacement of any damaged wires with new wires. For airplanes on which any burned wires are found, this action also requires an inspection to detect damage of the conduit, and replacement of any damaged conduit with a serviceable conduit. This amendment is prompted by an FAA determination that an environment conducive to vibration exists in the conduit and wire bundles of the boost pumps and of the auxiliary tank jettison pumps, which can cause abrasion of the Teflon sleeving and subsequent abrasion of the wires in the bundles. The actions specified in this AD are intended to detect and correct such abrasion, which could result in electrical arcing between the wires and the aluminum conduit and subsequent fire or explosion of the fuel tank.

DATES: Effective January 21, 1997.

The incorporation by reference of certain publications listed in the regulations is approved by the Director of the Federal Register as of January 21, 1997.

Comments for inclusion in the Rules Docket must be received on or before March 4, 1997.

ADDRESSES: Submit comments in triplicate to the Federal Aviation Administration (FAA), Transport Airplane Directorate, ANM–103, Attention: Rules Docket No. 96–NM–277–AD, 1601 Lind Avenue, SW., Renton, Washington 98055–4056.

The service information referenced in this AD may be obtained from Boeing Commercial Airplane Group, P.O. Box 3707, Seattle, Washington 98124–2207. This information may be examined at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington; or at the Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC.

FOR FURTHER INFORMATION CONTACT: G. Michael Collins, Aerospace Engineer, Propulsion Branch, ANM–140S, FAA, Transport Airplane Directorate, Seattle Aircraft Certification Office, 1601 Lind Avenue, SW., Renton, Washington 98055–4056; telephone (206) 227–2689; fax (206) 227–1181.

SUPPLEMENTARY INFORMATION: On July 17, 1996, a Boeing Model 747 series airplane broke up during climb over the Atlantic Ocean after takeoff from John F. Kennedy International Airport, Jamaica, New York. Although the National Transportation Safety Board (NTSB) has not determined the cause of the accident, it has identified mechanical failure as one possible cause. The NTSB also stated that the center fuel tank exploded at some time during the accident. However, the NTSB has not determined if that explosion was the cause of the accident or the result of some other event. Following the accident, the FAA began investigating potential failures that could result in ignition sources in the fuel tanks installed on Model 747 series airplanes.

Other Relevant Rulemaking and Survey

As part of its investigation, the FAA reviewed the actions required by certain existing AD's, and the results of a survey conducted on in-service Model 747 series airplanes, as discussed below.

In 1979, the FAA issued AD 79–05–04, amendment 39–3431 (44 FR 12636, March 8, 1979). That AD was prompted by a report indicating that the fuel pump wires in an aluminum conduit in an auxiliary fuel tank on a Model 747 series airplane chafed through the insulation. Electrical arcing from the chafed wire to the aluminum conduit caused a hole in the conduit; however, the arcing did not cause a fire or explosion. The hole in the conduit was discovered because fuel leaked through the hole and out of the conduit at the rear spar.

AD 79–05–04 required discontinuing the use of the auxiliary fuel tanks, draining fuel from those tanks, and opening and collaring the circuit breakers for the auxiliary tank jettison pumps. Those actions were required to be accomplished prior to further flight. The actions required by that AD affected 10 Model 747–200 series airplanes, unless Teflon sleeving had been installed on the wire bundles in accordance with Boeing Alert Service Bulletin 747–28A2091, Revision 1, dated February 5, 1979, or unless the pumps had been deactivated previously in accordance with Boeing Service

Bulletin 747–28–2067, dated November 11, 1977. The FAA has been advised that use of the fuel tanks has been discontinued on eight of the affected airplanes, and that Teflon sleeving has been installed on the wire bundles of two of the affected airplanes.

Following the issuance of AD 79–05–04, a survey involving an inspection of the wires in the conduits for the numbers 1 and 4 fuel tank pumps was conducted on approximately 26 in-service Model 747 series airplanes. The results of that survey revealed that numerous wires in these conduits were chafing against the conduit. Although none of the wires inspected at that time had worn completely through the insulation, chafing through up to 80 percent of the total insulation thickness was found on numerous wires.

Based on these survey results, the FAA issued AD 79–06–02, amendment 39–3439 (44 FR 16362, March 19, 1979). That AD requires an inspection, repair, and modification of the outboard main fuel tanks (numbers 1 and 4) boost pump wires in the conduits located in the inboard main fuel tanks (numbers 2 and 3) on Model 747 series airplanes. Any chafed wires are required to be replaced, and Teflon sleeving is to be installed to prevent chafing or abrasion of the wires against the conduit. Those actions were required to be accomplished within 750 hours time-in-service or 2 months, whichever occurred first, after the airplane had accumulated either 6,000 or 30,000 total hours time-in-service, depending upon the type of wires installed. The modification required by AD 79–06–02 involves tying the wires together every six inches and installing two concentric Teflon sleeves over the wire bundle. The requirements of that AD were intended to prevent abrasion of the electrical wires of the fuel tank boost pumps.

Background Information

The numbers 1 and 4 main fuel tanks (outboard main tanks) on Model 747 series airplanes each have two boost pumps that are located in dry bays (''dog houses'') inside the numbers 2 and 3 main fuel tanks (inboard main tanks). The electrical power for these boost pumps is supplied by wiring routed through aluminum conduits inside the inboard main tanks. These conduits begin at the wing rear spar and end at the boost pump dog houses. The wires are separated from the conduit by two concentric Teflon sleeves that are installed over the wire bundles.

The auxiliary tank jettison pumps, if installed, are located in the auxiliary fuel tanks. These pumps are mounted in dog houses inside the auxiliary fuel tanks. The electrical power for these pumps is routed through aluminum conduit inside the auxiliary fuel tanks, similar to the conduit of the boost pumps for the numbers 1 and 4 main fuel tanks.

Vibration of the conduit and wire bundles can cause abrasion of the Teflon sleeving, which could lead to abrasion of the wires in the bundles. Such abrasion, if not corrected, could result in electrical arcing between the wires and the aluminum conduit and subsequent fire or explosion of the fuel tank.

FAA's Determinations

The FAA finds that an environment conducive to vibration still exists in the conduit and wire bundles of the fuel boost pumps and the auxiliary tank jettison pumps (if installed). The FAA has determined that wire chafing has occurred on Model 747 series airplanes inside other conduits located outside the main fuel tanks in the vicinity of the conduits addressed in AD 79–06–02. In some cases, chafing through both the Teflon sleeving and the wire insulation has occurred on these airplanes [reference AD 96–03–14, amendment 39–9511 (61 FR 6500, February 21, 1996), and AD 89–14–04, amendment 39–6246 (54 FR 27157, June 28, 1989)]. The FAA concludes that follow-on inspections of the Teflon sleeving must be accomplished to determine if the sleeving continues to provide a protective barrier after extended time in service.

Explanation of Relevant Service Information

The FAA reviewed and approved Boeing Alert Service Bulletin 747–28A2204, dated December 19, 1996, which describes procedures for a one-time inspection to detect damage of the sleeving and wire bundles of the forward and aft boost pumps of the numbers 1 and 4 main fuel tanks, and of the wire bundles of the auxiliary tank jettison pumps (if installed); and repair or replacement of damaged parts with new parts. For airplanes on which any burned wires are found, the alert service bulletin describes procedures for an inspection to detect damage of the conduit, and replacement of any damaged conduit with a serviceable conduit.

Explanation of the Requirements of the Rule

Since an unsafe condition has been identified that is likely to exist or develop on other Boeing Model 747 series airplanes of the same type design, this AD is being issued to detect and correct abrasion of the Teflon sleeving and wires in the bundles of the fuel boost pumps for the numbers 1 and 4 main fuel tanks, which could result in electrical arcing between the wires and the aluminum conduit and subsequent fire or explosion of the fuel tank. This AD requires a one-time inspection to detect damage of the sleeving and wire bundles of the forward and aft boost pumps of the numbers 1 and 4 main fuel tanks, and of the auxiliary tank jettison pumps (if installed); replacement of any damaged sleeving with new sleeving; and repair or replacement of any damaged wires with new wires. For airplanes on which any burned wires are found, this AD requires an inspection to detect damage of the conduit, and replacement of any damaged conduit with a serviceable conduit. The actions are required to be accomplished in accordance with the alert service bulletin described previously.

This AD also requires that operators submit a report of inspection results to the FAA. In addition, this AD requires that operators submit damaged Teflon sleeving, wires, and conduits to the FAA.

Boeing Model 747 series airplanes having line numbers 433 and subsequent are equipped with fuel pump wire conduits made from corrosion-resistant steel (stainless steel). Arcing from the fuel pump wires to the stainless steel conduit will result in opening the fuel pump circuit breaker before sufficient heat is generated to penetrate the stainless steel conduit. The FAA is considering additional rulemaking to require replacing the aluminum conduits located in the fuel tanks with stainless steel conduits following accomplishment of the one-time inspection required by this AD. The details of the requirement to replace the aluminum conduits with stainless steel conduits will be finalized after reviewing the reports of inspection results required by this AD.

Additionally, the FAA recognizes that the degree of wear or damage to the parts may be difficult to describe in a written report of inspection results. Consequently, the FAA finds it necessary to require that any damaged parts be submitted to the FAA for examination. Examination of these parts will enable the FAA to determine whether a need exists to require future replacement of aluminum conduits with stainless steel conduits, and to develop appropriate compliance times based on the extent of wear or damage found.

Justification of Compliance Time

The required compliance time of 120 days is usually sufficient to allow for a brief comment period before adoption of a final rule. In this AD, however, that compliance time was selected in order to allow the requirements of the AD to be performed at a maintenance base where special equipment and trained maintenance personnel will be available without significant disruption of normal operations. Nevertheless, the FAA has determined that immediate adoption is necessary in this case because of the importance of initiating the required one-time inspection as soon as possible.

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–277–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:

96–26–06 Boeing: Amendment 39–9870. Docket 96–NM–277–AD.

Applicability: Model 747 series airplanes having line numbers up through 432, certificated in any category.

Note 1: This AD applies to each airplane identified in the preceding applicability provision, regardless of whether it has been modified, altered, or repaired in the area subject to the requirements of this AD. For airplanes that have been modified, altered, or repaired so that the performance of the requirements of this AD is affected, the owner/operator must request approval for an alternative method of compliance in accordance with paragraph (d) 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 detect and correct abrasion of the Teflon sleeving and wires in the bundles of the fuel boost pumps for the numbers 1 and 4 main fuel tanks and of the auxiliary tank jettison pumps (if installed), which could result in electrical arcing between the wires and the aluminum conduit and subsequent fire or explosion of the fuel tank, accomplish the following:

(a) Within 120 days after the effective date of this AD, perform a one-time inspection to detect damage of the sleeving and wire bundles of the forward and aft boost pumps of the numbers 1 and 4 main fuel tanks, and of the wire bundles of the auxiliary tank jettison pumps (if installed), in accordance with Boeing Alert Service Bulletin 747–28A2204, dated December 19, 1996.

(1) If any damaged sleeving is found, prior to further flight, replace the sleeving with new sleeving in accordance with the alert service bulletin.

(2) If any damaged wire is found, prior to further flight, repair or replace the wire with new wire in accordance with the alert service bulletin.

(3) If any burned wire is found, prior to further flight, perform an inspection to detect damage of the conduit, in accordance with the alert service bulletin. If any damage is found, prior to further flight, replace the conduit with a serviceable conduit in accordance with the alert service bulletin.

(b) Within 14 days after accomplishing the requirements of paragraph (a) of this AD, submit a report of inspection results to the Manager, Seattle Aircraft Certification Office (ACO), FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, WA 98055–4056; fax (206) 227–1181. The report shall include the information specified in paragraphs (b)(1), (b)(2), (b)(3), (b)(4), and (b)(5) of this AD. Information collection requirements contained in this regulation have been approved by the Office of Management and Budget (OMB) under the provisions of the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 *et seq.*) and have been assigned OMB Control Number 2120–0056.

(1) The airplane serial number.

(2) The total hours time-in-service accumulated on the airplane.

(3) The total number of flight cycles accumulated on the airplane.

(4) A description of any damage found.

(5) The location where the damaged part was installed.

(c) If any damaged sleeving, wire, or conduit is found during any inspection

required by this AD, within 14 days after accomplishing the inspection, submit the damaged part to the Manager, Seattle ACO, along with the report of inspection results required by paragraph (b) of this AD.

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

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

(e) Special flight permits may be issued in accordance with 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.

(f) The actions shall be done in accordance with Boeing Alert Service Bulletin 747–28A2204, dated December 19, 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 Boeing Commercial Airplane Group, P.O. Box 3707, Seattle, Washington 98124–2207. Copies may be inspected at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington; or at the Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC.

(g) This amendment becomes effective on January 21, 1997.

Issued in Renton, Washington, on December 23, 1996.

S. R. Miller,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 96–33105 Filed 12–31–96; 12:23 pm]

BILLING CODE 4910–13–U

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14 CFR Part 39

[Docket No. 96–ANE–37; Amendment 39–9874; AD 97–01–03]

RIN 2120–AA64

Airworthiness Directives; Textron Lycoming Reciprocating Engines

AGENCY: Federal Aviation Administration, DOT.

ACTION: Final rule; request for comments.

SUMMARY: This amendment adopts a new airworthiness directive (AD) that is applicable to certain Textron Lycoming reciprocating engines. This action requires removal from service of defective piston pins, and replacement with serviceable parts. This amendment is prompted by a report of failure of a piston pin. The actions specified in this AD are intended to prevent piston pin failure, which could result in engine failure.

DATES: Effective January 21, 1997.

The incorporation by reference of certain publications listed in the regulations is approved by the Director of the Federal Register as of January 21, 1997.

Comments for inclusion in the Rules Docket must be received on or before March 4, 1997.

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–37, 12 New England Executive Park, Burlington, MA 01803–5299.

The service information referenced in this AD may be obtained from Textron Lycoming, 652 Oliver St., Williamsport, PA 17701; telephone (717) 327–7278, fax (717) 327–7022. This information may be examined at the FAA, New England Region, Office of the Assistant Chief Counsel, 12 New England Executive Park, Burlington, MA; or at the Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC.

FOR FURTHER INFORMATION CONTACT: Franco Pieri and Pat Perrotta, Aerospace Engineer, New York Aircraft Certification Office, FAA, Engine and Propeller Directorate, 10 Fifth St., Valley Stream, NY 11581; telephone (516) 256–7526 and (516) 256–7534, fax (516) 568–2716.

SUPPLEMENTARY INFORMATION: The Federal Aviation Administration (FAA) received a report of metal detected in an engine oil filter on a Textron Lycoming Model AEIO–540–L1B5 reciprocating engine. The investigation revealed the metal in the oil filter was caused by a failed piston pin, Part Number (P/N) LW–14077. Failure of the piston pin may cause puncturing of the engine crankcase by the piston rod resulting in the loss of oil leading to total power failure and possible fire. Failure of the piston pin may also cause jamming of the engine crankcase by the piston rod resulting in total power failure. The FAA has determined that a quantity of piston pins, marked with code 17328, were produced that did not meet manufacturing specifications. The defects are grooves in the piston pin created during manufacturing that result in the fatigue failure of the pins. Textron Lycoming has notified the FAA of three piston pin failures that were reported at 50, 62.4 and 386 hours total time in service (TIS) with the defective piston pin installed. This condition, if not corrected, could result in piston pin failure, which could result in engine failure.

The FAA has reviewed and approved the technical contents of Textron Lycoming Mandatory Service Bulletin (SB) No. 527B, dated October 8, 1996, that lists serial numbers (S/Ns) of engines manufactured, remanufactured, or overhauled by Textron Lycoming during the time period that defective piston pins could have been installed, and describes procedures for removal from service of defective piston pins, and replacement with serviceable parts.

Since an unsafe condition has been identified that is likely to exist or develop on other engines of the same type design, this AD is being issued to prevent piston pin failure, which could result in engine failure. This AD requires removal from service of defective piston pins, and replacement with serviceable parts. The actions are required to be accomplished in accordance with the Mandatory SB described previously.

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

Comments Invited

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

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

concerned with the substance of this AD will be filed in the Rules Docket.

Commenters wishing the FAA to acknowledge receipt of their comments submitted in response to this notice must submit a self-addressed, stamped postcard on which the following statement is made: ''Comments to Docket Number 96–ANE–37.'' The postcard will be date stamped and returned to the commenter.

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

The FAA has determined that this regulation is an emergency regulation that must be issued immediately to correct an unsafe condition in aircraft, and 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 USC 106(g), 40113, 44701.

§ 39.13 [Amended]

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

97–01–03 Textron Lycoming: Amendment 39–9874. Docket 96–ANE–37.

Applicability: Textron Lycoming O–320, IO–320, AEIO–320, O–360, LO–360, IO–360, LIO–360, VO–360, IVO–360, HO–360, HIO–360, AIO–360, AEIO–360, TIO–360, TO–360, O–540 (except O–540–J1A5D, –J1C5D, –J2A5D, –J3A5D, –J3C5D, –L3C5D), IO–540 (except IO–540–W1A5D, –W3A5D, –AB1A5), AEIO–540, TIO–540, LTIO–540, TIO–541, TIGO–541, and IO–720 series reciprocating engines, that meet any one of the following conditions:

1. Engines with serial numbers (S/Ns) listed in Textron Lycoming Mandatory Service Bulletin (SB) No. 527B, dated October 8, 1996; or

2. Engines that had Textron Lycoming cylinder kits installed after December 15, 1995; or

3. Engines that have been overhauled, or had cylinder head maintenance performed, by a repair facility other than Textron Lycoming after December 15, 1995. These engines are installed on but not limited to reciprocating engine powered aircraft manufactured by Aerospatiale, Bellanca, Cessna, The New Piper Company, Beech, Schweizer, Maule, and Mooney.

Note 1: A maintenance records check may allow an owner or operator to determine if this AD applies.

Note 2: 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 request approval for an alternative method of compliance in accordance with paragraph (d) 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 piston pin failure, which could result in engine failure, accomplish the following:

(a) For engines with S/Ns listed in Textron Lycoming Mandatory SB No. 527B, dated October 8, 1996, accomplish the following:

(1) Check the piston pin code in accordance with Textron Lycoming SB No. 527B, dated October 8, 1996 in accordance with the following schedule:

(i) For engines with 45 hours or more time in service (TIS) since the engine was shipped from Textron Lycoming, since overhaul, since installation of a cylinder kit, or since installation of a replacement piston pin, as applicable, accomplish within 5 hours TIS after the effective date of this AD.

(ii) For engines with less than 45 hours TIS since the engine was shipped from Textron Lycoming, since overhaul, since installation of a cylinder kit, or since installation of a replacement piston pin, as applicable, accomplish prior to accumulating 50 hours TIS since the applicable date.

(2) Remove from service piston pins, Part Number (P/N) LW–14077, code 17328, and replace with serviceable piston pins.

(b) For all other affected engines, determine if a suspect piston pin, P/N LW–14077, code 17328 could have been installed, in accordance with Textron Lycoming Mandatory SB No. 527B, dated October 8, 1996, and accomplish the following:

(1) If it is determined that suspect piston pins, P/N LW–14077, code 17328 could have been installed, accomplish paragraphs (a)(1) and (a)(2) of this AD.

(2) If it is determined that suspect piston pins, P/N LW–14077, code 17328 could not have been installed, no further action is required.

(3) If it cannot be determined if the suspect piston pins, P/N LW–14077, code 17328 were installed, accomplish paragraphs (a)(1) and (a)(2) of this AD.

(c) For purposes of this AD a serviceable piston pin is a piston pin, P/N LW–14077, with a piston pin code of ''BN'' or ''71238.'' Installation of a piston pin, P/N LW–14077, with a piston pin code of ''17328'' is prohibited after the effective date of this AD.

(d) An alternative method of compliance or adjustment of the compliance time that provides an acceptable level of safety may be used if approved by the Manager, New York Aircraft Certification Office. The request should be forwarded through an appropriate FAA Maintenance Inspector, who may add comments and then send it to the Manager, New York Aircraft Certification Office.

Note 3: Information concerning the existence of approved alternative methods of compliance with this airworthiness directive, if any, may be obtained from the New York Aircraft Certification Office.

(e) 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.

(f) The actions required by this AD shall be done in accordance with the following Textron Lycoming Mandatory SB:

Document No.	Pages	Date
527B	1–3	October 8, 1996.
Attachment	1–6	October 8, 1996.
Total pages.	9	

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 Textron Lycoming, 652 Oliver St., Williamsport, PA 17701; telephone (717) 327–7278, fax (717) 327–7022. Copies may be inspected at the FAA, New England Region, Office of the Assistant Chief Counsel, 12 New England Executive Park, Burlington, MA; or at the Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC.

(f) This amendment becomes effective on January 21, 1997.

Issued in Burlington, Massachusetts, on December 26, 1996.

Jay J. Pardee,

Manager, Engine and Propeller Directorate, Aircraft Certification Service.

[FR Doc. 96–33399 Filed 12–31–96; 12:23 pm]

BILLING CODE 4910–13–U

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14 CFR Part 71

[Airspace Docket No. 96–AEA–11]

Amendment to Class E Airspace, Staunton, VA

AGENCY: Federal Aviation Administration (FAA) DOT.

ACTION: Final rule.

SUMMARY: This amendment modifies the Class E airspace at Staunton, VA, to accommodate a Global Positioning System (GPS) Standard Instrument Approach Procedure (SIAP) to Runway (RWY) 23 at Shenandoah Valley Regional Airport. This amendment also corrects the airspace description of the Staunton, VA Class E airspace are, published as a Notice of Proposed Rulemaking in the Federal Register November 1, 1996 (61 FR 56480). The intended effect of this action is to provide adequate controlled airspace for instrument flight rules (IFR) operations at the airport.

EFFECTIVE DATE: 0901 UTC, March 27, 1997.

FOR FURTHER INFORMATION CONTACT: Mr. Francis Jordan, Airspace Specialist, Operations Branch, AEA–530, Air Traffic Division, Eastern Region, Federal Aviation Administration, Federal Building #111, John F. Kennedy International Airport, Jamaica, New York 11430, telephone: (718) 553–4521.

SUPPLEMENTARY INFORMATION:

History

On November 1, 1996, the FAA proposed to amend Part 71 of the Federal Aviation Regulations (14 CFR Part 71) by modifying Class E airspace at Staunton, VA, (61 FR 56480). This action would provide adequate Class E airspace for IFR operations at Shenandoah Valley Regional Airport.

Interested parties were invited to participate in this rulemaking proceeding by submitting written comments on the proposal to the FAA. No comments objecting to the proposal were received.

Class E airspace areas designations are published in paragraph 6005 of FAA Order 7400.9D, dated September 4, 1996, and effective September 16, 1996, which is incorporated by reference in 14 CFR 71.1. The Class E airspace designation listed in this document will be published subsequently in the Order.

The Rule

This amendment to Part 71 of the Federal Aviation Regulations (14 CFR Part 71) modifies Class E airspace area at Staunton, VA, to accommodate a GPS RWY 23 SIAP and for IFR operations at Shenandoah Valley Regional Airport.

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. Therefore, this regulation—(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 10034; 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 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 Federal Aviation Administration 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; EO 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 Federal Aviation Administration Order 7400.9D, Airspace Designations and Reporting Points, dated September 4, 1996, and effective September 16, 1996, is amended as follows:

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

* * * * *

AEA VA E5 Staunton, VA [Revised]

Shenandoah Valley Regional Airport, VA
(lat. 38°15′50″N., long. 78°53′47″W.)
Bridgewater Air Park, VA
(lat. 38°22′00″N., long. 78°57′37″W.)
Bridgewater NDB
(lat. 38°21′56″N., long. 78°57′40″W.)
STAUT NDB
(lat. 38°12′06″N., long. 78°57′26″W.)

That airspace extending upward from 700 feet above the surface within a 10.5–mile radius of the Shenandoah Valley Regional Airport and within 8 miles northwest and 4 miles southeast of the Shenandoah Valley Regional Airport localizer southwest course extending from the STAUT NDB to 16 miles southwest of the NDB and within a 6.8–mile radius of Bridgewater Air Park and within 4 miles northwest and 8 miles southeast of the 208° bearing from the Bridgewater NDB extending from the NDB to 16 miles southwest of the NDB.

* * * * *

Issued in Jamaica, New York on December 18, 1996.

James K. Buckles,

Acting Manager, Air Traffic Division, Eastern Region.

[FR Doc. 97–76 Filed 1–2–97; 8:45 am]

BILLING CODE 4910–13–M

SOCIAL SECURITY ADMINISTRATION

20 CFR Part 416

[Regulations No. 16]

RIN 0960–AD75

Supplemental Security Income for the Aged, Blind, and Disabled; Charging Administration Fees for Making State Supplementary Payments; Interest Charging on State Supplementary Payment Funds

AGENCY: Social Security Administration (SSA).

ACTION: Final rule.

SUMMARY: We are revising our rules to bring them into accord with statutory changes which require the Social Security Administration (SSA) to charge the States an administration fee for making supplementary payments on behalf of States and authorize SSA to charge the States an additional services fee for performing services not customarily provided at the request of States. We also are conforming our regulations to reflect the requirements of the law regarding the transfer of funds

from States to SSA for use in making supplementary payments.

EFFECTIVE DATE: These rules are effective February 3, 1997.

FOR FURTHER INFORMATION CONTACT: Henry D. Lerner, Legal Assistant, Division of Regulations and Rulings, Social Security Administration, 6401 Security Blvd., Baltimore, MD 21235, (410) 965–1762 for information about these rules. For information on eligibility or claiming benefits, call our national toll-free number, 1–800–772–1213.

SUPPLEMENTARY INFORMATION

Background

These regulations reflect the provisions of section 13731 of Pub. L. 103–66 (the Omnibus Budget Reconciliation Act (OBRA) of 1993) and Pub. L. 101–453 (the Cash Management Improvement Act (CMIA) of 1990) as amended by Pub. L. 102–589 (the Cash Management Improvement Act Amendments of 1992). From the inception of the supplemental security income (SSI) program in January 1974 through September 1993, SSA did not have the authority to charge States for the costs it incurred in administering mandatory and optional State supplementary payment programs. During that same period of time, SSA did not have specific authority to charge States for the costs it incurred in performing, at the request of the States, services not customarily provided in the administration of State supplementary payment programs.

Section 13731 of Public Law 103–66, effective for supplementary payments made for any month beginning on or after October 1, 1993, requires SSA to charge the States an administration fee for making supplementary payments on behalf of States and authorizes SSA to charge the States an additional services fee for performing services at the request of States not customarily provided.

The CMIA requires that transfers of funds from the States to SSA for the payment of supplementary payments be timed to coincide as closely as possible with disbursements of those funds to eligible individuals. In the case of certain States, transfers which do not occur on due dates and/or which are not in appropriate amounts will cause the imposition of an interest liability on either the States or on the Federal Government in accordance with the regulations of the United States Department of the Treasury implementing the CMIA. The provisions of the CMIA were effective on the later of July 1, 1993, or the first day of the State's fiscal year beginning in 1993. Prior to the effective date of the CMIA, no interest liability was incurred by either the States or the Federal Government on the transfer of funds to SSA for use in making State supplementary payments.

At the outset of the SSI program, States were encouraged to supplement the Federal benefit. As an incentive to provide a supplement, States that agreed to make optional supplementary payments and signed an agreement to have those payments administered by the Federal Government would not be charged a fee for Federal administration. States required to pay mandatory supplementary payments could also enter into agreements providing for Federal administration of those payments at no cost to the States. States electing Federal administration were required to periodically transfer to SSA only amounts equal to the expenditures made by SSA for supplementary payments.

On October 1, 1993, pursuant to amendments made to the Social Security Act (the Act) and to section 212(b)(3) of Public Law 93–66 by section 13731 of Public Law 103–66, SSA began charging States that had elected Federal administration of optional and/or mandatory State supplementary payments a fee for administering those payments. The administration fee is charged monthly and is derived by multiplying the number of State supplementary payments made by SSA on behalf of a State for a month by the applicable dollar rate for the fiscal year (FY), as prescribed in section 13731 of Public Law 103–66. The dollar rates are as follows: for FY 1994, $1.67; for FY 95, $3.33; for FY 96, $5.00; and, for FY 1997 and each succeeding FY, $5.00 or such different rate as determined by SSA to be appropriate for any particular State, taking into account the complexity of administering the State's supplementary payment program. The number of supplementary payments made by SSA in a month is the total number of checks issued, and direct deposits made, to recipients in that month, that are composed in whole or in part of State supplementary funds. The number of supplementary payments include, for example, recurring monthly payments (ongoing monthly payments to individuals who maintain eligibility from the previous month); supplemental payments (payments certified after the date established for the regular transfer of payment data to the United States Department of the Treasury); daily payments (non-recurring initial claims or post-entitlement payments including one-time payments such as those made to correct underpayments); erroneous payments (overpayments and payments to ineligibles); unnegotiated check payments (payments by check not presented for payment by the recipient within 180 days of issuance); replacement checks (duplicate checks issued when recipients allege nonreceipt of original check issuances); and, installment payments of large past-due amounts (payments made over a period of months, the sum of which is equal to amounts due recipients).

Section 13731 of Public Law 103–66 also authorizes SSA to charge a State an additional services fee if, at the request of the State, SSA agrees to provide the State with additional services beyond the level customarily provided in the administration of State supplementary payments. SSA is not required to perform any additional services requested by a State and may, at its sole discretion, refuse to perform those additional services. An additional services fee charged a State may be a one-time charge or, if the furnished services result in ongoing costs to the Federal Government, a monthly or less frequent charge to the State for providing such services. Section 13731 of Public Law 103–66 requires that the additional services fee be in an amount that SSA determines is necessary to cover all costs (including indirect costs) incurred by the Federal Government in furnishing the additional services. Prior to the effective date of section 13731 of Pub. L. 103–66, SSA had no specific authority to impose additional services fees.

The CMIA was enacted to ensure greater efficiency, effectiveness and equity in the exchange of funds between the Federal Government and the States. For purposes of Federal administration of State supplementary payments, the CMIA requires that the transfer of funds from the States to SSA for use in making supplementary payments be timed to coincide as closely as possible with the actual payment of those funds to recipients. While all States are required to comply with the funding techniques of the CMIA, pursuant to the implementing regulations of the United States Department of the Treasury at 31 CFR Part 205, only those States whose State supplementary payment programs meet the requirements of a major Federal assistance program in their respective States are subject to the interest liability provisions of the CMIA. For those States, transfers of supplementary payment funds to SSA which are not made on due dates and/or are not made in appropriate amounts will cause the imposition of an interest liability on either the State, or the

Federal Government. Currently, SSA administers the supplementary payment programs of 25 States and the District of Columbia. The supplementary payment programs of 11 of those States and the District of Columbia meet the requirements of a major Federal assistance program and, thus, are subject to the interest liability provisions of the CMIA.

Each month, States are notified of the amount of funds they must transfer to SSA to be used in the succeeding month to make supplementary payments and to pay administration fees. Notification is made, generally, 7 work days before the end of the month. For purposes of complying with the funding technique requirements of the CMIA and its implementing regulations, all State funds must be received by SSA by the fifth Federal business day following the day the regularly recurring monthly supplementary payments are issued. This date is the State supplementary payment transfer date and represents the dollar-weighted average day of clearance of all SSI/State supplementary payment checks and direct deposits made to individuals in a month. Section 1616(d) of the Act and section 212(b)(3) of Public Law 93–66, as amended by section 13731 of Public Law 103–66, require that the States pay administration fees on the same day they transfer to SSA the amounts necessary to make State supplementary payments. However, the provisions of the CMIA apply only to the amounts transferred to SSA for use in making supplementary payments. Therefore, the interest provisions of the CMIA are inapplicable to the payment of administration fees not made on transfer dates and/or not made in appropriate amounts. However, administration fee payment delinquencies by States are subject to the provisions of the claims collection regulations at 45 CFR Part 30, which include the imposition of interest on amounts due SSA. These Department of Health and Human Services regulations remain applicable after March 30, 1995, to the assessment of interest on delinquent administration fees by SSA pursuant to section 106(b) of Public Law 103–296, the Social Security Independence and Program Improvements Act of 1994.

It is not possible for SSA to forecast the precise amount of State expenditures that will be made in the subsequent month. Therefore, the amounts transferred on the State supplementary payment transfer date are based on estimates made by SSA. After the close of the month for which the amounts are transferred, when final expenditure figures become available, those amounts will be revealed to be either more or less than actually expended, therefore triggering an interest liability on either the State or the Federal Government. Prior to the amendments being made by these final rules, SSA's regulations did not reflect the CMIA requirement that supplementary payment funds be transferred to SSA on the date of average clearance of SSI/supplementary payments, nor did they authorize the charging or payment of interest by either SSA or the States with regard to the transfer of State supplementary payment funds.

Regulations Changes

We are amending the regulations at §§ 416.2010(b) and 416.2090 to reflect the provisions of section 13731 of Public Law 103–66 that require SSA to charge States an administrative fee for administering their State supplementary payments and authorize SSA to charge States an additional services fee for services not customarily performed. Examples of services not customarily provided States and thus, for which an additional fee will be charged if SSA agrees to perform them, are presented below. The list is not intended to be inclusive. Any and all additional services performed by SSA at the request of a State will be subject to the services fee, including:

- The collection and/or verification of additional information in the claims or redetermination process which SSA does not now typically or usually collect and/or verify;
- The modification of a supplementary payment level variation or replacement of a supplementary payment level variation, resulting in a variation more labor intensive or otherwise more costly to administer than variations normally administered by SSA;
- The modification or expansion of the existing SSI Quality Assurance sample that would increase the level of reporting usually performed by SSA;
- The development and issuance of notices to SSI/State supplementary payment recipients in the State beyond those normally provided;
- The revision of State supplementary payment amounts which requires software changes in the SSI payment system not otherwise necessary. Such revisions would be other than the customary revisions associated with annual cost-of-living adjustments to the Federal benefit rate;
- The provision of more detailed or frequent accounting data or reports; and
- A service that would require SSA to engage in software development or modification and/or reprogramming efforts not normally undertaken.

We also are amending the regulations at § 416.2090(a)(2) to provide, consistent with our present procedure, that all State funds to be used by SSA to make monthly supplementary payments and to pay administration fees for that month, as estimated by SSA, must be on deposit with SSA by the fifth Federal business day following the day the regularly recurring monthly supplementary payments are issued. This paragraph also provides that any additional services fees are to be on deposit with SSA on the date specified by SSA. In addition, we are amending § 416.2090(b) to clarify that administration and additional services fees are included in SSA's accounting of State funds and to reflect the fact that SSA and the States may now incur interest charges with respect to the adjustment and accounting of State supplementary payment funds in accordance with the CMIA and implementing regulations of the United States Department of the Treasury.

We also are making technical revisions to the regulations in Subpart T that are unrelated to the provisions of OBRA of 1993 and the CMIA. Section 184 of Public Law 97–248, enacted September 3, 1982, phased-out the hold-harmless provisions of the Social Security Act. In order to reflect the fact that these provisions are now obsolete, we are deleting the hold-harmless regulations at §§ 416.2010(b) (except for the last sentence which is unrelated to the hold-harmless protection and which will be inserted at the end of §§ 416.2005(d)), 416.2080, 416.2082, and 416.2085 per SSA's June 1, 1995, report to President Clinton on Eliminating and Improving Regulations, and are amending the regulations at § 416.2050(b)(1) and § 416.2090 (a)(2) and (d). Section 416.2010(d) is being redesignated as § 416.2010(c) and is being revised to indicate that agreements will renew automatically one year after the date they are signed for a period of one year unless the State or SSA gives written notice not to renew at least 90 days before the beginning of the new period. The regulations previously provided that the agreements run until June 30, the Federal government's former end of a fiscal year. This change takes into consideration the fact that States have not signed their agreements on one uniform date. Finally, these rules, in the sections being amended, replace all references to the Secretary of Health and Human Services with references to SSA to reflect Public Law 103–296 which, effective March 31, 1995, established

SSA as an independent agency separate from the Department of Health and Human Services.

Comments on Notice of Proposed Rulemaking

These regulations were published in the Federal Register (61 FR 18529) as a notice of proposed rulemaking (NPRM) on April 26, 1996. Interested parties were given 60 days to submit comments. Public comments were received from a State's Governor's office which raised concerns about interest charging on State supplementary funds. We address these concerns in our responses to the comments by elaborating on certain statements we made in the NPRM. We are, therefore, publishing the final rules with no substantive changes from the proposed rules.

Comment: The commenter believes it is contrary to the spirit of CMIA to assess interest when a State timely transmits to SSA the amount of SSI funds requested for a month's disbursements. The NPRM indicates that such interest results because ''[i]t is not possible for SSA to forecast the precise amount of State expenditures that will be made in the subsequent month . . .,'' (61 FR 18529, 18530) which the commenter sees as an explicit admission that SSA procedures require improvement.

The commenter stated that in conversations with SSA on this subject, it was explained that necessary adjustments occurring subsequent to the payment due date affect the final monthly figures. This could and does result in differences between the amounts estimated by SSA and amounts actually paid out, leading to a calculation of interest due to or from the Federal Government. According to the commenter, a fairer solution to the problem would be for SSA to record the later adjustments and apply them, plus or minus, to the estimates for the succeeding month. These estimates, when timely transmitted by the State, would result in no interest calculation and would be in keeping with the spirit of CMIA.

Response: Pursuant to CMIA, interest has been and will be calculated on the difference between the amount of the State's monthly payment to SSA and the actual amount of monthly outlays for State supplementary payments made by SSA on behalf of the State. The monthly funds requests are developed nearly two months before the actual current month's expenditures are available. SSA does take adjustments into consideration when developing the monthly estimates. However, State supplementary payments are not processed only on the first of each month. Payments and recoveries are processed daily and the volume is unpredictable. By including as many monthly adjustments and payments as possible in the monthly funds request, interest charges to either party are kept to a minimum. The greatest cause of interest to either party is the early or late transfer of State payment funds not the adjustments included in the funds requests.

Comment: The same commenter also addresses the rate of interest SSA uses in calculating a ''penalty'' for untimely delivery of the processing fees. According to the commenter, SSI is by its nature not a ''Federal Assistance Program,'' which defines the scope of CMIA. However, since the program is specifically covered by CMIA regulations, the commenter accepts its inclusion under CMIA.

The commenter states that CMIA defines the interest rate applicable to programs covered by CMIA, and does not reserve to SSA or any Federal agency the right to charge interest rates other than those calculated in accordance with CMIA; therefore, any interest charged for delinquent payment of processing fees should be subject to CMIA interest rules. The commenter believes that in terms of equity and fairness, SSA cannot have it both ways: either SSI and related fees are subject to CMIA or they are not. If they are subject to CMIA, as it appears, then only one interest rate should apply—that specified by CMIA regulations.

Response: The CMIA is only applicable to funds representing benefit payments to recipients. The administration fees are not covered by CMIA. However, the fees are covered by the claims collection regulations, set forth at Subpart B of 45 C.F.R. Part 30. These regulations require that the Commissioner of Social Security take action to collect debts and reduce delinquencies and generally require the imposition of interest on debts. The interest rate is set by the Secretary of the Treasury after taking into consideration the prevailing private consumer rates of interest. The State is immediately notified of any interest due as a result of a failure to make timely payment of its administrative fee.

Regulatory Procedures

Executive Order 12866

We have consulted with the Office of Management and Budget (OMB) and determined that these rules do not meet the criteria for a significant regulatory action under Executive Order 12866. Thus, they were not subject to OMB review.

Regulatory Flexibility Act

We certify that these rules will not have a significant economic impact on a substantial number of small entities. Therefore, a regulatory flexibility analysis as provided in Public Law 96–354, the Regulatory Flexibility Act, is not required.

Paperwork Reduction Act

These rules impose no reporting/recordkeeping requirements subject to OMB clearance.

(Catalog of Federal Domestic Assistance Program No. 96.006, Supplemental Security Income)

List of Subjects in 20 CFR Part 416

Administrative practice and procedure, Aged, Blind, Disability benefits, Public assistance programs, Reporting and recordkeeping requirements, Supplemental Security Income.

Dated: December 19, 1996.

Shirley S. Chater,

Commissioner of Social Security.

Subpart T of part 416 of chapter III of title 20 of the Code of Federal Regulations is amended as follows:

PART 416—[AMENDED]

Subpart T—[Amended]

1. The authority citation for subpart T of part 416 continues to read as follows:

Authority: Secs. 702(a)(5), 1616, 1618, and 1631 of the Social Security Act (42 U.S.C. 902(a)(5), 1382e, 1382g, and 1383); sec. 212, Pub. L. 93–66, 87 Stat. 155 (42 U.S.C. 1382 note); sec. 8(a), (b)(1)–(b)(3), Pub. L. 93–233, 87 Stat. 956 (7 U.S.C. 612c note, 1431 note and 42 U.S.C. 1382e note); secs. 1 (a)–(c) and 2(a), 2(b)(1), 2(b)(2), Pub. L. 93–335, 88 Stat. 291 (42 U.S.C. 1382 note, 1382e note).

2. Section 416.2005 is amended by revising paragraph (a), removing ''the Secretary'' and adding ''SSA'' in the heading and each time it appears in paragraphs (b)–(d) and adding a sentence to the end of paragraph (d) to read as follows:

§ 416.2005 Administration agreements with SSA.

(a) *Agreement-mandatory only.* Subject to the provisions of paragraph (d) of this section, any State having an agreement with the Social Security Administration (SSA) under § 416.2001(c) may enter into an administration agreement with SSA under which SSA will make the mandatory minimum supplementary payments on behalf of such State. An agreement under § 416.2001(c) and an

administration agreement under this paragraph may be consolidated into one agreement.

* * * * *

(d) * * * If the State elects options available under this subpart (specified in §§ 416.2015–416.2035), such options must be specified in the administration agreement.

3. Section 416.2010 is amended by removing paragraph (b), redesignating paragraphs (c) through (f) as paragraphs (b) through (e), removing ''the Secretary'' and adding ''SSA'' each time it appears in paragraphs (a), (d) and (e), and by revising redesignated paragraphs (b) and (c) to read as follows:

§ 416.2010 Essentials of the administration agreements.

* * * * *

(b) *Administrative costs.* (1) SSA shall assess each State that had elected Federal administration of optional and/or mandatory State supplementary payments an administration fee for administering those payments. The administration fee is assessed and paid monthly and is derived by multiplying the number of State supplementary payments made by SSA on behalf of a State for any month in a fiscal year by the applicable dollar rate for the fiscal year. The number of supplementary payments made by SSA in a month is the total number of checks issued, and direct deposits made, to recipients in that month, that are composed in whole or in part of State supplementary funds. The dollar rates are as follows:

(i) For fiscal year 1994, $1.67;

(ii) For fiscal year 1995, $3.33;

(iii) For fiscal year 1996, $5.00; and

(iv) For fiscal year 1997 and each succeeding fiscal year, $5.00, or such different rate as determined by SSA to be appropriate for any particular State, taking into account the complexity of administering the State's supplementary payment program.

(2) SSA shall charge a State an additional services fee if, at the request of the State, SSA agrees to provide the State with additional services beyond the level customarily provided in the administration of State supplementary payments. The additional services fee shall be in an amount that SSA determines is necessary to cover all costs, including indirect costs, incurred by the Federal Government in furnishing the additional services. SSA is not required to perform any additional services requested by a State and may, at its sole discretion, refuse to perform those additional services. An additional services fee charged a State may be a one-time charge or, if the furnished services result in ongoing costs to the Federal Government, a monthly or less frequent charge to the State for providing such services.

(c) *Agreement period.* The agreement period for a State which has elected Federal administration of its supplementary payments will extend for one year from the date the agreement was signed unless otherwise designated. The agreement will be automatically renewed for a period of one year unless either the State or SSA gives written notice not to renew, at least 90 days before the beginning of the new period. For a State to elect Federal administration, it must notify SSA of its intent to enter into an agreement, furnishing the necessary payment specifications, at least 120 days before the first day of the month for which it wishes Federal administration to begin, and have executed such agreement at least 30 days before such day.

* * * * *

§ 416.2050 [Amended]

4. Paragraph (b)(1) of section 416.2050 is amended by removing the phrase ''(as defined in § 416.2085(e))'' and removing ''the Secretary'' and adding ''SSA'' each time it appears.

§ 416.2080 [Removed]

5. Section 416.2080 is removed.

§ 416.2082 [Removed]

6. Section 416.2082 is removed.

§ 416.2085 [Removed]

7. Section 416.2085 is removed.

8. Section 416.2090 is amended by removing ''the Secretary'' and adding ''SSA'' each time it appears in paragraph (c), by removing the phrase ''for purposes of § 416.2080'' at the end of paragraph (d), and by revising the section heading and paragraphs (a) and (b) to read as follows:

§ 416.2090 State funds transferred for supplementary payments.

(a) *Payment transfer and adjustment.* (1) Any State which has entered into an agreement with SSA which provides for Federal administration of such State's supplementary payments shall transfer to SSA:

(i) An amount of funds equal to SSA's estimate of State supplementary payments for any month which shall be made by SSA on behalf of such State; and

(ii) An amount of funds equal to SSA's estimate of administration fees for any such month determined in the manner described in § 416.2010(b)(1); and

(iii) If applicable, an amount of funds equal to SSA's determination of the costs incurred by the Federal government in furnishing additional services for the State as described in § 416.2010(b)(2).

(2) In order for SSA to make State supplementary payments on behalf of a State for any month as provided by the agreement, the estimated amount of State funds referred to in paragraph (a)(1)(i) of this section, necessary to make those payments for the month, together with the estimated amount of administration fees referred to in paragraph (a)(1)(ii) of this section, for that month, must be on deposit with SSA on the State supplementary payment transfer date, which is the fifth Federal business day following the day in the month that the regularly recurring monthly supplemental security income payments are issued. The additional services fee referred to in paragraph (a)(1)(iii) of this section shall be on deposit with SSA on the date specified by SSA. The amount of State funds paid to SSA for State supplementary payments and the amount paid for administration fees will be adjusted as necessary to maintain the balance with State supplementary payments paid out by SSA on behalf of the State, and administration fees owed to SSA, respectively.

(b) *Accounting of State funds.* (1) As soon as feasible, after the end of each calendar month, SSA will provide the State with a statement showing, cumulatively, the total amounts paid by SSA on behalf of the State during the current Federal fiscal year; the fees charged by SSA to administer such supplementary payments; any additional services fees charged the State; the State's total liability therefore; and the end-of-month balance of the State's cash on deposit with SSA.

(2) SSA shall provide an accounting of State funds received as State supplementary payments, administration fees, and additional services fees, within three calendar months following the termination of an agreement under § 416.2005.

(3) Adjustments will be made because of State funds due and payable or amounts of State funds recovered for calendar months for which the agreement was in effect. Interest will be incurred by SSA and the States with respect to the adjustment and accounting of State supplementary payments funds in accordance with applicable laws and regulations of the United States Department of the Treasury.

* * * * *

[FR Doc. 97–39 Filed 1–2–97; 8:45 am]

BILLING CODE 4190–29–P

INTERNATIONAL DEVELOPMENT COOPERATION AGENCY

U.S. Agency for International Development

22 CFR Part 228

RIN 0412–AA28

Rules on Source, Origin and Nationality for Commodities and Services Financed by the Agency for International Development; Correction

AGENCY: United States Agency for International Development (USAID), IDCA.

ACTION: Correction to final regulations.

SUMMARY: This document contains corrections to final regulations (22 CFR Part 228) which were published Tuesday, October 15, 1996 (61 FR 53615). The regulations cover USAID's rules on source, origin and nationality for commodities and services financed by USAID.

EFFECTIVE DATE: January 3, 1997.

FOR FURTHER INFORMATION CONTACT: Kathleen J. O'Hara, Office of Procurement, Procurement Policy Division (M/OP/P), USAID, Room 1600A, SA–14, Washington, DC 20523–1435. Telephone (703) 875–1534, facsimile (703) 875–1243.

SUPPLEMENTARY INFORMATION: The final rule that is the subject of these corrections was effective on November 14, 1996.

Need for Correction

As published, the final rule contains errors which may prove to be misleading and are in need of correction.

Correction of Publication

Accordingly, the publication on October 15, 1996 of the final rule, which were the subject of FR Doc. 96–26246, is corrected as follows:

§ 228.11(b) [Corrected]

1. On page 53618, in the first column, in § 228.11, paragraph (b) is corrected by removing ''non-Free World'' and putting ''foreign policy restricted'' in its place.

§ 228.13 [Corrected]

2. On page 53618, in the second column, in § 228.13, paragraph (b) is corrected by deleting the fifth sentence, which begins on line 23 of the paragraph.

§ 228.14 [Corrected]

3. On page 53628, in the third column, in § 228.14, paragraph (c)(2) is corrected by deleting ''Deputy Assistant Administrator for Management (DAA/M)'' and putting ''Procurement Executive'' in its place.

§ 228.22 [Corrected]

4. On page 53619, in the second column, in § 228.22, paragraph (d), the word ''agreement'' at the end of the paragraph is corrected to read ''agreements''.

§ 228.37 [Corrected]

5. On page 53621, in the first column, in § 228.37, paragraph (b), line nine is corrected by adding the word ''Director'' after ''Mission''.

§ 228.51 [Corrected]

6. On page 53622, in the first column, in § 228.51, paragraph (c) is corrected by adding: ''In no event, however, shall procurement be from a non-Code 935 source.'' at the end of the paragraph.

Dated: December 13, 1996.

Marcus L. Stevenson,

Procurement Executive.

[FR Doc. 97–63 Filed 1–2–97; 8:45 am]

BILLING CODE 6116–01–M

DEPARTMENT OF JUSTICE

28 CFR Part 9

[AG ORDER No. 2064–96]

RIN 1105–AA23

Revision of Regulations Governing the Remission or Mitigation of Civil and Criminal Forfeitures

AGENCY: Department of Justice.

ACTION: Final rule.

SUMMARY: This order amends and adopts rules that govern the processing of petitions for remission and mitigation of forfeitures by the Criminal Division, the Drug Enforcement Administration, the Federal Bureau of Investigation, the Immigration and Naturalization Service, and the United States Marshals Service of the Department of Justice. The amendments are made in an effort to ameliorate the harsh results in individual forfeiture cases and to provide relief to innocent persons whose property is used by others for criminal purposes.

EFFECTIVE DATE: February 3, 1997.

FOR FURTHER INFORMATION CONTACT: Nancy L. Rider, Deputy Chief, Asset Forfeiture and Money Laundering Section, Criminal Division, Department of Justice, Washington, DC 20530, telephone (202) 514–1263. This is not a toll-free number.

SUPPLEMENTARY INFORMATION:

Background

This order amends 28 CFR part 9 primarily so the Department can transfer forfeited assets to victims of the offense or related offenses underlying particular forfeiture actions. Under the current regulations, standing to seek remission or mitigation is limited to parties having a present legally cognizable interest in the forfeited property (*e.g.*, owners, lienholders), and unless a particular victim has such an interest, forfeited assets cannot be used to restore property to those victimized by the criminal conduct. The amendments permit the Department to transfer certain forfeited assets to victims of certain fraud-type offenses who lack a present ownership interest in particular forfeited assets but who are victims of the offense underlying the forfeiture or related offense where the applicable statutes allow such a transfer. These regulations also clarify certain ambiguities in the present regulations pertaining to who has standing to file petitions for remission. The notice of proposed rulemaking for these regulations was published in the Federal Register on June 29, 1994 (59 FR 33457).

Comments

The Department received five comments during the comment period that ended July 29, 1994. Three of the comments pertained to issues relating to the use of remission to transfer seized and forfeited property to victims of the criminal or criminal conduct. Two of the comments concerned the manner in which victims' interests are treated under the new regulations. The purpose of remission is not to effect restitution to all victims of crime, but rather to ameliorate the hardship that may result from forfeiture to those who (i) have an ownership interest in the property, and (ii) others who, even though they do not have a cognizable interest in the property, have incurred a monetary loss as a result of the same underlying or related criminal offense and who are uninvolved in or unaware of the underlying criminal activity that resulted in the forfeiture. Restitution, on the other hand, a remedy that is often confused with remission, is available as an equitable remedy designed to make parties whole and to prevent unjust enrichment.

The Department believes the definition of victim for purposes of the relevant statutes is included in the definition of an owner as found at section 9.2(1), where the victim has a legally cognizable interest in the forfeited property. Victims who do not

have a legally cognizable interest in the property that has been seized and forfeited, but have been victimized by the criminal from whom the property was seized are non-owners and are, to the extent the Department may recognize those interests, covered by section 9.8.

One of the two comments concerning victims suggested the regulation's definition of the word victim be expanded to include an owner-victim, whose ownership interest is based on the fact that the forfeited property was acquired with property wrongfully taken from him, but where the forfeiture was not based on an offense underlying the victim's loss. The example cited was that of a thief who steals money and buys a car that is subsequently forfeited for an offense unrelated to the theft. The concern is that the person from whom the thief stole the money would not be a victim covered under the regulations if the forfeiture was based on an offense unrelated to the theft. The commenter is mistaking remission for restitution. If the government seized and forfeited the stolen money for a reason unconnected to the theft, and the money was clearly taken in the theft, the money would be restored to the individual from whom it had been stolen as the rightful owner. If the thief used stolen money to purchase a vehicle that was subsequently forfeited for a reason unconnected to the theft, the government would not be able to restore the stolen money, nor the vehicle purchased with stolen money, for many practicable and evidentiary reasons, unless the victim clearly established a legally cognizable interest in the forfeited property and thus demonstrated his interest as that of an ''owner'' under section 9.2(1).

Another commenter stated that sections 9.2(v) and 9.8 are inconsistent, in that section 9.2(v) only applies to victims of the offense underlying a forfeiture and excludes or of [a] related offense, which appears in section 9.8. The commenter was correct and the distinction is purposeful. As noted, there is a difference between section 9.2(v) and section 9.8 victims: section 9.2(v) covers owners, who have been victimized by the criminal conduct that was the basis of the forfeiture, while section 9.8 covers non-owners who have been victimized by the criminal conduct that was the basis of the forfeiture or related to the forfeiture. For example, section 9.8 would address victims of a mail fraud scheme where the forfeiture is brought pursuant to the RICO statute—18 U.S.C. § 1963, where such a person would not be covered by section 9.2(v).

Because the sections were drafted to address different types of victims for the reasons previously given, the suggestion to align the two definitions of ''victim'' would be inconsistent with the purpose and intent of these regulations.

The third comment concerning victims issues maintained that the regulations do not appear to have been drafted with an emphasis on forfeiture cases that arise out of financial crimes, *i.e.,* schemes to defraud banks and individuals. The regulations implement federal laws, and relate to the remission of forfeitures conducted pursuant to statutes such as sections 981 and 982 of title 18, United States Code, which permit the forfeiture of the proceeds of certain bank fraud violations, as well as the criminal proceeds of other violations of federal law predicated on schemes to defraud.

Another comment suggested that the regulations ignored forfeitures under title 26, for failure to file Currency Transaction Reports (CTRs), and title 31, for failure to file Currency and Monetary Instrument Reports (CMIRs). It stated that since these statutes do not contain innocent owner provisions, there is no avenue for remission or mitigation for individuals who are affected by title 26 or title 31 forfeitures. The Department of Justice responds by pointing out that section 9.5(a)(1)(ii) specifically provides that ''[i]f the applicable civil forfeiture statute contains no innocent owner defense, the innocent owner provisions applicable to 21 United States Code § 881(a)(4) shall apply.''

The last comment suggested that section 9.6(f)(1)(iii) be amended to allow a judgment creditor to be recognized if he or she had no knowledge of the acts giving rise to the forfeiture at the time of the transaction upon which the judgment was based instead of requiring the creditor to have no knowledge ''at the time the judgment became a lien on the forfeited property.'' The Department responds that section 9.6(f)(1)(iii) is necessarily consistent with the time-of-knowledge standard applicable to *all* petitioners pursuant to section 9.5. The suggested amendment must be rejected as it would provide judgment creditors with an unfair advantage over other petitioners in the petition for remission process.

Recent changes in the Immigration and Naturalization Service organizational structure have modified internal decision-making authority. Accordingly, under section 9.1(b)(1), authority to grant remission and mitigation is now delegated to the INS Regional Directors.

The Department has deleted the last sentence of the definition of the term ''owner'' in section 9.2(l), which provided that ''[t]he mere existence of a community property interest without proof of financial contribution to the purchase of the property will not be deemed sufficient to support a petition.'' This provision was included to guard against spouses of drug dealers and other criminals obtaining a windfall from the proceeds of illegal activities where the petitioning spouse made no financial contribution to the purchase of the property at issue. Though this rationale remains a concern, the sweep of the provision was unduly broad, possibly precluding meritorious petitions by innocent spouses claiming an ownership interest under state community property laws. Accordingly, the Department will review petitions predicated upon state community property laws on a case-by-case basis and may deny such petitions where the petitioning spouse would be unjustly enriched by the proceeds of the offending spouse's criminal wrongdoing.

The Department has made other technical changes in section 9.8 which do not require an additional notice and comment period.

Other Matters

In accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)), the Attorney General certifies that this rule does not have a significant adverse economic impact on a substantial number of small entities. This regulation will not have substantial direct effects on the States, on the relationship between the national government and the States, or on distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 12612, it is determined that this rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment. This regulation has been drafted and reviewed in accordance with Executive Order 12866, § 1(b), Principles of Regulation. The Department of Justice has determined that this rule is a ''significant regulatory action'' under Executive Order 12866, § 3(f), Regulatory Planning and Review; accordingly, it has been reviewed by the Office of Management and Budget.

List of Subjects in 28 CFR Part 9

Administrative practice and procedure, Crime, Seizures and forfeitures.

By virtue of the authority vested in me as Attorney General by 28 U.S.C. 509 and 510, 28 CFR part 9 is revised to read as follows:

PART 9—REGULATIONS GOVERNING THE REMISSION OR MITIGATION OF CIVIL AND CRIMINAL FORFEITURES

Sec.
9.1 Authority, purpose, and scope.
9.2 Definitions.
9.3 Petitions in administrative forfeiture cases.
9.4 Petitions in judicial forfeiture cases.
9.5 Criteria governing administrative and judicial remission and mitigation.
9.6 Special rules for specific petitioners.
9.7 Terms and conditions of remission and mitigation.
9.8 Provisions applicable to victims.
9.9 Miscellaneous provisions.

Authority: 28 U.S.C. 509, 510, 515–518, 524; 8 U.S.C. 1324; 15 U.S.C. 1177; 17 U.S.C. 509; 18 U.S.C. 512, 981, 982, 1467, 1955, 1963, 2253, 2254, 2513; 19 U.S.C. 1613, 1618; 21 U.S.C. 853, 881; 22 U.S.C. 401.

§ 9.1 Authority, purpose, and scope.

(a) *Purpose.* This part sets forth the procedures for agency officials to follow when considering remission or mitigation of administrative forfeitures under the jurisdiction of the agency, and civil judicial and criminal judicial forfeitures under the jurisdiction of the Criminal Division. The purpose of the regulations in this part is to provide a basis for ameliorating the effects of forfeiture through the partial or total remission of forfeiture for individuals who have an interest in the forfeited property but who did not participate in, or have knowledge of, the conduct that resulted in the property being subject to forfeiture and, where required, took all reasonable steps under the circumstances to ensure that such property would not be used, acquired, or disposed of contrary to law. Additionally, the regulations provide for partial or total mitigation of the forfeiture and imposition of alternative conditions in appropriate circumstances.

(b) *Authority to grant remission and mitigation.* (1) Remission and mitigation functions in administrative forfeitures are performed by the agency seizing the property. Within the Federal Bureau of Investigation, authority to grant remission and mitigation is delegated to the Forfeiture Counsel, who is the Unit Chief, Legal Forfeiture Unit, Office of the General Counsel; within the Drug Enforcement Administration, authority to grant remission and mitigation is delegated to the Forfeiture Counsel, Office of Chief Counsel; and within the Immigration and Naturalization Service, authority to grant remission and mitigation is delegated to the INS Regional Directors.

(2) Remission and mitigation functions in judicial cases are performed by the Criminal Division of the Department of Justice. Within the Criminal Division, authority to grant remission and mitigation is delegated to the Chief, Asset Forfeiture and Money Laundering Section, Criminal Division.

(3) The powers and responsibilities delegated by these regulations in this part may be redelegated to attorneys or managers working under the supervision of the designated officials.

(c) The time periods and internal requirements established in this part are designed to guide the orderly administration of the remission and mitigation process and are not intended to create rights or entitlements in favor of individuals seeking remission or mitigation. The regulations will apply to all decisions on petitions for remission or mitigation made on or after February 3, 1997. The regulations will apply to decisions on requests for reconsideration of a denial of a petition under §§ 9.3(j) and 9.4(k) only if the initial decision on the petition was made under the provisions of this part effective on February 3, 1997.

(d) This part governs any petition for remission filed with the Attorney General and supersedes any Department of Justice regulation governing petitions for remission, to the extent such regulation is inconsistent with this part. In particular, this part supersedes the provisions of 21 CFR 1316.79 and 1316.80, which contain remission and mitigation procedures for property seized for narcotics violations. The provisions of 8 CFR 274.13 through 274.19 and 28 CFR 8.10, which concern non-drug related forfeitures, are also superseded by this part where those regulations relate to remission and mitigation.

§ 9.2 Definitions.

As used in this part:

(a) The term *administrative forfeiture* means the process by which property may be forfeited by an investigative agency rather than through judicial proceedings.

(b) The term *appraised value* means the estimated market value of an asset at the time and place of seizure if such or similar property was freely offered for sale between a willing seller and a willing buyer.

(c) The term *Assets Forfeiture Fund* means the Department of Justice Assets Forfeiture Fund or Department of the Treasury Asset Forfeiture Fund, depending upon the identity of the seizing agency.

(d) The term *Attorney General* means the Attorney General of the United States or his or her designee.

(e) The term *beneficial owner* means a person with actual use of, as well as an interest in, the property subject to forfeiture.

(f) The terms *Chief, Asset Forfeiture and Money Laundering Section,* and *Chief,* refer to the Chief of the Asset Forfeiture and Money Laundering Section, Criminal Division, United States Department of Justice.

(g) The term *general creditor* means one whose claim or debt is not secured by a specific right to obtain satisfaction against the particular property subject to forfeiture.

(h) The term *judgment creditor* means one who has obtained a judgment against the debtor but has not yet received full satisfaction of the judgment.

(i) The term *judicial forfeiture* means either a civil or a criminal proceeding in a United States District Court that may result in a final judgment and order of forfeiture.

(j) The term *lienholder* means a creditor whose claim or debt is secured by a specific right to obtain satisfaction against the particular property subject to forfeiture. A lien creditor qualifies as a lienholder if the lien:

(1) Was established by operation of law or contract;

(2) Was created as a result of an exchange of money, goods, or services; and

(3) Is perfected against the specific property forfeited for which remission or mitigation is sought (*e.g.*, a real estate mortgage; a mechanic's lien).

(k) The term *net equity* means the amount of a lienholder's monetary interest in property subject to forfeiture. Net equity shall be computed by determining the amount of unpaid principal and unpaid interest at the time of seizure, and by adding to that sum unpaid interest calculated from the date of seizure through the last full month prior to the date of the decision on the petition. Where a rate of interest is set forth in a security agreement, the rate of interest to be used in this computation will be the annual percentage rate so specified in the security agreement that is the basis of the lienholder's interest. In this computation, however, there shall be no allowances for attorneys' fees, accelerated or enhanced interest charges, amounts set by contract as damages, unearned extended warranty fees, insurance, service contract charges incurred after the date of seizure, allowances for dealer's reserve, or any other similar charges.

(l) The term *owner* means the person in whom primary title is vested or whose interest is manifested by the actual and beneficial use of the property, even though the title is vested in another. A victim of an offense, as

defined in paragraph (v) of this section, may also be an owner if he or she has a present legally cognizable ownership interest in the property forfeited. A nominal owner of property will not be treated as its true owner if he or she is not its beneficial owner.

(m) The term *person* means an individual, partnership, corporation, joint business enterprise, estate, or other legal entity capable of owning property.

(n) The term *petition* means a petition for remission or mitigation of forfeiture under the regulations in this part. This definition includes a petition for restoration of the proceeds of sale of forfeited property and a petition for the value of forfeited property placed into official use.

(o) The term *petitioner* means the person applying for remission, mitigation, restoration of the proceeds of sale, or for the appraised value of forfeited property, under the regulations in this part. A petitioner may be an owner as defined in § 9.2(l), a lienholder as defined in § 9.2(j), or a victim as defined in § 9.2(v), subject to the limitations of § 9.8.

(p) The term *property* means real or personal property of any kind capable of being owned or possessed.

(q) The term *record* means a series of arrests for related crimes, unless the arrestee was acquitted or the charges were dismissed for lack of evidence; a conviction for a related crime or completion of sentence within ten years of the acquisition of the property subject to forfeiture; or two convictions for a related crime at any time in the past.

(r) The term *related crime* as used in § 9.2(q) and § 9.6(e) means any crime similar in nature to that which gives rise to the seizure of property for forfeiture. For example, where property is seized for a violation of the federal laws relating to drugs, a related crime would be any offense involving a violation of the federal laws relating to drugs or the laws of any state or political subdivision thereof relating to drugs.

(s) The term *related offense* as used in § 9.8 means:

(1) Any predicate offense charged in a Federal Racketeer Influenced and Corrupt Organizations Act (RICO) count for which forfeiture was ordered; or

(2) An offense committed as part of the same scheme or design, or pursuant to the same conspiracy, as was involved in the offense for which forfeiture was ordered.

(t) The term *Ruling Official* means any official to whom decision making authority has been delegated pursuant to § 9.1(b).

(u) The term *seizing agency* means the federal agency that seized the property or adopted the seizure of another agency for federal forfeiture.

(v) The term *victim* means a person who has incurred a pecuniary loss as a direct result of the commission of the offense underlying a forfeiture. A drug user is not considered a victim of a drug trafficking offense under this definition. A victim does not include one who acquires a right to sue the perpetrator of the criminal offense for any loss by assignment, subrogation inheritance, or otherwise form the actual victim, unless that person has acquired an actual ownership interest in the forfeited property.

(w) The term *violator* means the person whose use or acquisition of the property in violation of the law subjected such property to seizure for forfeiture.

§ 9.3 Petitions in administrative forfeiture cases.

(a) *Notice of seizure.* The notice of seizure and intent to forfeit the property shall advise any persons who may have a present ownership interest in the property to submit their petitions for remission or mitigation within thirty (30) days of the date they receive the notice in order to facilitate processing. Petitions shall be considered any time after notice until the forfeited property is placed into official use, sold, or otherwise disposed of according to law, except in cases involving petitions to restore the proceeds from the sale of forfeited property. A notice of seizure shall include the title of the seizing agency, the Ruling Official, the mailing and street address of the official to whom petitions should be sent, and an asset identifier number.

(b) *Persons who may file.* A petition for remission or mitigation must be filed by a petitioner as defined in § 9.2(o) or as prescribed in §§ 9.9(g) and (h).

(c) *Contents of petition.* (1) All petitions must include the following information in clear and concise terms:

(i) The name, address, and social security or other taxpayer identification number of the person claiming an interest in the seized property who is seeking remission or mitigation;

(ii) The name of the seizing agency, the asset identifier number, and the date and place of seizure;

(iii) A complete description of the property, including make, model, and serial numbers, if any; and

(iv) A description of the petitioner's interest in the property as owner, lienholder, or otherwise, supported by original or certified bills of sale, contracts, deeds, mortgages, or other documentary evidence.

(2) Any factual recitation or documentation of any type in a petition must be supported by a sworn affidavit.

(d) *Releases.* In addition to the contents of the petition for remission or mitigation set forth in paragraph (c) of this section, upon request, the petitioner shall also furnish the agency with an instrument executed by the titled or registered owner and any other known claimant of an interest in the property releasing interest in such property.

(e) *Filing petition with agency.* (1) A petition for remission or mitigation subject to administrative forfeiture shall be addressed to the appropriate federal agency as follows:

(i) Drug Enforcement Administration, Office of Chief Counsel, Street Address: 700 Army Navy Drive, Arlington, VA 22202

Mailing Address: P.O. Box 28356, Washington, D.C. 20038.

(ii) Federal Bureau of Investigation, Special Agent in Charge, Field Office that seized the property.

(iii) Immigration and Naturalization Service District Director, Chief Patrol Agent, or Regional Asset Forfeiture Office at location with jurisdiction over the forfeiture proceeding.

(2) The petition is to be sent to the official address provided in the notice of seizure and shall be sworn to by the petitioner or by the petitioner's attorney upon information and belief, supported by the client's sworn notice of representation pursuant to 28 U.S.C. 1746, as set out in § 9.9(g). The Chief of the Asset Forfeiture and Money Laundering Section is delegated authority to amend the address of the official to whom petitions may be sent from time to time, as necessary, by publishing notice of the change of address in the Federal Register. Failure to publish a notice of change of address in the Federal Register shall not alter the authority of the Ruling Official to determine petitions for remission or mitigation nor the obligation of a petitioner to file a petition at the address provided in the notice of seizure. Failure to publish a notice of change of address in the Federal Register shall not be grounds for expanding the time for filing a petition for remission or mitigation under the regulations in this part.

(f) *Agency investigation.* Upon receipt of a petition, the seizing agency shall investigate the merits of the petition and prepare a written report containing the results of that investigation. This report shall be submitted to the Ruling Official for review and consideration.

(g) *Ruling.* Upon receipt of the petition and the agency report, the Ruling Official for the seizing agency

shall review the petition and the report, and shall rule on the merits of the petition. No hearing shall be held.

(h) *Petitions granted.* If the Ruling Official grants a remission or mitigation of the forfeiture, a copy of the decision shall be mailed to the petitioner or, if represented by an attorney, to the petitioner's attorney. A copy shall also be sent to the United States Marshals Service or other property custodian. The written decision shall include the terms and conditions, if any, upon which the remission or mitigation is granted and the procedures the petitioner must follow to obtain release of the property or the monetary interest therein.

(i) *Petitions denied.* If the Ruling Official denies a petition, a copy of the decision shall be mailed to the petitioner or, if represented by an attorney, to the petitioner's attorney of record. A copy of the decision shall also be sent to the United States Marshals Service or other property custodian. The decision shall specify the reason that the petition was denied. The decision shall advise the petitioner that a request for reconsideration of the denial of the petition may be submitted to the Ruling Official in accordance with paragraph (j) of this section.

(j) *Request for reconsideration.* (1) A request for reconsideration of the denial of the petition shall be considered if:

(i) It is postmarked or received by the office of the Ruling Official within ten (10) days from the receipt of the notice of denial of the petition by the petitioner; and

(ii) The request is based on information or evidence not previously considered that is material to the basis for the denial or presents a basis clearly demonstrating that the denial was erroneous.

(2) In no event shall a request for reconsideration be decided by the same Ruling Official who ruled on the original petition.

(3) Only one request for reconsideration of a denial of a petition shall be considered.

(k) *Restoration of proceeds from sale.* (1) A petition for restoration of the proceeds from the sale of forfeited property, or for the appraised value of forfeited property when the forfeited property has been retained by or delivered to a government agency for official use, may be submitted by an owner or leinholder in cases in which the petitioner:

(i) Did not know of the seizure prior to the entry of a declaration of forfeiture; and

(ii) Could not reasonably have known of the seizure prior to the entry of a declaration of forfeiture.

(2) Such a petition shall be submitted pursuant to paragraphs (b) through (e) of this section within ninety (90) days of the date the property is sold or otherwise disposed of.

§ 9.4 Petitions in judicial forfeiture cases.

(a) *Notice of seizure.* The notice of seizure and intent to forfeit the property shall advise any persons who may have a present ownership interest in the property to submit their petitions for remission or mitigation within thirty (30) days of the date they receive the notice in order to facilitate processing. Petitions shall be considered any time after notice until such time as the forfeited property is placed in official use, sold, or otherwise disposed of according to law, except in cases involving petitions to restore property. A notice of seizure shall include the title of the Ruling Official and the mailing and street address of the official to whom petitions should be sent, the name of the agency seizing the property, an asset identifier number, and the district court docket number.

(b) *Persons who may file.* A petition for remission or mitigation must be filed by a petitioner as defined in § 9.2(o) or as prescribed in § § 9.9 (g) and (h).

(c) *Contents of petition.* (1) All petitions must include the following information in clear and concise terms:

(i) The name, address, and social security or other taxpayer identification number of the person claiming an interest in the seized property who is seeking remission or mitigation;

(ii) The name of the seizing agency, the asset identifier number, and the date and place of seizure;

(iii) The district court docket number;

(iv) A complete description of the property, including the address or legal description of real property, and make, model, and serial numbers of personal property, if any; and

(v) A description of the petitioner's interest in the property as owner, lienholder, or otherwise, supported by original or certified bills of sale, contracts, mortgages, deeds, or other documentary evidence.

(2) Any factual recitation or documentation of any type in a petition must be supported by a sworn affidavit.

(d) *Releases.* In addition to the content of the petition for remission or mitigation set forth in paragraph (c) of this section, the petitioner, upon request, also shall furnish the agency with an instrument executed by the titled or registered owner and any other known claimant of an interest in the property releasing the interest in such property.

(e) *Filing petition with Department of Justice.* A petition for remission or mitigation of a judicial forfeiture shall be addressed to the Attorney General; shall be sworn to by the petitioner or by the petitioner's attorney upon information and belief, supported by the client's sworn notice of representation pursuant to 28 U.S.C. 1746, as set forth in § 9.9(g); and shall be submitted to the United States Attorney for the district in which the judicial forfeiture proceedings are brought. A petitioner also shall submit a copy of the petition to the seizing agency in the judicial district in which the seizure occurred as specified in the notice of seizure, except in Drug Enforcement Administration cases, where the copy shall be submitted to Drug Enforcement Administration Headquarters, Office of Chief Counsel, P.O. Box 28356, Washington, D.C. 20038, or 700 Army Navy Drive, Arlington, VA 22202.

(f) *Agency investigation and recommendation; United States Attorney's recommendation.* Upon receipt of a petition, the United States Attorney shall direct the seizing agency to investigate the merits of the petition based on the information provided by the petitioner and the totality of the agency's investigation of the underlying basis for forfeiture. The agency shall submit to the United States Attorney a report of its investigation and its recommendation on whether the petition should be granted or denied. Upon receipt of the agency's report and recommendation, the United States Attorney shall forward to the Chief, Asset Forfeiture and Money Laundering Section, the petition, the seizing agency's report and recommendation, and the United States Attorney's recommendation on whether the petition should be granted or denied.

(g) *Ruling.* The Chief shall rule on the petition. No hearing shall be held. The Chief shall not rule on any petition in any case in which similar petition has been administratively denied by the seizing agency prior to the referral of the case to the United States Attorney for the institution of forfeiture proceedings.

(h) *Petitons under Internal Revenue Service liquor laws.* The Chief shall accept and consider petitions submitted in judicial forfeiture proceedings under the Internal Revenue Service liquor laws only prior to the time a decree of forfeiture is entered. Thereafter, district courts have exclusive jurisdiction.

(i) *Petitions granted.* If the Chief grants a remission or mitigates the forfeiture, the Chief shall mail a copy of the decision to the petitioner or, if represented by an attorney, to the petitioner's attorney, the appropriate

United States Attorney, the United States Marshals Service or other property custodian, and the appropriate seizing agency. The written decision shall include the terms and conditions, if any, upon which the remission or mitigation is granted and the procedures the petitioner must follow to obtain release of the property or the monetary interest therein. The Chief shall advise the petitioner or the petitioner's attorney to consult with the United States Attorney as to such terms and conditions. The United States Attorney shall confer with the seizing agency regarding the release and shall coordinate disposition of the property with that office and the United States Marshals Service or other property custodian.

(j) *Petitions denied.* If the Chief denies a petition, a copy of that decision shall be mailed to the petitioner, or if represented by an attorney, to the petitioner's attorney of record, to the appropriate United States Attorney, the United States Marshals Service or other property custodian, and to the appropriate seizing agency. The decision shall specify the reason that the petition was denied. The decision shall advise the petitioner that a request for reconsideration of the denial of the petition may be submitted to the Chief at the address provided in the decision, in accordance with paragraph (k) of this section.

(k) *Request for reconsideration.* (1) A request for reconsideration of the denial shall be considered if:

(i) It is postmarked or received by the Asset Forfeiture and Money Laundering Section at the address contained in the decision denying the petition within ten (10) days from the receipt of the notice of denial of the petition by the petitioner; and

(ii) The request is based on information or evidence not previously considered that is material to the basis for the denial or presents a basis clearly demonstrating that the denial was erroneous. A copy of the request must be received by the appropriate United States Attorney within ten (10) days of the receipt of the denial by the petitioner.

(2) In no event shall a request for reconsideration be decided by the Ruling Official who ruled on the original petition.

(3) Only one request for reconsideration of a denial of a petition shall be considered.

(4) Upon receipt of the request for reconsideration of the denial of a petition, disposition of the property will be delayed pending notice of the decision at the request of the Chief. If the United States Attorney does not receive a copy of the request for reconsideration within the prescribed period, the deposition of the property may proceed.

(l) *Restoration of Proceeds from sale.* (1) A petition for restoration of the proceeds from the sale of forfeited property, or for the appraised value of forfeited property when the forfeited property has been retained by or delivered to a government agency for official use, may be submitted by an owner or lienholder in cases in which the petitioner:

(i) Did not know of the seizure prior to the entry of a final order of forfeiture; and

(ii) Could not reasonably have known of the seizure prior to the entry of a final order of forfeiture.

(2) Such a petition must be submitted pursuant to paragraphs (b) through (e) of this section within ninety (90) days of the date the property was sold or otherwise disposed of.

§ 9.5 Criteria governing administrative and judicial remission and mitigation.

(a) *Remission.* (1) The Ruling Official shall not grant remission of a forfeiture unless the petitioner establishes that:

(i) The petitioner has a valid, good faith, and legally cognizable interest in the seized property as owner or lienholder as defined in this part; and

(ii) The petitioner is innocent within the meaning of the innocent owner provisions of the applicable civil forfeiture statute, is a bona fide purchaser for value without cause to believe that the property was subject to forfeiture at the time of the purchase, or is one who held a legally cognizable interest in the seized property at the time of the violation underlying the forfeiture superior to that of the defendant within the meaning of the applicable criminal forfeiture statute, and is thereby entitled to recover his or her interest in the forfeited property by statute. (If the applicable civil forfeiture statute contains no innocent owner defense, the innocent owner provisions applicable to 21 U.S.C. 881(a)(4) shall apply.) Unless otherwise provided by statute, in the case of petitioners who acquired their interest in the property after the time of the violation underlying the forfeiture, the question of whether the petitioner had knowledge of the violation shall be determined as of the point in time when the interest in the property was acquired.

(2) The knowledge and responsibilities of petitioner's representative, agent, or employee in paragraph (a)(1)(ii) of this section are imputed to the petitioner where the representative, agent, or employee was acting in the course of his or her employment and in furtherance of the petitioner's business.

(3) The petitioner has the burden of establishing the basis for granting a petition for remission or mitigation of forfeited property, a restoration of proceeds of sale or appraised value of forfeited property, or a reconsideration of a denial of such a petition. Failure to provide information or documents and to submit to interviews, as requested, may result in a denial of the petition.

(4) The Ruling Official shall presume a valid forfeiture and shall not consider whether the evidence is sufficient to support the forfeiture.

(5) Willful, materially-false statements or information, made or furnished by the petitioner in support of a petition for remission or mitigation of forfeited property, the restoration of proceeds or appraised value of forfeited property, or the reconsideration of a denial of any such petition, shall be grounds for denial of such petition and possible prosecution for the filing of false statements.

(b) *Mitigation.* (1) The Ruling Official may grant mitigation to a party not involved in the commission of the offense underlying forfeiture:

(i) Where the petitioner has not met the minimum conditions for remission, but the Ruling Official finds that some relief should be granted to avoid extreme hardship, and that return of the property combined with imposition of monetary and/or other conditions of mitigation in lieu of a complete forfeiture will promote the interest of justice and will not diminish the deterrent effect of the law. Extenuating circumstances justifying such a finding include those circumstances that reduce the responsibility of the petitioner for knowledge of the illegal activity, knowledge of the criminal record of a user of the property, or failure to take reasonable steps to prevent the illegal use or acquisition by another for some reason, such as a reasonable fear of reprisal; or

(ii) Where the minimum standards for remission have been satisfied but the overall circumstances are such that, in the opinion of the Ruling Official, complete relief is not warranted.

(2) The Ruling Officials may in his or her discretion grant mitigation to a party involved in the commission of the offense underlying the forfeiture where certain mitigating factors exist, including, but not limited to: the lack of a prior record or evidence of similar criminal conduct; if the violation does not include drug distribution,

manufacturing, or importation, the fact that the violator has taken steps, such as drug treatment, to prevent further criminal conduct; the fact that the violation was minimal and was not part of a larger criminal scheme; the fact that the violator has cooperated with federal, state, or local investigations relating to the criminal conduct underlying the forfeiture; or the fact that complete forfeiture of an asset is not necessary to achieve the legitimate purposes of forfeiture.

(3) Mitigation may take the form of a monetary condition or the imposition of other conditions relating to the continued use of the property, and the return of the property, in addition to the imposition of any other costs that would be chargeable as a condition to remission. This monetary condition is considered as an item of cost payable by the petitioner, and shall be deposited into the Assets Forfeiture Fund as an amount realized from forfeiture in accordance with the applicable statute. If the petitioner fails to accept the Ruling Official's mitigation decision or any of its conditions, or fails to pay the monetary amount within twenty (20) days of the receipt of the decision, the property shall be sold, and the monetary amount imposed and other costs chargeable as a condition to mitigation shall be subtracted from the proceeds of the sale before transmitting the remainder to the petitioner.

§ 9.6 Special rules for specific petitioners.

(a) *General creditors.* A general creditor may not be granted remission or mitigation of forfeiture unless he or she otherwise qualifies as petitioner under this part.

(b) *Rival claimants.* If the beneficial owner of the forfeited property and the owner of a security interest in the same property each files a petition, and if both petitions are found to be meritorious, the claims of the beneficial owner shall take precedence.

(c) *Voluntary bailments.* A petitioner who allows another to use his or her property without cost, and who is not in the business of lending money secured by property or of leasing or renting property for profit, shall be granted remission or mitigation of forfeiture in accordance with the provisions of § 9.5.

(d) *Lessors.* A person engaged in the business of leasing or renting real or personal property on a long-term basis with the right to sublease shall not be entitled to remission or mitigation of a forfeiture of such property unless the lessor can demonstrate compliance with all the requirements of § 9.5.

(e) *Straw owners.* A petition by any person who has acquired a property interest recognizable under this part, and who knew or had reason to believe that the interest was conveyed by the previous owner for the purpose of circumventing seizure, forfeiture, or the regulations in this part, shall be denied. A petition by a person who purchases or owns property for another who has a record for related crimes as defined in § 9.2(r), or a petition by a lienholder who knows or has reason to believe that the purchaser or owner of record is not the real purchaser or owner, shall be denied unless both the purchaser of record and the real purchaser or owner meet the requirements of § 9.5.

(f) *Judgment creditors.* (1) A judgment creditor will be recognized as a lienholder if:

(i) The judgment was duly recorded before the seizure of the property for forfeiture;

(ii) Under applicable state or other local law, the judgment constitutes a valid lien on the property that attached to it before the seizure of the property for forfeiture; and

(iii) The petitioner had no knowledge of the commission of any act or acts giving rise to the forfeiture at the time the judgment became a lien on the forfeited property.

(2) A judgment creditor will not be recognized as a lienholder if the property in question is not property of which the judgment debtor is entitled to claim ownership under applicable state or other local law (e.g., stolen property). A judgment creditor is entitled under this part to no more than the amount of the judgment, exclusive of any interest, costs, or other fees including attorney's fees associated with the action that led to the judgment or its collection.

(3) A judgment creditor's lien must be registered in the district where the property is located if the judgment was obtained outside the district.

§ 9.7 Terms and conditions of remission and mitigation.

(a) *Owners.* (1) An owner's interest in property that has been forfeited is represented by the property itself or by a monetary interest equivalent to that interest at the time of seizure. Whether the property or a monetary equivalent will be remitted to an owner shall be determined at the discretion of the Ruling Official.

(2) If a civil judicial forfeiture action against the property is pending, release of the property must await an appropriate court order.

(3) Where the government sells or disposes of the property prior to the grant of the remission, the owner shall receive the proceeds of that sale, less any costs incurred by the government in the sale. The Ruling Official, at his or her discretion, may waive the deduction of costs and expenses incident to the forfeiture.

(4) Where the owner does not comply with the conditions imposed upon release of the property by the Ruling Official, the property shall be sold. Following the sale, the proceeds shall be used to pay all costs of the forfeiture and disposition of the property, in addition to any monetary conditions imposed. The remaining balance shall be paid to the owner.

(b) *Lienholders.* (1) When the forfeited property is to be retained for official use or transferred to a state or local law enforcement agency or foreign government pursuant to law, and remission or mitigation has been granted to a lienholder, the recipient of the property shall assure that:

(i) In the case of remission, the lien is satisfied as determined through the petition process; or

(ii) In the case of mitigation, an amount equal to the net equity, less any monetary conditions imposed, is paid to the lienholder prior to the release of the property to the recipient agency of foreign government.

(2) When the forfeited property is not retained for official use or transferred to another agency or foreign government pursuant to law, the lienholder shall be notified by the Ruling Official of the right to select either of the following alternatives:

(i) *Return of property.* The lienholder may obtain possession of the property after paying the United States, through the Ruling Official, the costs and expenses incident to the forfeiture, the amount, if any, by which the appraised value of the property exceeds the lienholder's net equity in the property, and any amount specified in the Ruling Official's decision as a condition to remit the property. The Ruling Official, at his or her discretion, may waive costs and expenses incident to the forfeiture. The Ruling Official shall forward a copy of the decision, a memorandum of disposition, and the original releases to the United States Marshals Service or other property custodian who shall thereafter release the property to the lienholder; or

(ii) *Sale of Property and Payment to Lienholder.* Subject to the provisions of § 9.9(a), upon sale of the property, the lienholder may receive the payment of a monetary amount up to the sum of the lienholder's net equity, less the expenses and costs incident to the forfeiture and sale of the property, and any other monetary conditions imposed. The Ruling Official, at his or her

discretion, may waive costs and expenses incident to the forfeiture.

(3) If the lienholder does not notify the Ruling Official of the selection of one of the two options set forth in paragraph (b)(2) of this section within twenty (20) days of the receipt of notification, the Ruling Official shall direct the United States Marshal or other property custodian to sell the property and pay the lienholder an amount up to the net equity, less the costs and expenses incurred incident to the forfeiture and sale, and any monetary conditions imposed. In the event a lienholder subsequently receives a payment of any kind on the debt owed for which he or she received payment as a result of the granting of remission or mitigation, the lienholder shall reimburse the Assets Forfeiture Fund to the extent of the payment received.

(4) Where the lienholder does not comply with the conditions imposed upon the release of the property, the property shall be sold after forfeiture. From the proceeds of the sale, all costs incident to the forfeiture and sale shall first be deducted, and the balance up to the net equity, less any monetary conditions, shall be paid to the lienholder.

§ 9.8 Provisions applicable to victims.

The provisions of this section apply to victims of an offense underlying the forfeiture of property, or of a related offense, who do not have a present ownership interest in the forfeited property (or, in the case of multiple victims of an offense, who do not have a present ownership interest in the forfeited property that is clearly superior to that of other petitioner victims). The provisions of this section apply only with respect to property forfeited pursuant to statutes that explicitly authorize restoration or remission of forfeited property to victims. Victims who have a superior present legally cognizable ownership interest in forfeited property may file petitions, as other owners, subject to the regulations set forth in § 9.7(a). The claims of such owner victims, like those of any other owners, shall have priority over the claims of any non-owner victims whose claims are recognized pursuant to this section.

(a) *Qualification to file.* A victim, as defined in § 9.2(v), of an offense that was the underlying basis for the criminal, civil, or administrative forfeiture of specific property, or a victim of a related offense, may be granted remission of the forfeiture of that property, if in addition to complying with the other applicable provisions of § 9.8, the victim satisfactorily demonstrates that:

(1) A pecuniary loss of a specific amount has been directly caused by the criminal offense, or related offense, that was the underlying basis for the forfeiture, and that the loss is supported by documentary evidence including invoices and receipts;

(2) The pecuniary loss is the direct result of the illegal acts and is not the result of otherwise lawful acts that were committed in the course of a criminal offense;

(3) The victim did not knowingly contribute to, participate in, benefit from, or act in a willfully blind manner towards the commission of the offense, or related offense, that was the underlying basis of the forfeiture;

(4) The victim has not in fact been compensated for the wrongful loss of the property by the perpetrator or others; and

(5) The victim does not have recourse reasonably available to other assets from which to obtain compensation for the wrongful loss of the property.

(b) *Pecuniary loss.* The amount of the pecuniary loss suffered by a victim for which remission may be granted is limited to the fair market value of the property of which the victim was deprived as of the date of the occurrence of the loss. No allowance shall be made for interest foregone or for collateral expenses incurred to recover lost property or to seek other recompense.

(c) *Torts.* A tort associated with illegal activity that formed the basis for the forfeiture shall not be a basis for remission, unless it constitutes the illegal activity itself, nor shall remission be granted for physical injuries to a petitioner or for damage to a petitioner's property.

(d) *Denial of petition.* In the exercise of his or her discretion, the Ruling Official may decline to grant remission where:

(1) There is substantial difficulty in calculating the pecuniary loss incurred by the victim or victims;

(2) The amount of the remission, if granted, would be small compared with the amount of expenses incurred by the government in determining whether to grant remission; or

(3) The total number of victims is large and the monetary amount of the remission so small as to make its granting impractical.

(e) *Pro rata basis.* In granting remission to multiple victims pursuant to this section, the Ruling Official should generally grant remission on a pro rata basis to recognized victims when petitions cannot be granted in full due to the limited value of the forfeited property. However, the Ruling Official may consider, among others, the following factors in establishing appropriate priorities in individual cases:

(1) The specificity and reliability of the evidence establishing a loss;

(2) The fact that a particular victim is suffering an extreme financial hardship;

(3) The fact that a particular victim has cooperated with the government in the investigation related to the forfeiture or to a related persecution or civil action; and

(4) In the case of petitions filed by multiple victims of related offenses, the fact that a particular victim is a victim of the offense underlying the forfeiture.

(f) *Reimbursement.* Any petitioner granted remission pursuant to this part shall reimburse the Assets Forfeiture Fund for the amount received to the extent the individual later receives compensation for the loss of the property from any other source. The petitioner shall surrender the reimbursement upon payment from any secondary source.

(g) *Claims of financial institution regulatory agencies.* In cases involving property forfeitable under 18 U.S.C. 981(a)(1)(C) or (a)(1)(D), the Ruling Official may decline to grant a petition filed by a petitioner in whole or in part due to the lack of sufficient forfeitable funds to satisfy both the petition and claims of the financial institution regulatory agencies pursuant to 18 U.S.C. 981(e)(3) or (7). Generally, claims of financial institution regulatory agencies pursuant to 18 U.S.C. 981(e)(3) or (7) shall take priority over claims of victims.

§ 9.9 Miscellaneous Provisions.

(a) *Priority of payment.* Except where otherwise provided in this part, costs incurred by the United States Marshals Service and other agencies participating in the forfeiture that were incident to the forfeiture, sale, or other disposition of the property shall be deducted from the amount available for remission or mitigation. Such costs include, but are not limited to, court costs, storage costs, brokerage and other sales-related costs, the amount of any liens and associated costs paid by the government on the property, costs incurred in paying the ordinary and necessary expenses of a business seized for forfeiture, awards for information as authorized by statute, expenses of trustees or other assistants pursuant to paragraph (c) of this section, investigative or prosecutive costs specially incurred incident to the particular forfeiture, and costs incurred incident to the processing of the petition(s) for remission or mitigation.

The remaining balance shall be available for remission or mitigation. The Ruling Official shall direct the distribution of the remaining balance in the following order or priority, except that the Ruling Official may exercise discretion in determining the priority between petitioners belonging to classes described in paragraphs (a)(3) and (4) of this section in exceptional circumstances:

(1) Owners;

(2) Lienholders;

(3) Federal financial institution regulatory agencies (pursuant to paragraph (e) of this section), not constituting owners or lienholders; and

(4) Victims not constituting owners or lienholders (pursuant to § 9.8).

(b) *Sale or disposition of property prior to ruling.* If forfeited property has been sold or otherwise disposed of prior to a ruling, the Ruling Official may grant relief in the form of a monetary amount. The amount realized by the sale of the property is presumed to be the value of the property. Monetary relief shall not be greater than the appraised value of the property at the time of seizure and shall not exceed the amount realized from the sale or other disposition. The proceeds of the sale shall be distributed as follows:

(1) Payment of the government's expenses incurred incident to the forfeiture and sale, including court costs and storage charges, if any;

(2) Payment to the petitioner of an amount up to his or her interest in the property;

(3) Payment to the Assets Forfeiture Fund of all other costs and expenses incident to the forfeiture;

(4) In the case of victims, payment of any amount up to the amount of his or her loss; and

(5) Payment of the balance remaining, if any, to the Assets Forfeiture Fund.

(c) *Trustees and other assistants.* In the exercise of his or her discretion, the Ruling Official, with the approval of the Asset Forfeiture and Money Laundering Section, may use the services of a trustee, other government official, or appointed contractors to notify potential petitioners, process petitions, and make recommendations to the Ruling Official on the distribution of property to petitioners. The expense for such assistance shall be paid out of the forfeited funds.

(d) *Other agencies of the United States.* Where another agency of the United States is entitled to remission or mitigation of forfeited assets because of an interest that is recognizable under this part or is eligible for such transfer pursuant to 18 U.S.C. 981(e)(6), such agency shall request the transfer in writing, in addition to complying with any applicable provisions of §§ 9.3 through 9.5. The decision to make such transfer shall be made in writing by the Ruling Official.

(e) *Financial institution regulatory agencies.* A Ruling Official may direct the transfer of property under 18 U.S.C. 981(e) to certain federal financial institution regulatory agencies or an entity acting in their behalf, upon receipt of a written request, in lieu of ruling on a petition for remission or mitigation.

(f) *Transfers to foreign governments.* A Ruling Official may decline to grant remission to any petitioner other than an owner or lienholder so that forfeited assets may be transferred to a foreign government pursuant to 18 U.S.C. 981(i)(1), 19 U.S.C. 1616a(c)(2), or 21 U.S.C. 881(e)(1)(E).

(g) *Filing by attorneys.* (1) A petition for remission or mitigation may be filed by a petitioner or by his or her attorney or legal guardian. If an attorney files on behalf of the petitioner, the petition must include a signed and sworn statement by the client-petitioner stating that:

(i) The attorney has the authority to represent the petitioner in this proceeding;

(ii) The petitioner has fully reviewed the petition; and

(iii) The petition is truthful and accurate in every respect.

(2) Verbal notification of representation is not acceptable. Responses and notification of rulings shall not be sent to an attorney claiming to represent a petitioner unless a written notice of representation is filed. No extensions of time shall be granted due to delays in submission of the notice of representation.

(h) *Consolidated petitions.* At the discretion of the Ruling Official in individual cases, a petition may be filed by one petitioner on behalf of other petitioners, provided the petitions are based on similar underlying facts, and the petitioner who files the petition has written authority to do so on behalf of the other petitioners. This authority must be either expressed in documents giving the petitioner the authority to file petitions for remission, or reasonably implied from documents giving the petitioner express authority to file claims or lawsuits related to the course of conduct in question on behalf of these petitioners. An insurer or an administrator of an employee benefit plan, for example, which itself has standing to file a petition as a ''victim'' within the meaning of § 9.2(v), may also file a petition on behalf of its insured or plan beneficiaries for any claims they may have based on co-payments made to the perpetrator of the offense underlying the forfeiture or the perpetrator of a ''related offense'' within the meaning of § 9.2(s), if the authority to file claims or lawsuits is contained in the document or documents establishing the plan. Where such a petition is filed, any amounts granted as a remission must be transferred to the other petitioners, not the party filing the petition; although, in his or her discretion, the Ruling Official may use the actual petitioner as an intermediary for transferring the amounts authorized as a remission to the other petitioners.

Dated: December 19, 1996.

Janet Reno,

Attorney General.

[FR Doc. 97–117 Filed 1–2–97; 8:45 am]

BILLING CODE 4410–14–M

GENERAL SERVICES ADMINISTRATION

41 CFR Part 101–38

[FPMR Amendment G–111]

RIN 3090–AG26

Motor Vehicles

AGENCY: Office of Governmentwide Policy, GSA.

ACTION: Final rule.

SUMMARY: This regulation updates fuel economy standards; provides references to the newly-established General Services Administration (GSA) Office of Governmentwide Policy; updates reporting requirements pertaining to leasing vehicles from commercial activities; updates organizational titles within the Departments of Agriculture, Labor and the Treasury; and provides unlimited exemptions from the requirement to display official U.S. Government tags and other identification for certain activities of the Environmental Protection Agency, GSA, and the Departments of Defense, Housing and Urban Development, Transportation, and Veterans Affairs (VA). The regulation also revises residence to place of employment procedures for users of GSA Interagency Fleet Management System vehicles; revises restrictions on the use of leaded gasoline in Government-owned or -leased motor vehicles; reformats the Table of Minimum Replacement Standards; revises requirements for the use of the SF 149, U.S. Government National Credit Card, and SF 149A, U.S. Government Fleet Credit Card, and makes minor editorial changes. This

regulation is issued to show new references to the GSA Office of Governmentwide Policy; reflect new fuel economy standards issued by the Secretary of Transportation, to update exemptions for the identification of motor vehicles, to update gasoline requirements for Government operated motor vehicles; to provide a separate replacement category for ambulances, to delete the restriction that fuel credit cards cannot be used for vehicles leased or rented from commercial sources for less than 60 continuous days, and to update the regulation in light of current industry practices, other regulatory requirements, and improved readability. The intended result is to reduce administrative burdens on agencies, to update 41 CFR Part 38 in light of other regulatory issuances, to provide updated fuel economy standards, to update the list of activities authorized exemption from the requirement to display official U.S. Government identification and license plates, and to correct organizational structure inconsistencies caused by agency reorganizations.

EFFECTIVE DATE: January 3, 1997.

FOR FURTHER INFORMATION CONTACT: Michael W. Moses, Office of Governmentwide Policy, Federal Vehicle Policy Division (202–501–2507) or E-mail at mike.moses@gsa.gov.

SUPPLEMENTARY INFORMATION: The GSA has determined that this rule is not a significant rule for the purposes of Executive Order 12866.

Regulatory Flexibility Act

This final rule is not required to be published in the Federal Register for notice and comment. Therefore, the Regulatory Flexibility Act does not apply.

GSA has established the Office of Governmentwide Policy (OGP) in response to President Clinton's request for GSA to place greater emphasis on its policy functions. The new Federal Vehicle Policy Division (MTV), within the Office of Transportation and Personal Property of OGP, is tasked with establishing Governmentwide policies that promote efficiency and economy in the operation of Federal agency vehicle fleets. Some of the Governmentwide functions previously performed by the GSA Interagency Fleet Management Division are now the responsibility of this new office. The regulation is being updated to reflect this new office, where appropriate.

GSA's Interagency Fleet Management System (IFMS) has been a ''provider of choice'' since its inception in 1954. Vehicle support from the IFMS has historically been based upon mutual agreement between GSA and executive agencies based on cost effectiveness and the availability of vehicles. The regulation currently requires executive agencies desiring to lease vehicles for 60 consecutive days or more to first obtain a determination from GSA of whether vehicle requirements can be satisfied through the IFMS. This requirement may be interpreted to mean that the IFMS is a mandatory source for vehicle services. Accordingly, the regulation is revised to remove this requirement.

The Secretary of Transportation establishes yearly fleet average fuel economy standards for passenger automobiles and light trucks. Prior to this amendment, 41 CFR 101–38.104 provided fuel economy standards through fiscal year 1995 for passenger automobiles and through fiscal year 1994 for light trucks. The Secretary of Transportation has established fuel economy standards for passenger automobiles through fiscal year 1998, and for light trucks through fiscal year 1997. Accordingly, the FPMR is updated by this amendment to reflect these additional standards.

On May 1, 1996, the Defense Logistics Agency (DLA) requested an unlimited exemption from the requirement to display U.S. Government identification on vehicles used for intelligence, investigative, or security purposes. This request was approved by GSA.

On April 29, 1996, the Environmental Protection Agency requested an unlimited exemption from the requirement to display U.S. Government identification on vehicles used for law enforcement and investigative duties. The request was specifically for the Office of Inspector General and the Office of Enforcement and Compliance Assurance. This request was approved by GSA.

On April 9, 1996, the GSA Public Buildings Service requested an unlimited exemption from the requirement to display U.S. Government identification on vehicles assigned to the GSA Federal Protective Service. The request specifically identified Special Agents of the GSA Federal Protective Service engaged in criminal investigations and surveillance activities. On May 10, 1996, a similar request was received for the GSA Office of Inspector General. These requests were approved by GSA.

On January 30, 1996, the Department of Transportation, Federal Highway Administration requested an unlimited exemption from the requirement to display U.S. Government identification in lieu of requesting a continuation of the limited exemption now in effect. The request specifically identified Special Agents of the Idaho Division Office of Motor Carriers, Federal Highway Administration. This request was approved by GSA.

On October 12, 1995, the Department of the Treasury requested that Federal Property Management Regulations, § 101–38.204–1(u), be corrected to reflect current organizational titles for activities within the Bureau of Alcohol, Tobacco, and Firearms (ATF). Specifically, the request stated that the Office of Criminal Enforcement and the Office of Internal Affairs within ATF had been changed on October 1, 1994, to the Office of Enforcement and the Office of Inspection. On May 6, 1996, the Department of Labor requested that § 101–38.204–1(m) be corrected to reflect an organizational change within DOL. Specifically, the Office of Manpower Administration (Bureau of Apprenticeship and Training) is now identified as the Employment and Training Administration. A similar request to correct organizational titles within § 101–38.204–1(b) was received from the Department of Agriculture on May 15, 1996. The regulation is being changed to reflect these new titles.

On May 7, 1996, the Department of Housing and Urban Development requested an unlimited exemption from the requirement to display official U.S. Government tags and other identification for vehicles used by the Office of Inspector General for law enforcement and investigative purposes. GSA approved this request.

On August 7, 1995, the Department of Veterans Affairs requested an unlimited exemption from the requirement to display official U.S. Government tags and other identification for regional Field Inspectors and Property Management Inspectors. GSA approved this request on August 22, 1995, and is changing this regulation to reflect this additional exemption.

Prior to May 1993, the GSA Interagency Fleet Management Division (IFMS) required customer agencies to notify the servicing GSA Fleet Management Center when vehicle operators were allowed residence to place of employment travel in IFMS vehicles. When GSA's internal handbook was rewritten in May 1993, this requirement was deleted to reduce the workload on customer agencies and GSA. This regulation removes this reporting requirement.

On February 2, 1996, the Environmental Protection Agency published a direct final rule titled Prohibition on Gasoline Containing Lead or Lead Additives for Highway Use (40 CFR part 80). The regulation promulgated provisions in the Clean Air

Act which prohibit the introduction of gasoline containing lead or lead additives into commerce for use as a motor vehicle fuel after December 31, 1995. Accordingly, the provisions in 41 CFR 101–38.401–1 concerning the restrictions on the use of leaded gasoline in Government-owned or -leased motor vehicles operated within the 50 States is no longer needed and is being removed.

Federal Property Management Regulations Amendment G–78 was issued on April 4, 1986. This amendment reformatted FPMR Parts 101–38 and 101–39 to separate issues covering the Federal fleet as a whole and issues concerning interagency motor pool management. Prior to the issuance of FPMR G–78, minimum replacement standards for ambulances were identified as a separate entity. Amendment G–78 grouped ambulances with sedans and station wagons under a passenger vehicle category. The Department of Defense (DOD) has requested that ambulances be returned to a separate category, since ambulances are routinely classified as special purpose vehicles built and operated for a distinct purpose other than transporting passengers. GSA agrees with DOD's request and is revising the Table of Minimum Replacement Standards accordingly.

The Department of Health and Human Services, Food and Drug Administration, has requested a deviation from § 101–38.800 of the FPMR. The agency's investigative mission requires the short- term rental of commercial motor vehicles on a routine basis. The regulation now states that Government fuel credit cards can only be used for vehicles rented or leased for 60 continuous days or more; thus, an agency must pay cash for fuel purchases and be reimbursed through imprest funds. This procedure is time consuming and does not take advantage of the Government's exemption from State sales taxes. Additionally, with the discontinuance of GSA IFMS dispatch vehicle services at most locations, the Government has increased its reliance on the commercial sector for short-term vehicle needs. GSA has decided that the 60-day restriction is burdensome for the Government as a whole and no longer makes good economic sense. This restriction is being removed.

On April 16, 1996, GSA informally sent a draft copy of this amendment to all major Federal agencies asking for their comment on the proposed changes and to solicit additional changes not included in that draft. Comments were received from the Departments of Agriculture, Defense, Labor, Treasury, and Veterans Affairs and the Environmental Protection Agency. These comments involved changes in organizational structures, additional exemptions to 41 CFR 101–38.204–1, and editorial changes to improve readability. These comments are addressed in this amendment.

List of Subjects

41 CFR Part 101–38

Energy conservation, Government property management, Motor vehicles, Reporting and record keeping requirements.

For the reasons set out in the preamble, 41 CFR Part 101–38 is amended as follows:

1. The authority citation for part 101–38 continues to read as follows:

Authority: Sec. 205(c), 63 Stat. 390; (40 U.S.C. 486(c)).

PART 101–38—MOTOR EQUIPMENT MANAGEMENT

1a. The heading of Part 101–38 is revised to read as set forth above.

2. Section 101–38.001–19 is revised to read as follows:

§ 101–38.001–19 Light truck.

Light truck means a truck up to 8,500 pounds gross vehicle weight rating (GVWR), which is a four-wheeled vehicle propelled by fuel (gasoline, diesel, or an alternative fuel such as natural gas, ethanol, or methanol), is manufactured primarily for use on public streets, roads, and highways, and is contained in Federal Standard No. 307 (Trucks: Light commercial, two-wheel drive) or Federal Standard No. 292 (Trucks: Light commercial, four-wheel drive).

3. Section 101–38.104 is amended by revising paragraphs (b)(2), (b)(3), and (b)(4) (ii) (A) through (E) to read as follows:

§ 101–38.104 Fuel efficient passenger automobiles and light trucks.

* * * * *

(b) * * *

(1) * * *

(2) The Federal fleet program enables GSA to determine the total fleet average fuel economy achieved by all executive agencies at the end of each fiscal year and to provide management assistance to agencies to ensure compliance with Executive Order 12375. Copies or synopses of actual vehicle leases and vehicle purchases not procured through the GSA Automotive Center shall be forwarded to the General Services Administration, ATTN: MTV, Washington, DC 20405, not later than December 1st of each year, in accordance with the requirements set forth in § 101–38.105.

(3) Passenger automobiles and light trucks acquired by executive agencies must meet the fleet average fuel economy objectives set forth below for the appropriate fiscal year:

Fiscal year	Miles per gallon			
	Average [1] fuel economy standard	Passenger automobiles	Light trucks	
			Fleet average fuel [2] economy 4 × 2	Fleet average fuel [2] economy 4 × 4
1977	18.0	18.0		
1978	18.0	20.0		
1979	19.0	22.0	17.2	15.8
1980	20.0	24.0	16.0	14.0
1981	22.0	26.0	16.7	15.0
1982	24.0	24.0	18.0	16.0
1983	26.0	26.0	19.5	17.5
1984	27.0	27.0	20.3	18.5
1985	27.5	27.5	19.7	18.9
1986	26.0	26.0	20.5	19.5
1987	26.0	26.0	21.0	19.5
1988	26.0	26.0	21.0	19.5

Fiscal year	Miles per gallon			
	Average [1] fuel economy standard	Passenger automobiles	Light trucks	
			Fleet average fuel [2] economy 4 × 2	Fleet average fuel [2] economy 4 × 4
1989	26.5	26.5	21.5	19.0
1990	27.5	27.5	20.5	19.0
1991	27.5	27.5	20.7	19.1
1992	27.5	27.5	[3] 20.2	[3] 20.2
1993	27.5	27.5	[3] 20.4	[3] 20.4
1994	27.5	27.5	[3] 20.5	[3] 20.5
1995	27.5	27.5	[3] 20.6	[3] 20.6
1996	27.5	27.5	[3] 20.7	[3] 20.7
1997	27.5	27.5	[3] 20.7	[3] 20.7
1998 and beyond	27.5	27.5	([4])	([4])

* * * * *

(4) * * *

(ii) * * *

(A) Six-cylinder automatic transmission passenger vans and cargo vans (200) divided by 22.1 mpg, plus

(B) Eight-cylinder automatic transmission passenger vans and cargo vans (75) divided by 19.2 mpg, plus

(C) Six-cylinder manual transmission pick-ups (100) divided by 20.8 mpg, plus

(D) Sic-cylinder automatic transmission pick-ups (200) divided by 20.5 mpg, plus

(E) Six-cylinder automatic transmission compact van wagons (25) divided by 23.4 mpg.

$$= \frac{600}{\frac{200}{22.1} + \frac{75}{19.2} + \frac{100}{20.8} + \frac{200}{20.5} + \frac{25}{23.4}}$$

$$= \frac{600}{9.0490 + 3.9063 + 4.8077 + 9.7561 + 1.0684}$$

$$= \frac{600}{28.5883} = 20.9876 \left(\text{Rounded to nearest 0.1 mpg}\right)$$

* * * * *

4. Section 101–38.105 is amended by revising paragraphs (a), (e), (h) and (i) to read as follows:

§ 101–38.105 Agency purchase and lease of motor vehicles.

(a) Executive agencies that obtain a waiver of the provisions of § 101–26.501–1 in accordance with paragraphs (b) and (c) of that section may acquire vehicles without using the services of the GSA Automotive Center. Copies or synopses of actual vehicle leases and purchases acquired for domestic fleets which are not acquired through the GSA Automotive Center will be furnished to the General Services Administration, ATTN: MTV, Washington, DC 20405. Each submission shall use the unadjusted combined city/highway mileage ratings for passenger automobiles and light trucks developed by the Environmental Protection Agency (EPA) for each fiscal year. The submissions shall be forwarded to GSA as soon as possible after the purchase or effective date of the lease. All submissions for the previous fiscal year shall reach GSA by December 1st of each year. GSA issues information concerning the EPA mileage ratings and miles per gallon rating guidance to assist agencies in the timely planning of their acquisitions. Agencies not intending to purchase or lease vehicles or agencies that satisfy their total motor vehicle requirements through the GSA Interagency Fleet Management System shall so inform GSA.

* * * * *

(e) In order to maintain a master record of all leased passenger vehicles and light trucks under 8,500 pounds (GVWR), agencies shall forward to the General Services Administration, ATTN: MTV, Washington, DC 20405, copies or synopses of lease agreements for those vehicles leased for a period of 60 continuous days or more, or they may submit the following information:

(1) Number of vehicles, by category;

(2) Year;

(3) Make;

(4) Model;

(5) Transmission type (if manual, number of forward speeds);

(6) Cubic inch displacement;

(7) Fuel type (i.e., gasoline or alternative fuel);

(8) Monthly lease cost;

(9) Duration of lease (include option to renew);

(10) Vehicle type (4X2 or 4X4—light trucks only);

(11) Gross vehicle weight rating (GVWR): Light trucks only; and

(12) Lessor's name and address.

* * * * *

(h) Agencies may request GSA assistance when planning their acquisitions by contacting the General Services Administration, Attn: MTV, Washington, DC 20405.

(i) Information concerning vehicles purchased for agencies by the GSA Automotive Center is provided

internally; therefore, vehicles procured by GSA are not required to be reported.

§ 101–38.106 [Removed]

5. Section 101–38.106 is removed.

6. Section 101–38.200 is amended by revising paragraphs (f) and (g) to read as follows:

§ 101–38.200 General requirements.

* * * * *

(f) Exemptions, in addition to those authorized in §§ 101–38.204–1 and 101–38.204–2 may be authorized by the head of the agency or designee upon written certification that conspicuous identification will interfere with the purpose for which the motor vehicle is used. This certification shall be maintained at the agency headquarters. A copy of this certification shall also be provided to the General Services Administration, Attn: FBF, Washington, DC 20406, if the vehicle is obtained through the GSA Interagency Fleet Management System. Approval by GSA will not be required. The certification must state that the motor vehicle(s) is (are) acquired and used primarily for the purpose of investigative, law enforcement, or intelligence duties involving security activities or for safety of the vehicle's occupant(s), and that the identification of the motor vehicle(s) would interfere with the discharge of such duties or endanger the security of individuals or the United States Government. Vehicles regularly used for common administrative purposes not directly connected with the performance of law enforcement, investigative, or intelligence duties involving security activities shall not be exempt. All exemptions granted under the provisions of this § 101–38.200(f) are limited to 1 year. If the requirement for exemption still exists at the end of the year, the agency shall recertify its intent to continue the exemption. A copy of this certification shall be forwarded to GSA if the vehicle is leased from the GSA Interagency Fleet Management System.

(g) Certain organizational units of Federal agencies may be authorized to remove official Government markings and substitute license plates issued by the appropriate State, Commonwealth, territory, or possession whenever the agency head or designee determines that temporary removal is in the public interest. A written determination and justification for temporary removal of official Government markings shall be maintained at the agency headquarters. This determination shall also be submitted to the General Services Administration, Attn: FBF, Washington, DC 20406, if the vehicle is leased from the GSA Interagency Fleet Management System.

7. Section 101–38.202–2 is amended by revising paragraph (b)(1) to read as follows:

§ 101–38.202–2 Outside the District of Columbia.

* * * * *

(b) * * *

(1) Purchase orders shall include the code letters to be imprinted on the tags; the dates on which deliveries are required; the consignee and shipping instructions; the symbol number of the appropriation to be charged; and the signature of an officer authorized to obligate the cited appropriation.

* * * * *

8. Section 101–38.202–4 is revised to read as follows:

§ 101–38.202–4 Numbering and coding.

Official U.S. Government tags shall be numbered serially for each executive agency, beginning with 101, and shall be preceded by a letter code designating the agency having accountability for the motor vehicles as follows:

ACTION	ACT
Agriculture, Department of	A
Air Force, Department of the	AF
Army, Department of the	W
Commerce, Department of	C
Consumer Product Safety Commission	CPSC
Corps of Engineers, Civil Works	CE
Defense Commissary Agency	DECA
Defense Contract Audit Agency	DA
Defense, Department of	D
Defense Logistics Agency	DLA
District of Columbia Redevelopment Land Agency	LA
Education, Department of	ED
Energy, Department of	E
Enrichment Corporation, U.S.	EC
Environmental Protection Agency	EPA
Executive Office of the President	EO
Council of Economic Advisers, National Security Council, Office of Management and Budget	
Export-Import Bank of the United States	EB
Federal Communications Commission	FC
Federal Deposit Insurance Corporation	FD
Federal Emergency Management Agency	FE
Federal Home Loan Bank Board	FB
Federal Mediation and Conciliation Service	FM
Federal Reserve System	FR
Federal Trade Commission	FT
General Accounting Office	GA
General Services Administration	GS
Government Printing Office	GP
Health and Human Services, Department of	HHS
Housing and Urban Development, Department of	H
Interagency Fleet Management System, GSA	G
Interior, Department of	I
Judicial Branch of the Government	JB
Justice, Department of	J
Labor, Department of	L
Legislative Branch	LB
Marine Corps	MC
National Aeronautics and Space Administration	NA

National Capital Housing Authority	NH
National Capital Planning Commission	NP
National Guard Bureau	NG
National Labor Relations Board	NL
National Science Foundation	NS
Navy, Department of the	N
Nuclear Regulatory Commission	NRC
Office of Personnel Management	OPM
Panama Canal Commission	PC
Railroad Retirement Board	RR
Securities and Exchange Commission	SE
Selective Service System	SS
Small Business Administration	SB
Smithsonian Institution	SI
National Gallery of Art	
Soldiers' and Airmen's Home, U.S.	SH
State, Department of	S
Tennessee Valley Authority	TV
Transportation, Department of	DOT
Treasury, Department of the	T
United States Information Agency	IA
United States Postal Service	P
Veterans Affairs, Department of	VA

9. Section 101–38.202–5 is revised to read as follows:

§ 101–38.202–5 Requests for additional code designations.

Additional code designations are issued by GSA upon written request to General Services Administration, ATTN: MTV, Washington, DC 20405.

10. Section 101–38.204–1 is amended by redesignating paragraphs (h) through (v) as paragraphs (k) through (y); adding paragraphs (h), (i) and (j); and revising paragraphs (b), (d), and redesignated paragraphs (n), (v), (w), and (x) to read as follows:

§ 101–38.204–1 Unlimited exemptions.

* * * * *

(b) *Agriculture, Department of.* Motor vehicles that the Agricultural Marketing Service, Animal and Plant Health Inspection Service, Food Safety and Inspection Service, Forest Service, Grain Inspection, Packers and Stockyard Administration, Packers and Stockyard Program, Food and Consumer Service, and Office of Inspector General use in the conduct of investigative or law enforcement activities.

* * * * *

(d) *Defense, Department of.* Motor vehicles used for intelligence, investigative, or security purposes, including such vehicles used by the U.S. Army Intelligence Agency and the Criminal Investigation Command of the Department of the Army; Office of Naval Intelligence of the Department of the Navy; Office of Special Investigations of the Department of the Air Force; the Defense Criminal Investigation Service, Office of the Inspector General; and the Defense Logistics Agency.

* * * * *

(h) *Environmental Protection Agency.* Motor vehicles used for law enforcement and investigative purposes operated by the Office of Inspector General and the Office of Enforcement and Compliance Assurance.

(i) *Federal Communications Commission.* Motor vehicles operated by the Field Operations Bureau for investigative purposes.

(j) *General Services Administration.* Motor vehicles operated by Special Agents of the Public Buildings Service, Federal Protective Service and Special Agents of the Office of Inspector General while engaged in criminal investigations, surveillance, and security activities.

* * * * *

(n) *Justice, Department of.* All motor vehicles operated in undercover law enforcement activities or investigative work by the Department.

* * * * *

(v) *State, Department of.* All motor vehicles designated for the protection of both domestic and foreign dignitaries and motor vehicles used in the investigations of passport and visa fraud cases.

(w) *Transportation, Department of.* All motor vehicles used for intelligence, investigative, or security purposes by the DOT Office of Inspector General; the OST Office of Security; the Investigations and Security Division and field counterparts in the U.S. Coast Guard; the Office of Civil Aviation Security and field counterparts in the Federal Aviation Administration; and the Idaho Division Office of Motor Carriers in the Federal Highway Administration.

(x) *Treasury, Department of the.* All motor vehicles operated by the U.S. Secret Service; Criminal Investigation Division, Internal Security Division, and vehicles used for investigative purposes by the Collection Division of the Internal Revenue Service; the Office of Enforcement and the Office of Inspection of the Bureau of Alcohol, Tobacco, and Firearms; and the Office of Enforcement, Office of Compliance Operations, and Office of Internal Affairs of the U.S. Customs Service.

* * * * *

11. Section 101–38.204–4 is revised to read as follows:

§ 101–38.204–4 Report of exempted motor vehicles.

The head of each executive agency shall submit a report, upon request, to the General Services Administration, ATTN: MTV, Washington, DC 20405, concerning motor vehicles exempted under Subpart 101–38.2. Interagency report control number 1537–GSA–AR has been assigned to this reporting requirement.

12. Section 101–38.301 is revised to read as follows:

§ 101–38.301 Authorized use.

Officers and employees of the Government shall use Government-owned or -leased motor vehicles for official purposes only. ''Official purposes'' does not include transportation of an officer or employee between his or her residence and place of employment, unless authorized under the provisions of 31 U.S.C. 1344, or other applicable law. A copy of any written approval shall be maintained at the appropriate level within the agency. Each agency should establish procedures to monitor and control the use of its vehicles at all times. Officers and employees entrusted with a motor vehicle are responsible for the proper care, operation, maintenance, and protection of the vehicle. Any officer or employee who uses or authorizes the use of such vehicle for other than official purposes is subject to a suspension of at least 1 month or, up to

and including, removal by the head of the agency (31 U.S.C. 1349).

13. Section 101–38.401–1 is amended by removing the introductory text, redesignating paragraph (c) as paragraph (b), and revising paragraph (a) introductory text to read as follows:

§ 101–38.401–1 Gasoline for use in motor vehicles.

(a) Unleaded (0.05gm/gal.) gasoline shall be used in all Government-operated motor vehicles used overseas unless—

(1) * * *

(2) * * *

(b) Under no circumstances should premium gasoline be used in Government-owned vehicles, except for those vehicles that require premium gasoline.

14. Section 101–38.401–2 is amended by revising the introductory text and removing paragraphs (a) through (d) to read as follows:

§ 101–38.401–2 Use of self-service pumps.

Heads of agencies shall require the use of self-service pumps by their motor vehicle operators when purchasing fuel at commercial service stations with self-service pumps to the fullest extent possible. Operators should minimize the cost of fuel purchases by using service stations which accept the Standard Form 149, U.S. Government National Credit Card, and SF 149A, U.S. Government Fleet Credit Card, for gasoline purchases at self-service pumps.

15. Section 101–38.402 is amended by revising paragraph (a) to read as follows:

§ 101–38.402 Replacement standards.

(a) Table of minimum replacement standards.

TABLE OF MINIMUM REPLACEMENT STANDARDS

Vehicle description	Life expectancy	
	Years	Miles
Sedans/Station Wagons	3	60,000
Ambulances	7	60,000
Buses:		
Intercity-Type	N/A	280,000
City-Type	N/A	150,000
School-Type	N/A	80,000
Trucks:		
Less than 12,500 pounds GVWR	6	50,000
12,500—23,999 GVWR	7	60,000
24,000 pounds and over	9	80,000
4-or 6-wheel drive vehicles	6	40,000

* * * * *

16. Section 101–38.504 is revised to read as follows:

§ 101–38.504 Assistance to agencies.

GSA is available to assist agencies in establishing or revising their scheduled maintenance programs. Requests for this assistance shall be submitted by owning agencies to the General Services Administration, ATTN: MTV, Washington, DC 20405.

17. Section 101–38.701 is amended by revising paragraph (a)(1) to read as follows:

§ 101–38.701 Transfer of title for Government-owned motor vehicles.

(a) * * *

(1) All Government-owned motor vehicles to be titled by State motor vehicle activities shall be transferred by executing Standard Form (SF) 97, The United States Government Certificate to Obtain Title to a Vehicle. The use of this form in foreign countries is optional.

* * * * *

18. Section 101–38.800 is amended by revising paragraph (f) to read as follows:

§ 101–38.800 General.

* * * * *

(f) The SF 149 and SF 149A may be used for any properly identified U.S. Government motor vehicle, boat, small aircraft, or nonvehicular equipment.

19. Section 101–38.903 is amended by revising paragraphs (a) and (b)(1) to read as follows:

§ 101–38.903 Reporting of data.

(a) Federal agencies shall use Standard Form 82, Agency Report of Motor Vehicle Data, to report vehicle inventory, cost, and operating data to GSA. Interagency Report Control Number 1102–GSA–AN has been assigned to this reporting requirement.

(b) * * *

(1) Each owning agency shall submit a Standard Form 82 to the General Services Administration, ATTN: MTV, Washington, DC 20405 within 75 calendar days after the end of the fiscal year.

* * * * *

Dated: October 28, 1996.

David J. Barram,

Acting Administrator of General Services.

[FR Doc. 97–52 Filed 1–2–97; 8:45 am]

BILLING CODE 6820–24–P

FEDERAL MARITIME COMMISSION

46 CFR Part 572

[Docket No. 94–31]

Post-Effective Reporting Requirements for Agreements Among Ocean Common Carriers Subject to the Shipping Act of 1984

AGENCY: Federal Maritime Commission.

ACTION: Final Rule; lifting of stay.

SUMMARY: The Federal Maritime Commission (''FMC'' or ''Commission'') is lifting the stay of monitoring report requirements contained in its agreement regulations. The filing of the quarterly monitoring reports will begin with the report covering the first quarter of calendar year 1997.

EFFECTIVE DATE: 46 CFR 572.701(a) and 572.702, which were stayed at 61 FR 11564, March 21, 1996, are effective January 3, 1997.

FOR FURTHER INFORMATION CONTACT: Austin L. Schmitt, Director, Bureau of Economics and Agreement Analysis, Federal Maritime Commission, 800 North Capitol Street, N.W., Washington, DC 20573–0001, 202–523–5787.

SUPPLEMENTARY INFORMATION: In Docket No. 94–31, *Information Form and Post-Effective Reporting Requirements for Agreements Among Ocean Common*

Carriers Subject to the Shipping Act of 1984, the Federal Maritime Commission amended its regulations set forth in 46 CFR Part 572 governing the filing, processing and review of agreements subject to the Shipping Act of 1984. 61 FR 11 564 (Mar. 21, 1996) and 61 FR 40530 (Aug. 5, 1996). For the most part, these amended regulations became effective on April 19, 1996. Since that date, new agreements have been required to comply with the revised information form provisions. However, the proper application of the new monitoring report provisions in 46 CFR 572.701–572.705 to agreements already in effect could not be determined immediately, because the market share data necessary to separate Class A/B agreements into Class A and Class B was not readily available. Accordingly, the Commission stayed the effectiveness of the monitoring report provisions of the final rule until further notice. Under section 15 of the 1984 Act, the Commission has directed all existing Class A/B agreements to submit reports that include the information demanded of new Class A/B agreements under the information form regulations, including market share data.

The market share data has been submitted to the Commission, and existing Class A/B agreements can now be assigned their appropriate rereporting classifications. Those agreements are being notified, via letter, of their reporting classification for 1997.

Therefore, the Commission is lifting the stay of the monitoring report provisions at 46 CFR 572.701(a) and 572.702. With this action, the lifting of quarterly monitoring reports, including those applicable to Class C agreements, will begin with the report covering the first quarter (i.e., January-March) of calendar year 1997, which is to be filed within 75 days of the end of that quarter, pursuant to 46 CFR 572.701(f).

By the Commission.

Joseph C. Polking,

Secretary.

[FR Doc. 97–60 Filed 1–2–97; 8:45 am]

BILLING CODE 6730–01–M

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[MM Docket No. 95–50; RM–8581; RM–8662]

Radio Broadcasting Services; Willcox, AZ; Lordsburg, NM

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: This document substitutes Channel 285C3 for Channel 252A at Willcox, Arizona, and modifies the license of Station KWCX–FM to specify operation on the nonadjacent higher powered channel, as requested by William S. Konopnicki. *See* 60 FR 22022, May 4, 1995. Also, Channel 223C3 is allotted to Willcox, as an additional equivalent channel, since an interest in applying for a second Class C3 allotment at that community was expressed by Michael T. McKenna. Additionally, Channel 289C3 is allotted to Lordsburg, New Mexico, as an additional local FM transmission service at that community, in response to a counterproposal filed on behalf of Lordsburg Broadcasting Associates. Coordinates used for Channel 223C3 at Willcox are 32–16–22 North Latitude and 109–48–14 West Longitude; coordinates used for Channel 285C3 at Willcox are 32–14–48 North Latitude and 109–39–52 West Longitude; coordinates used for Channel 289C3 at Lordsburg, are 32–20–48 North Latitude and 108–42–36 West Longitude. As Willcox, Arizona, and Lordsburg, New Mexico, are located within 320 kilometers (199 miles) of the United States-Mexico border, concurrence of the Mexican government in the respective allotments was obtained. With this action, the proceeding is terminated.

DATES: Effective February 10, 1997. The window period for filing applications for Channel 223C3 at Willcox, Arizona, and for Channel 289C3 at Lordsburg, New Mexico, will open on February 10, 1997, and close on March 13, 1997.

FOR FURTHER INFORMATION CONTACT: Nancy Joyner, Mass Media Bureau, (202) 418–2180. Questions related to the window application filing process for Channel 223C3 at Willcox, Arizona, and for Channel 289C3 at Lordsburg, New Mexico, should be addressed to the Audio Services Division, (202) 418–2700.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's Report and Order, MM Docket No. 95–50, adopted December 20, 1996, and released December 27, 1996. The full text of this Commission decision is available for inspection and copying during normal business hours in the FCC's Reference Center (Room 239), 1919 M Street, NW, Washington, D.C. The complete text of this decision may also be purchased from the Commission's copy contractors, International Transcription Service, Inc., (202) 857–3800, located at 1919 M Street, N.W., Room 246, or 2100 M Street, N.W., Suite 140, Washington, D.C. 20037.

List of Subjects in 47 CFR Part 73

Radio broadcasting.

Part 73 of title 47 of the Code of Federal Regulations is amended as follows:

PART 73—[AMENDED]

1. The authority citation for Part 73 continues to read as follows:

Authority: Secs. 303, 48 Stat., as amended, 1082; 47 U.S.C. 154, as amended.

§ 73.202 [Amended]

2. Section 73.202(b), the Table of FM Allotments under Arizona, is amended by adding Channel 223C3 at Willcox;

3. Section 73.202(b), the Table of FM Allotments under Arizona, is amended by removing Channel 252A and adding Channel 285C3 at Willcox;

4. Section 73.202(b), the Table of FM Allotments under New Mexico, is amended by adding Channel 289C3 at Lordsburg.

Federal Communications Commission.

John A. Karousos,

Chief, Allocations Branch, Policy and Rules Division, Mass Media Bureau.

[FR Doc. 97–47 Filed 1–2–97; 8:45 am]

BILLING CODE 6712–01–P

47 CFR Part 73

[MM Docket No. 96–76; RM–8770]

Radio Broadcasting Services; Nekoosa, Wisconsin

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: Action in this document allots Channel 288A to Nekoosa, Wisconsin, in response to a petition filed by Lyle Robert Evans d/b/a The Radio Company. *See* 61 FR 18541, April 26, 1996. The coordinates for Channel 288A are 44–18–33 and 90–03–10. There is a site restriction 11.9 kilometers (7.4 miles) west of the community. With this action this proceeding is terminated.

DATES: Effective February 10, 1997. The window period for filing applications for Channel 288A at Nekoosa, Wisconsin, will open on February 10, 1997, and close on March 13, 1997.

FOR FURTHER INFORMATION CONTACT: Kathleen Scheuerle, Mass Media Bureau, (202) 418–2180.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's Report and Order, MM Docket No. 96–76,

adopted December 20, 1996, and released December 27, 1997. The full text of this Commission decision is available for inspection and copying during normal business hours in the Commission's Reference Center (Room 239), 1919 M Street, NW, Washington, D.C. The complete text of this decision may also be purchased from the Commission's copy contractors, International Transcription Services, Inc., 2100 M Street, N.W., Suite 140, Washington, D.C. 20037, (202) 857–3800.

List of Subjects in 47 CFR Part 73

Radio broadcasting.

Part 73 of Title 47 of the Code of Federal Regulations is amended as follows:

PART 73—[AMENDED]

1. The authority citation for Part 73 continues to read as follows:

Authority: Secs. 303, 48 Stat., as amended, 1082; 47 U.S.C. 154, as amended.

§ 73.202 [Amended]

2. Section 73.202(b), the Table of FM Allotments under Wisconsin, is amended by adding Channel 288A at Nekoosa.

Federal Communications Commission.

John A. Karousos,

Chief, Allocations Branch, Policy and Rules Division, Mass Media Bureau.

[FR Doc. 97–46 Filed 1–2–97; 8:45 am]

BILLING CODE 6712–01–M

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration (NOAA)

50 CFR Part 259

[Docket No.961122326–6326–01; I.D. 081092G]

RIN 0648–AF22

Capital Construction Fund; Interim Fishing Vessel Capital Construction Fund Procedures

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

ACTION: Final rule.

SUMMARY: NMFS issues this final rule to allow fishermen to use the Fishing Vessel Capital Construction Fund Program (Program) for equipping and/or modifying their fishing vessels to increase general vessel safety and/or to comply with specific requirements established under the Commercial Fishing Industry Vessel Safety Act of 1988 and/or other laws or regulations that materially increase the safety of a fishing vessel. The result is that a vessel equipment acquisition or vessel modification, which materially increases the safety of a qualified vessel, will be treated as a reconstruction and exempted from certain Program rules so that payment for it becomes a qualified withdrawal.

EFFECTIVE DATE: February 3, 1997.

FOR FURTHER INFORMATION CONTACT: Charles L. Cooper (Financial Services Division, NMFS) at 301-713-2396.

SUPPLEMENTARY INFORMATION:

Background

The Program allows fisheries taxpayers to defer paying Federal taxes on fishing vessel income. Income on which taxes are to be deferred must be deposited in accordance with Capital Construction Fund Agreements and reserved for the equity portion of fishing vessel construction, reconstruction, or acquisition costs. All deferred taxes are eventually recaptured by reductions in the depreciation basis, for tax purposes, of vessels benefitting from tax deferrals under the Program.

Under present Program rules (50 CFR part 259), fishermen cannot use the Program to pay for safety equipment unless that equipment is part of a vessel construction or reconstruction project. Although this is not generally a problem when fishing vessel construction is involved, it can be a problem when fishing vessel reconstruction is involved.

Generally, improving a fishing vessel will not qualify as reconstruction under this Program's rules unless the cost of doing so: (1) Is a capital expenditure; (2) amounts to at least $100,000 or 20 percent of the vessel's acquisition cost (whichever is less); and (3) substantially prolongs the vessel's useful life, increases its value, or adapts it to a different fisheries use. The purchase and installation of fishing vessel safety equipment would seldom meet this rules test. Many fishing vessel modifications for safety purposes would also fail to meet this test.

Additionally, the conditional fishery requirements apply to fishing vessel reconstruction under this Program. These requirements restrict the availability of Program benefits in fisheries where the Government deems additional or increased harvesting capacity unwarranted. These conditional fishery requirements could also, under the present Program rules, prevent use of this Program for safety projects.

This rulemaking permits Program use for the acquisition and installation of fishing vessel safety equipment and for fishing vessel modifications whose central purpose is to increase vessel safety to be treated, in their own right, as reconstructions for the purpose of withdrawing tax-deferred funds from Capital Construction Funds to pay for them. Except for the capital expenditure requirement, these fishing vessel safety projects are now exempted from the normal rules test that determines whether fishing vessel improvements can qualify as reconstructions. They are now also exempted from the conditional fishery requirements that would otherwise apply to reconstruction projects.

Notice of proposed rulemaking for this change was published in the Federal Register on November 18, 1992 (57 FR 54356).

Comments and Responses

Seven parties responded in writing to the notice of proposed rulemaking. All supported it. The general response was that this rule would give the industry needed flexibility in meeting new and proposed safety requirements for fishing vessels. One of those responding was the Director, Northeast Region, NMFS, for NOAA, who also recommended expanding the proposed rule to include the acquisition and installation of equipment required by law or regulation which materially increases the safety of a qualified fishing vessel. This recommendation was made for the purpose of helping fishermen pay for the high cost of transponders required for fishery management purposes; but which also serve to materially increase vessel safety by providing accurate hourly position transmissions that could be sent directly to the U.S. Coast Guard.

After considering these comments, NMFS has decided to proceed with final rulemaking with only a minimum change in the proposed rule to allow the Program to be used for vessel equipment acquisitions or vessel modifications, which materially increase the safety of a qualified vessel, to be treated as a reconstruction when made either for such central purpose or because it was required by law or regulation.

Effect of Final Rule

This rule allows the fishing industry to use their Capital Construction Funds to pay for fishing vessel safety-related projects without regard to: (1) The cost of the safety project; (2) whether the fishing vessel involved in the safety project had its useful life extended, its

value increased, or was converted to a different fisheries use; and (3) conditional fishery requirements.

Classification

The General Counsel of the Department of Commerce certified to the Chief Counsel for Advocacy of the Small Business Administration that this rule will not have a significant economic impact on a substantial number of small entities because it relates to financial assistance programs in which participation is voluntary and does not impose any cost, economic burden, or reporting burden on the industry. As a result, a regulatory flexibility analysis was not prepared.

This action has been determined to be not significant for the purposes of E.O. 12866.

List of Subjects in 50 CFR Part 259

Fisheries, Fishing vessels, Income taxes, Reporting and recordkeeping requirements.

Dated: December 27, 1996.

Nancy Foster,

Deputy Assistant Administrator for Fisheries, National Marine Fisheries Service.

For the reasons set out in the preamble, 50 CFR part 259 is amended as follows:

PART 259—CAPITAL CONSTRUCTION FUND

1. The authority citation for part 259 continues to read as follows:

Authority: 46 U.S.C. 1177.

2. Section 259.31 is amended by removing the authority citation in the parenthetical at the end of the section and by adding a new paragraph (e) to read as follows:

§ 259.31 Acquisition, construction, or reconstruction.

* * * * *

(e) *Safety projects*. The acquisition and installation of safety equipment for a qualified vessel and vessel modifications whose central purpose is materially increasing the safety of a qualified vessel or the acquisition and installation of equipment required by law or regulation that materially increases the safety of a qualified vessel shall, regardless of cost, be treated as reconstruction for the purpose of qualifying a CCF withdrawal for such expenditure, shall be exempt from having to meet conditional fishery requirements for reconstruction as set forth in § 259.32, and shall be exempt from all qualifying tests for reconstruction set forth in paragraph (b) of this section, with the following exceptions:

(1) A safety improvement shall be required to meet both conditional fishery requirements and all qualifying tests for reconstruction if it serves the dual purpose of safety and meeting the reconstruction requirement of paragraph (a) of this section for qualifying a withdrawal for the acquisition of a used vessel;

(2) That portion of the actual cost of a safety improvement that is to be paid for from the CCF must be classifiable and treated as a capital expenditure for Internal Revenue Service purposes;

(3) Safety improvement projects whose clear and central purpose is restricted to complying with the requirements of the Commercial Fishing Industry Vessel Safety Act of 1988 (Public Law 100–424 Sec. 1, 102 stat. 1585 (1988) (codified in scattered sections of 46 U.S.C.)) shall, without further documentation, be considered to fall within this paragraph (e). Satisfactory documentation will be required for all other projects proposed to be considered as falling within this paragraph (e). Projects not required by law or regulation whose central purpose clearly involves something other than an improvement that materially increases the safety of a vessel will not be considered to fall within this paragraph (e).

[FR Doc. 96–33386 Filed 12–27–96; 4:05 am]

BILLING CODE 3510–22–F

National Oceanic and Atmospheric Administration

50 CFR Part 285

[Docket No. 961209344–6344–01; I.D. 102596D]

RIN 0648–AI29

Atlantic Tuna Fisheries; Permit Requirements

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

ACTION: Final rule; technical amendment.

SUMMARY: NMFS amends the final regulations governing the Atlantic tunas fisheries by removing references to the Regional Director for the purposes of applying for and issuing tuna permits. These changes are necessary to allow the Atlantic tunas permit program to be managed by contract.

EFFECTIVE DATE: December 30, 1996. See **SUPPLEMENTARY INFORMATION** for the permit conversion schedule.

FOR FURTHER INFORMATION CONTACT: Chris Rogers, 301–713–2347.

SUPPLEMENTARY INFORMATION: The Atlantic tuna fisheries are managed under the authority of the Atlantic Tunas Convention Act (ATCA). The ATCA authorizes the Secretary of Commerce (Secretary) to implement regulations as necessary to carry out the recommendations of the International Commission for the Conservation of Atlantic Tunas (ICCAT). The authority to implement ICCAT recommendations has been delegated from the Secretary to the Assistant Administrator for Fisheries, NOAA.

ICCAT requires contracting parties to report annual fishing effort and catch statistics for species under international management. To implement the ICCAT data collection program, NMFS has established vessel permitting requirements for Atlantic tuna fisheries (60 FR 38505, July 27, 1995). Due to the volume of permits issued, NMFS has determined that the Atlantic tunas permit program can be more efficiently managed under contract.

This final rule amends tuna regulations by removing references to the Regional Director for the purposes of applying for and issuing tuna permits. These changes are necessary to allow the Atlantic tunas permit program to be managed by contract. This amendment does not affect any other requirements for vessel permits. However, all existing Atlantic tunas permits must be reissued under the new system in order to remain valid and a fee of $18.00 will be assessed to recover administrative costs of the contract.

Atlantic tunas permits which expired in 1996, regardless of whether or not renewed, must be reissued under the new system to remain valid beginning January 1, 1997. In addition, all new permit applications and requests for category changes must be made under the new system beginning January 1, 1997. In a proposed rule to be published soon, NMFS will propose that permits expiring on or after January 1, 1997 must be renewed under the new system by March 31, 1997. NMFS will inform vessel owners of procedures to access the new permitting system in letters to individual permit holders and in notices broadcast over the Highly Migratory Species FAX network.

Classification

Because this amendment only revises agency procedure or practice, under 5 U.S.C. 553(b)(A) prior notice and opportunity for comment are not required. Because this rule is not substantive, under 5 U.S.C. 553(d), it is

not subject to a 30-day delay in effectiveness.

This rule is exempt from review under E.O. 12866.

List of Subjects in 50 CFR Part 285

Fisheries, Fishing, Penalties, Reporting and recordkeeping requirements, Treaties.

Dated: December 27, 1996.

Nancy Foster,

Deputy Assistant Administrator for Fisheries, National Marine Fisheries Service.

For the reasons set out in the preamble, 50 CFR part 285 is amended by making the following technical amendment:

PART 285—ATLANTIC TUNA FISHERIES

1. The authority citation for part 285 continues to read as follows:

Authority: 16 U.S.C. 971 *et seq.*

2. In § 285.21 paragraphs (b)(1), (c), (d), (e), (g) and (l) are revised to read as follows:

§ 285.21 Vessel permits.

* * * * *

(b) *Categories of permits.* (1) Upon submission of a complete and valid application pursuant to paragraph (c) of this section, the owner of each qualifying vessel may be issued a permit by NMFS for one of the following permit categories: General, Charter/Headboat, Angling, Harpoon Boat, Purse Seine, or Incidental Catch. A permit will not be issued for more than one category.

* * * * *

(c) *Application procedure.* Permits issued under this section must be renewed upon expiration. A vessel owner applying for an initial Atlantic tuna permit, or transfer, under this section must submit a completed permit application signed by the owner or agent on a form approved by the Assistant Administrator. The application must be submitted as indicated in the instructions on the form at least 30 days before the date on which the applicant desires to have the permit made effective. To be deemed complete, an application must include all the information required on the form and must contain copies of required documents as indicated in the instructions on the form. The application must include the name, address and telephone number of the vessel owner(s) (for each owner that owns more than a 25 percent interest in the vessel); the name of the vessel; the port where the vessel is docked; the official U.S. Coast Guard documentation or state registration number; the gross tonnage, if known; the length of the vessel; the engine horsepower; the year the vessel was built; the type of vessel construction; the type of vessel propulsion; the vessel's fish hold capacity; the type(s) of fishing gear used; the normal crew size; number of party or charter passengers licensed to carry (if applicable); and the category of the permit. In addition, applicants must submit a copy of the official state registration or U.S. Coast Guard documentation, party/charter boat license, and, if a boat is owned by a corporation or partnership, the corporate or partnership documents (copy of Certificate of Incorporation and Articles of Association or Incorporation, including the names and addresses of all shareholders owning 25 percent or more of the corporation's shares). Except for purse seine vessels, an owner may change the category of the vessel's permit by application on the appropriate form to the Assistant Administrator before May 15. After May 15, the vessel's permit category may not be changed for the remainder of the calendar year, regardless of any change in the vessel's ownership, unless there is sufficient evidence for the Assistant Administrator to determine that an error involving contradictory information was made on the application.

(d) *Issuance.* (1) Except as provided in subpart D of 15 CFR part 904, a permit shall be issued within 30 days of receipt of a complete and valid application.

(2) The applicant will be notified of any deficiency in the application. If the applicant fails to correct the deficiency within 15 days following the date of notification, the application will be considered abandoned.

(e) *Duration.* A permit issued under this section remains valid until it is suspended or revoked, or it expires. A permit issued under this section expires when the name of the owner or vessel changes, or upon the renewal date specified on the permit.

* * * * *

(g) *Replacement.* Replacement permits will be issued when requested in writing by the owner or authorized representative, stating the need for replacement, the name of the vessel, and the fishing permit number assigned. A request for a replacement permit will not be considered a new application. An appropriate fee, consistent with paragraph (k) of this section, may be charged for issuance of the replacement permit.

* * * * *

(l) *Change in application information.* Within 15 days after any change in the information contained in an application submitted under this section, the vessel owner must report the change in writing. In such case, a new permit will be issued to incorporate the new information. For certain informational changes, NMFS may require supporting documentation before a new permit will be issued. The permit is void if any change in the information is not reported within 15 days.

* * * * *

3. In § 285.53 paragraphs (a) through (c), and the first sentence in (d) are revised to read as follows:

§ 285.53 Vessel permits.

(a) *Permit requirements.* The operator of each vessel that fishes for, or takes, Atlantic yellowfin, bigeye, albacore, and skipjack tunas and Atlantic bonito must have on board a valid permit issued under this section.

(b) *Commercial vessel permits.* As a prerequisite to selling Atlantic yellowfin, bigeye, albacore, and skipjack tunas and Atlantic bonito and to be eligible for exemption from applicable bag limits, if any, specified in this subpart, an owner or operator of a vessel that fishes for or takes Atlantic yellowfin, bigeye, albacore, and skipjack tunas and Atlantic bonito must be issued a vessel permit in the commercial category appropriate for the gear type or method of fishing.

(c) *Charter/Headboat vessel permits.* Owners or operators of charter vessels and headboats must be issued a charter/headboat vessel permit to lawfully fish for, catch, retain or land Atlantic yellowfin, bigeye, albacore, and skipjack tunas and Atlantic bonito. Anglers on board charter vessels and headboats must adhere to applicable catch limits for the recreational fisheries.

(d) *Recreational vessel permits.* Owners or operators of private recreational vessels must be issued vessel permits in order to fish for, catch, retain, or land Atlantic yellowfin, bigeye, albacore, and skipjack tunas.

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[FR Doc. 96–33391 Filed 12–30–96; 2:50 pm]

BILLING CODE 3510–22–F

Proposed Rules

Federal Register
Vol. 62, No. 2
Friday, January 3, 1997

This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

DEPARTMENT OF AGRICULTURE

Federal Crop Insurance Corporation

7 CFR Parts 401 and 457

General Crop Insurance Regulations, Fresh Market Sweet Corn Endorsement; and Common Crop Insurance Regulations, Fresh Market Sweet Corn Crop Insurance Provisions

AGENCY: Federal Crop Insurance Corporation, USDA.

ACTION: Proposed rule.

SUMMARY: The Federal Crop Insurance Corporation (FCIC) proposes specific crop provisions for the insurance of fresh market sweet corn. The provisions will be used in conjunction with the Common Crop Insurance Policy Basic Provisions, which contain standard terms and conditions common to most crops. The intended effect of this action is to provide policy changes to better meet the needs of the insured, include the current Fresh Market Sweet Corn Endorsement under the Common Crop Insurance Policy for ease of use and consistency of terms, and to restrict the effect of the current Fresh Market Sweet Corn Endorsement to the 1997 and prior crop years.

DATES: Written comments, data and opinions on this proposed rule will be accepted until close of business February 3, 1997 and will be considered when the rule is to be made final. The comment period for information collections under the Paperwork Reduction Act of 1995 continues through March 3, 1997.

ADDRESSES: Interested persons are invited to submit written comments to the Chief, Product Development Branch, Federal Crop Insurance Corporation, United States Department of Agriculture, 9435 Holmes Road, Kansas City, MO 64131. Written comments will be available for public inspection and copying in room 0324, South Building, United States Department of Agriculture, 14th and Independence Avenue, S.W., Washington, D.C., 8:15 a.m. to 4:45 p.m., est, Monday through Friday, except holidays.

FOR FURTHER INFORMATION CONTACT: Linda Williams, Program Analyst, Research and Development Division, Product Development Branch, Federal Crop Insurance Corporation, at the Kansas City, MO, address listed above, telephone (816) 926–7730.

SUPPLEMENTARY INFORMATION:

Executive Order No. 12866

The Office of Management and Budget (OMB) has determined this rule to be exempt for the purposes of Executive Order No. 12866, and, therefore, this rule has not been reviewed by OMB.

Paperwork Reduction Act of 1995

The title of this information collection is ''Catastrophic Risk Protection Plan and Related Requirements including, Common Crop Insurance Regulations; Fresh Market Sweet Corn Crop Insurance Provisions.'' The information to be collected includes a crop insurance application and an acreage report. Information collected from the application and acreage report is electronically submitted to FCIC by the reinsured companies.

Potential respondents to this information collection are producers of fresh market sweet corn that are eligible for Federal crop insurance.

The information requested is necessary for the reinsured companies and FCIC to provide insurance and reinsurance, determine eligibility, determine the correct parties to the agreement or contract, determine and collect premiums or other monetary amounts, and pay benefits.

All information is reported annually. The reporting burden for this collection of information is estimated to average 16.9 minutes per response for each of the 3.6 responses from approximately 1,755,015 respondents. The total annual burden on the public for this information collection is 2,676,932 hours.

FCIC is requesting comments on the following: (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 the burden 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 through the use of automated collection techniques or other forms of information gathering technology.

Comments regarding paperwork reduction should be submitted to the Desk Officer for Agriculture, Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, D.C. 20503.

OMB is required to make a decision concerning the collections of information contained in these proposed regulations between 30 and 60 days after submission to OMB. Therefore, a comment to OMB is best assured of having full effect if OMB receives it within 30 days of publication. This does not affect the deadline for the public to comment on the proposed regulation.

Unfunded Mandates Reform Act of 1995

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104–4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on state, local, and tribal governments and the private sector. This rule contains no Federal mandates (under the regulatory provisions of title II of the UMRA) for state, local, and tribal governments or the private sector. Thus, this rule is not subject to the requirements of sections 202 and 205 of the UMRA.

Executive Order No. 12612

It has been determined under section 6(a) of Executive Order No. 12612, Federalism, that this rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment. The provisions contained in this rule will not have a substantial direct effect on states or their political subdivisions, or on the distribution of power and responsibilities among the various levels of government.

Regulatory Flexibility Act

This regulation will not have a significant impact on a substantial number of small entities. New provisions included in this rule will not impact small entities to a greater extent than large entities. Under the current regulations, a producer is required to complete an application and acreage

report. If the crop is damaged or destroyed, the insured is required to give notice of loss and provide the necessary information to complete a claim for indemnity. This regulation does not alter those requirements. The amount of work required of the insurance companies delivering and servicing these policies will not increase significantly from the amount of work currently required. This rule does not have any greater or lesser impact on the producer. Therefore, this action is determined to be exempt from the provisions of the Regulatory Flexibility Act (5 U.S.C. 605), and no Regulatory Flexibility Analysis was prepared.

Federal Assistance Program

This program is listed in the Catalog of Federal Domestic Assistance under No. 10.450.

Executive Order No. 12372

This program is not subject to the provisions of Executive Order No. 12372, which require intergovernmental consultation with state and local officials. See the Notice related to 7 CFR part 3015, subpart V, published at 48 FR 29115, June 24, 1983.

Executive Order No. 12778

The Office of the General Counsel has determined that these regulations meet the applicable standards provided in subsections 2(a) and 2(b)(2) of Executive Order No. 12778. The provisions of this rule will not have a retroactive effect prior to the effective date. The provisions of this rule will preempt state and local laws to the extent such state and local laws are inconsistent herewith. The administrative appeal provisions published at 7 CFR parts 11 and 780 must be exhausted before any action for judicial review may be brought.

Environmental Evaluation

This action is not expected to have a significant impact on the quality of the human environment, health, and safety. Therefore, neither an Environmental Assessment nor an Environmental Impact Statement is needed.

National Performance Review

This regulatory action is being taken as part of the National Performance Review Initiative to eliminate unnecessary or duplicative regulations and improve those that remain in force.

Background

FCIC proposes to add to the Common Crop Insurance Regulations (7 CFR part 457), a new section, 7 CFR 457.129, Fresh Market Sweet Corn Crop Insurance Provisions. The new provisions will be effective for the 1998 and succeeding crop years. These provisions will replace and supersede the current provisions for insuring fresh market sweet corn found at 7 CFR 401.138 (Fresh Market Sweet Corn Endorsement). FCIC also proposes to amend § 401.138 to limit its effect to the 1997 and prior crop years. FCIC will later publish a regulation to remove and reserve § 401.138.

This rule makes minor editorial and format changes to improve the Fresh Market Sweet Corn Crop Insurance Endorsement's compatibility with the Common Crop Insurance Policy. In addition, FCIC is proposing substantive changes in the provisions for insuring fresh market sweet corn as follows:

1. Section 1—Add definitions for the terms ''crate,'' ''days,'' ''excess rain,'' ''excess wind,'' ''FSA,'' ''good farming practices,'' ''interplanted,'' ''irrigated practice,'' ''planted acreage,'' ''practical to replant,'' ''replanting,'' and ''written agreement'' for clarification.

Clarify the definition of crop year to specify that the crop year begins on the first day of the earliest planting period for fall-planted sweet corn and continues through the end of the insurance period for spring-planted sweet corn.

Change the definition of freeze to specify that freeze occurs when low air temperatures cause ice to form in the cells of the plant or its fruit to encompass conditions found in both frost and freeze.

Change the definition of harvest to clarify and remove the term marketable. Sweet corn picked from the stalk is considered harvested whether marketable or not.

2. Section 3(a)—Clarify that an insured may select only one coverage level (and the corresponding amount of insurance designated in the Actuarial Table for the applicable planting period and practice) for all the sweet corn in the county insured under the policy.

3. Section 3(b)—Clarify that the amounts of insurance the insured chooses for each planting period and practice must have the same percentage relationship to the maximum amount of insurance offered by FCIC for each planting period and practice.

4. Section 5—Change the cancellation and termination dates to March 15 for all States that currently have an April 15 date. This change is necessary to standardize the cancellation and termination dates with the sales closing dates that were changed for spring planted crops to comply with the requirements of the Federal Crop Insurance Reform Act of 1994. To allow sweet corn crop expansion into other areas, Berrien County, Georgia, has been added to the Georgia Counties that have July 31 cancellation and termination dates. The July 31 cancellation and termination dates for Berrien County, Georgia coincide with production practices of other Georgia counties with that same date.

5. Section 9(a)—Add a provision that will provide coverage on newly cleared land or former pasture land that is planted to fresh market sweet corn. It is a recognized practice to plant the insured crop on tilled acreage that has been newly cleared or has been pasture land to eliminate some of the risk of disease and insect damage. This change also will standardize current regulations for the fresh market vegetable crops.

6. Section 9(b)(2)—Allow an insured to elect not to replant damaged sweet corn that is initially planted within the fall or winter planting periods, provided the final planting date for the planting period has passed. With this election, the insured may collect an indemnity and that particular acreage will be uninsurable for the next planting period. The insured may also elect to replant such sweet corn acreage, collect a replanting payment under section 12, and maintain the initial planting period coverage. This change incorporates and standardizes procedures utilized in the fresh market vegetable crops.

7. Section 10(f)—The calendar date for the end of the insurance period is now included in the sweet corn crop provisions and has been established as 100 days after the date of planting or replanting. This change incorporates the actual number of days for sweet corn to reach maturity and for the crop to be harvested. This change will also standardize provisions to that of other crop insurance policies. Currently, the calendar date for the end of the insurance period is contained in the Actuarial Table.

8. Section 11(a)—Add excess rain and excess wind as insurable causes of loss. Current regulations allow these causes to be covered only if they occur in conjunction with a cyclone. Removal of the requirement that these causes of loss must occur in conjunction with a cyclone will provide coverages for crop damage that is not associated with a cyclone.

9. Section 13—Change notice of damage or loss requirements to require that if the insured intends to claim an indemnity on any unit, notice must be given within 72 hours after the earliest of: discontinuance of harvest of any acreage on the unit; the date harvest would normally start if any acreage on the unit will not be harvested; or the

calendar date for the end of the insurance period. This change will standardize provisions found in all fresh market vegetable crop policies.

10. Section 14(b)(2)—Modify claim for indemnity calculations by providing calculations for catastrophic risk protection coverage and for coverage other than catastrophic risk protection. This provision includes the use of the catastrophic risk protection price election equivalent to determine the total dollar of production to count for indemnity purposes. This change is necessary to assure that producers that are insured based on a dollar amount of insurance are indemnified comparable to producers that are insured based on an actual production history (APH) yield basis.

11. Section 14(c)(1)—Clarify that the insured will receive not less than the amount of insurance per acre for the applicable stage for acreage that is: Abandoned; put to another use without the insurance provider's consent; damaged solely by uninsured causes; or for which the insured fails to provide production records. Current regulations require that not less than the final stage dollar amount of insurance be assessed for such acreage. This change allows for either the first stage amount of insurance or the final stage amount of insurance to be assessed against such acreage, depending on the growth stage of the crop when the event occurred. This change will standardize the provisions found in all fresh market vegetable crops.

12. Section 14(c)(2)(iii)—Require the insured to continue to care for acreage when the insured does not agree with the appraisal on that acreage. Production to count for such acreage will be determined using the harvested production if the crop is harvested, or our reappraisal if the crop is not harvested.

13. Section 14(c)(3)—Change the value to count for harvested production to the dollar amount obtained by subtracting the allowable cost from the price received (this resulting price must not be less than the minimum value shown in the Special Provisions), and multiplying this result by the number of crates harvested. Current regulations allow the value of sold production to be as low as zero. Also, clarify that harvested mature sweet corn that is damaged or defective due to insurable causes and is not marketable will not be counted as production. These changes are made to assure that the minimum value specified in the Special Provisions will be the lowest value considered for any marketable harvested production unless the insured selected the minimum value option.

14. Section 15—Add provisions for providing insurance coverage by written agreement. FCIC has a long standing policy of permitting certain modifications of the insurance contract by written agreement for some policies. This amendment allows FCIC to tailor the policy to a specific insured in certain instances. The new section will cover the procedures for and duration of written agreements.

15. Section 16—A minimum value option is added. The option allows the value of each harvested crate to be as low as zero. This option is selected on the insurance application. This change will provide consistency in regulations found in other fresh market vegetable crops.

List of Subjects in 7 CFR Parts 401 and 457

Crop insurance, Fresh market sweet corn endorsement, Fresh market sweet corn.

Proposed Rule

For the reasons set forth in the preamble, the Federal Crop Insurance Corporation hereby proposes to amend 7 CFR parts 401 and 457 as follows:

PART 401—GENERAL CROP INSURANCE REGULATIONS—REGULATIONS FOR THE 1988 AND SUBSEQUENT CONTRACT YEARS

1. The authority citation for 7 CFR part 401 continues to read as follows:

Authority: 7 U. S. C. 1506(l), 1506(p).

2. In § 401.138, the introductory text is revised to read as follows:

§ 401.138 Fresh market sweet corn endorsement.

The provisions of the Fresh Market Sweet Corn Endorsement for the 1991 through the 1997 crop years are as follows:

* * * * *

PART 457—COMMON CROP INSURANCE REGULATIONS; REGULATIONS FOR THE 1994 AND SUBSEQUENT CONTRACT YEARS

3. The authority citation for 7 CFR part 457 continues to read as follows:

Authority: 7 U.S.C. 1506(l), 1506(p).

4. 7 CFR part 457 is amended by adding a new § 457.129 to read as follows:

§ 457.129 Fresh Market Sweet Corn Crop Insurance Provisions.

The Fresh Market Sweet Corn Crop Insurance Provisions for the 1998 and succeeding crop years are as follows:

FCIC policies:

United States Department of Agriculture

Federal Crop Insurance Corporation

Reinsured policies:

(Appropriate title for insurance provider)

Both FCIC and reinsured policies:

Fresh Market Sweet Corn Crop Provisions

If a conflict exists among the Basic Provisions (§ 457.8), these crop provisions, and the Special Provisions, the Special Provisions will control these crop provisions and the Basic Provisions; and these crop provisions will control the Basic Provisions.

1. Definitions.

Crate—Forty-two (42) pounds of the insured crop.

Crop year—In lieu of the definition of ''crop year'' contained in section 1 (Definitions) of the Basic Provisions (§ 457.8), crop year is a period of time that begins on the first day of the earliest planting period for fall-planted sweet corn and continues through the last day of the insurance period for spring-planted sweet corn. The crop year is designated by the calendar year in which spring-planted sweet corn is harvested.

Days—Calendar days.

Direct marketing—Sale of the insured crop directly to consumers without the intervention of an intermediary such as a wholesaler, retailer, packer, processor, shipper or buyer. Examples of direct marketing include selling through an on-farm or roadside stand, farmer's market, and permitting the general public to enter the field for the purpose of picking all or a portion of the crop.

Excess rain—An amount of precipitation sufficient to directly damage the crop.

Excess wind—Wind speed strong enough to cause lodging of stalks and prevent a normal harvest.

FSA—The Farm Service Agency, an agency of the United States Department of Agriculture or a successor agency.

Freeze—The formation of ice in the cells of the plant or its fruit, caused by low air temperatures.

Good farming practices—The cultural practices generally in use in the county for the crop to make normal progress toward maturity, and are those recognized by the Cooperative State Research, Education and Extension Service as compatible with agronomic and weather conditions in the county.

Harvest—The picking of sweet corn on the unit.

Interplanted—Acreage on which two or more crops are planted in a manner that does not permit separate agronomic maintenance or harvest of the insured crop.

Irrigated practice—A method of producing a crop by which water is artificially applied during the growing season by appropriate systems and at the proper times, with the intention of providing the quantity of water needed for the insured crop to make normal progress toward maturity.

Marketable sweet corn—Sweet corn that meets the standards for grading U.S. No. 1 or better and will withstand normal handling and shipping.

Plant stand—The number of live plants per acre prior to the occurrence of an insurable cause of loss.

Planted acreage—Land in which, for each planting period, seed has been placed by a machine appropriate for the insured crop and planting method, at the correct depth, into a seedbed that has been properly prepared for the planting method and production practice. For each planting period, fresh market sweet corn must initially be planted in rows far enough apart to permit mechanical cultivation. Acreage planted in any other manner will not be insurable unless otherwise provided by the Special Provisions or by written agreement.

Planting period—The period of time designated in the Actuarial Table in which fresh market sweet corn must be planted to be considered fall, winter, or spring-planted sweet corn.

Potential production—The number of crates of sweet corn that the sweet corn plants will or would have produced per acre by the end of the insurance period, assuming normal growing conditions and practices.

Practical to replant—In lieu of the definition of ''Practical to replant'' contained in section 1 of the Basic Provisions (§ 457.8), practical to replant is defined as our determination, after loss or damage to the insured crop, based on factors, including but not limited to moisture availability, condition of the field, marketing windows, and time to crop maturity, that replanting to the insured crop will allow the crop to attain maturity prior to the calendar date for the end of the insurance period (inability to obtain seed will not be considered when determining if it is practical to replant).

Replanting—Performing the cultural practices necessary to replace the sweet corn seed and then replacing the sweet corn seed in the insured acreage with the expectation of growing a successful crop.

Sweet corn—A type of corn with kernels containing a high percentage of sugar that is adapted for human consumption as a vegetable.

Written agreement—A written document that alters designated terms of a policy in accordance with section 15.

2. Unit Division.

(a) A unit as defined in section 1 (Definitions) of the Basic Provisions (§ 457.8), (basic unit) will be divided by planting period.

(b) Unless limited by the Special Provisions, these basic units may be further divided into optional units if, for each optional unit you meet all the conditions of this section or if a written agreement for such further division exists.

(c) If you do not comply fully with these provisions, we will combine all optional units that are not in compliance with these provisions into the basic unit from which they were formed. We will combine the optional units at any time we discover that you have failed to comply with these provisions. If failure to comply with these provisions is determined to be inadvertent, and the optional units are combined into a basic unit, that portion of the premium paid for the purpose of electing optional units will be refunded to you for the units combined.

(d) All optional units established for a crop year must be identified on the acreage report for that crop year.

(e) The following requirements must be met for each optional unit:

(1) You must have records, which can be independently verified, of planted acreage and production for each optional unit for at least the last crop year in which the crop was planted;

(2) You must plant the crop in a manner that results in a clear and discernable break in the planting pattern at the boundaries of each optional unit;

(3) You must have records of marketed production or measurement of stored production from each optional unit maintained in such a manner that permits us to verify the production from each optional unit, or the production from each unit must be kept separate until loss adjustment is completed by us; and

(4) Each optional unit must be located in a separate legally identified section. In the absence of sections, we may consider parcels of land legally identified by other methods of measure including, but not limited to Spanish grants, railroad surveys, leagues, labors, or Virginia Military Lands, as the equivalent of sections for unit purposes. In areas that have not been surveyed using the systems identified above, or another system approved by us, or in areas where such systems exist but boundaries are not readily discernable, each optional unit must be located in a separate farm identified by a single FSA Farm Serial Number.

3. Amounts of Insurance and Production Stages.

(a) In addition to the requirements of section 3 (Insurance Guarantees, Coverage Levels, and Prices for Determining Indemnities) of the Basic Provisions (§ 457.8), you may select only one coverage level (and the corresponding amount of insurance designated in the Actuarial Table for the applicable planting period and practice) for all the sweet corn in the county insured under this policy.

(b) The amount of insurance you choose for each planting period and practice must have the same percentage relationship to the maximum price offered by us for each planting period and practice. For example, if you choose 100 percent of the maximum amount of insurance for a specific planting period and practice, you must also choose 100 percent of the maximum amount of insurance for all other planting periods and practices.

(c) The amount of insurance available under the catastrophic risk protection plan of insurance will be specified in the Actuarial Table.

(d) The production reporting requirements contained in section 3 (Insurance Guarantees, Coverage Levels, and Prices for Determining Indemnities) of the Basic Provisions (§ 457.8), do not apply to fresh market sweet corn.

(e) The amounts of insurance are progressive by stages as follows:

Stage	% of amount of insurance per acre that you selected	Length of time
1	65	From planting through the beginning of tasseling (which is when the tassel becomes visible above the whorl).
Final	100	From tasseling until the acreage is harvested.

(f) Any acreage of sweet corn damaged in the first stage to the extent that the majority of producers in the area would not normally further care for it, will be deemed to have been destroyed. The indemnity payable for such acreage will be based on the stage the plants had achieved when the damage occurred.

4. Contract Changes.

In accordance with section 4 (Contract Changes) of the Basic Provisions (§ 457.8), the contract change date shown below is the date preceding the cancellation date:

State and county	Date
All Florida counties; and all Georgia counties for which the Special Provisions designate a fall planting period ...	Apr. 30.
Alabama; South Carolina; all Georgia counties for which the Special Provisions do not designate a fall planting period; and all other States	Nov. 30.

5. Cancellation and Termination Dates.

In accordance with section 2 (Life of Policy, Cancellation, and Termination) of the Basic Provisions (§ 457.8), the cancellation and termination dates are:

State and county	Cancellation and termination dates
Florida; Atkinson, Baker, Berrien, Brantley, Camden, Colquitt, Cook, Early, Mitchell, and Ware Counties Georgia and all counties south thereof for which the Special Provisions designate a fall planting period	July 31.
Alabama; South Carolina; and all Georgia Counties for which the Special Provisions do not designate a fall planting period	Feb. 15.
All other States	Mar. 15.

6. Report of Acreage.

In addition to the requirements of section 6 (Report of Acreage) of the Basic Provisions (§ 457.8), you must report on or before the acreage reporting date contained in the Special Provisions for each planting period, all the acreage of sweet corn in the county

insured under this policy in which you have a share.

7. Annual Premium.

In lieu of the premium amount determinations contained in section 7 (Annual Premium) of the Basic Provisions (§ 457.8), the annual premium amount for each cultural practice (*e.g.* fall planted irrigated) is determined by multiplying the final stage amount of insurance per acre by the premium rate for the cultural practice as established in the Actuarial Table, by the insured acreage, by your share at the time coverage begins, and by any applicable premium adjustment factors contained in the Actuarial Table.

8. Insured Crop.

In accordance with section 8 (Insured Crop) of the Basic Provisions (§ 457.8), the crop insured will be all the sweet corn in the county for which a premium rate is provided by the Actuarial Table:

(a) In which you have a share;

(b) That is:

(1) Planted to be harvested and sold as fresh market sweet corn;

(2) Planted within the planting periods designated in the Actuarial Table;

(3) Grown under an irrigated practice;

(4) Grown by a person who in at least one of the three previous crop years:

(i) Grew sweet corn for commercial sale; or

(ii) Participated in managing a sweet corn farming operation;

(c) That is not:

(1) Interplanted with another crop;

(2) Planted into an established grass or legume; or

(3) Grown for direct marketing.

9. Insurable Acreage.

(a) In lieu of the provisions of section 9 (Insurable Acreage) of the Basic Provisions (§ 457.8), that prohibit insurance attaching if a crop has not been planted in at least one of the three previous crop years, we will insure newly cleared land or former pasture land planted to fresh market sweet corn.

(b) In addition to the provisions of section 9 (Insurable Acreage) of the Basic Provisions (§ 457.8):

(1) You must replant any acreage of sweet corn damaged during the planting period in which initial planting took place whenever less than 75 percent of the plant stand remains: and

(i) It is practical to replant: and

(ii) If, at the time the crop was damaged, the final day of the planting period has not passed.

(2) Whenever sweet corn initially is planted during the fall or winter planting periods and the condition specified in section 9(b)(1)(ii) is not satisfied, you may elect:

(i) To replant such acreage and collect any replant payment due as specified in section 12. The initial planting period coverage will continue for such replanted acreage.

(ii) Not to replant such acreage and receive an indemnity based on the stage of growth the plants had attained at the time of damage. However, such an election will result in the acreage being uninsurable in the subsequent planting period.

10. Insurance Period.

In lieu of the provisions of section 11 (Insurance Period) of the Basic Provisions (§ 457.8), coverage begins on each unit or part of a unit the later of the date we accept your application, or when the sweet corn is planted in each planting period. Coverage ends at the earliest of:

(a) Total destruction of the sweet corn on the unit;

(b) Abandonment of the sweet corn on the unit;

(c) The date harvest should have started on the unit on any acreage which will not be harvested;

(d) Final adjustment of a loss on the unit;

(e) Final harvest; or

(f) 100 days after the date of planting or replanting.

11. Causes of Loss.

(a) In accordance with the provisions of section 12 (Causes of Loss) of the Basic Provisions (§ 457.8), insurance is provided only against the following causes of loss that occur during the insurance period:

(1) Excess rain;

(2) Excess wind;

(3) Fire;

(4) Freeze;

(5) Hail;

(6) Tornado; or

(7) Failure of the irrigation water supply, if caused by an insured cause of loss that occurs during the insurance period.

(b) In addition to the causes of loss excluded in section 12 (Causes of Loss) of the Basic Provisions (§ 457.8), we will not insure against any loss of production due to:

(1) Disease;

(2) Insect infestation; or

(3) Failure to market the sweet corn, unless such failure is due to actual physical damage caused by an insured cause of loss that occurs during the insurance period.

12. Replanting Payments.

(a) In accordance with section 13 (Replanting Payment) of the Basic Provisions (§ 457.8), a replanting payment is allowed if, due to an insured cause of loss, more than 25 percent of the plant stand will not produce sweet corn and it is practical to replant.

(b) The maximum amount of the replanting payment per acre will be the result obtained by multiplying $65.00 by your insured share.

(c) In lieu of the provisions contained in section 13 (Replanting Payment) of the Basic Provisions (§ 457.8), limiting a replanting payment to one each crop year, only one replanting payment will be made for acreage planted during each planting period within the crop year.

13. Duties In The Event of Damage or Loss.

In addition to the requirements contained in section 14 (Duties In The Event of Damage or Loss) of the Basic Provisions (§ 457.8), if you intend to claim an indemnity on any unit you also must give us notice not later than 72 hours after the earliest of:

(a) The time you discontinue harvest of any acreage on the unit;

(b) The date harvest normally would start if any acreage on the unit will not be harvested; or

(c) The calendar date for the end of the insurance period.

14. Settlement of Claim.

(a) We will determine your loss on a unit basis. In the event you are unable to provide separate acceptable production records:

(1) For any optional unit, we will combine all optional units for which such production records were not provided; or

(2) For any basic unit, we will allocate any commingled production to such units in proportion to our liability on the harvested acreage for each unit.

(b) In the event of loss or damage covered by this policy, we will settle your claim by:

(1) Multiplying the insured acreage in each stage by the amount of insurance per acre for the final stage;

(2) Multiplying each result in section 14(b)(1) by the percentage for the applicable stage (see section 3(e));

(3) Total the results of section 14(b)(2);

(4) Subtracting either of the following values from the result of section 14(b)(3): (i) For other than catastrophic risk protection coverage, the total value of production to be counted (see section 14(c)); or

(ii) For catastrophic risk protection coverage, the result of multiplying the total value of production to be counted (see section 14(c)) times:

(A) Sixty percent for the 1998 crop year; or

(B) Fifty-five percent for 1999 and subsequent crop years; and

(5) Multiplying the result of section 14(b)(4) by your share.

(c) The total value of production to count from all insurable acreage on the unit will include:

(1) Not less than the amount of insurance per acre for the stage for any acreage:

(i) That is abandoned;

(ii) Put to another use without our consent;

(iii) That is damaged solely by uninsured causes; or

(iv) For which you fail to provide acceptable production records.

(2) The value of the following appraised production will not be less than the dollar amount obtained by multiplying the number of crates of appraised sweet corn times the minimum value per crate shown in the Special Provisions for the planting period:

(i) Unharvested production (unharvested production that is damaged or defective due to insurable causes and is not marketable will not be counted as production to count);

(ii) Production lost due to uninsured causes; and

(iii) Potential production on insured acreage that you intend to put to another use or abandon, if you and we agree on the appraised amount of production. Upon such agreement, the insurance period for that acreage will end when you put the acreage to another use or abandon the crop. If agreement on the appraised amount of production is not reached:

(A) We may require you to continue to care for the crop so that a subsequent appraisal may be made or the crop harvested to determine actual production (If we require you to continue to care for the crop and you do not do so, the original appraisal will be used); or

(B) You may elect to continue to care for the crop, in which case the amount of production to count for the acreage will be the harvested production, or our reappraisal if the crop is not harvested.

(3) The total value of all harvested production from the insurable acreage will be

the dollar amount obtained by subtracting the allowable cost contained in the Special Provisions from the price received for each crate of sweet corn (this result may not be less than the minimum value shown in the Special Provisions for any crate of sweet corn), and multiplying this result by the number of crates of sweet corn harvested. Harvested mature sweet corn that is damaged or defective due to insurable causes and is not marketable, will not be counted as production to count.

15. Written Agreements.

Designated terms of this policy may be altered by written agreement in accordance with the following:

(a) You must apply in writing for each written agreement no later than the sales closing date, except as provided in section 15(e);

(b) The application for a written agreement must contain all variable terms of the contract between you and us that will be in effect if the written agreement is not approved;

(c) If approved, the written agreement will include all variable terms of the contract, including, but not limited to, crop type or variety, and premium rate;

(d) Each written agreement will only be valid for one year (If the written agreement is not specifically renewed the following year, insurance coverage for subsequent crop years will be in accordance with the printed policy); and

(e) An application for a written agreement submitted after the sales closing date may be approved if, after a physical inspection of the acreage, it is determined that no loss has occurred and the crop is insurable in accordance with the policy and written agreement provisions.

16. Minimum Value Option

(a) The provisions of this option are continuous and will be attached to and made a part of your insurance policy, if:

(1) You elect the Minimum Value Option on your application, or on a form approved by us, on or before the sales closing date for the initial crop year in which you wish to insure fresh market sweet corn under this option, and pay the additional premium indicated in the Actuarial Table for this optional coverage; and

(2) You have not elected coverage under the Catastrophic Risk Protection Endorsement.

(b) In lieu of the provisions contained in section 14(c)(3), the total value of harvested production will be determined as follows:

(1) For sold production, the dollar amount obtained by subtracting the allowable cost contained in the Special Provisions from the price received for each crate of sweet corn (this result may not be less than zero for any crate of sweet corn), and multiplying this result by the number of crates of sweet corn sold; and

(2) For marketable production that is not sold, the dollar amount obtained by multiplying the number of crates of such sweet corn on the unit by the minimum value shown in the Special Provisions for the planting period (harvested production that is damaged or defective due to insurable causes and is not marketable will not be counted as production).

(c) This option may be canceled by either you or us for any succeeding crop year by giving written notice on or before the cancellation date preceding the crop year for which the cancellation of this option is to be effective.

Signed in Washington, D.C., on December 24, 1996

Kenneth D. Ackerman,

Manager, Federal Crop Insurance Corporation.

[FR Doc. 97–62 Filed 1–2–97; 8:45 am]

BILLING CODE 3410–FA–P

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7 CFR Parts 445 and 457

Pepper Crop Insurance Regulations; and Common Crop Insurance Regulations, Fresh Market Pepper Crop Insurance Provisions

AGENCY: Federal Crop Insurance Corporation, USDA.

ACTION: Proposed rule.

SUMMARY: The Federal Crop Insurance Corporation (FCIC) proposes specific crop provisions for the insurance of fresh market peppers. The provisions will be used in conjunction with the Common Crop Insurance Policy Basic Provisions, which contain standard terms and conditions common to most crops. The intended effect of this action is to provide policy changes to better meet the needs of the insured, include the current Pepper Crop Insurance Regulations under the Common Crop Insurance Policy for ease of use and consistency of terms, and to restrict the effect of the current Pepper Crop Insurance Regulations to the 1997 and prior crop years.

DATES: Written comments, data and opinions on this proposed rule will be accepted until close of business February 3, 1997 and will be considered when the rule is to be made final. The comment period for information collections under the Paperwork Reduction Act of 1995 continues through March 3, 1997.

ADDRESSES: Interested persons are invited to submit written comments to the Chief, Product Development Branch, Federal Crop Insurance Corporation, United States Department of Agriculture, 9435 Holmes Road, Kansas City, MO 64131. Written comments will be available for public inspection and copying in room 0324, South Building, United States Department of Agriculture, 14th and Independence Avenue, S.W., Washington, D.C., 8:15 a.m. to 4:45 p.m., est, Monday through Friday, except holidays.

FOR FURTHER INFORMATION CONTACT: Linda Williams, Program Analyst, Research and Development Division, Product Development Branch, Federal Crop Insurance Corporation, at the Kansas City, MO, address listed above, telephone (816) 926–7730.

SUPPLEMENTARY INFORMATION:

Executive Order No. 12866

The Office of Management and Budget (OMB) has determined this rule to be exempt for the purposes of Executive Order No. 12866, and, therefore, this rule has not been reviewed by OMB.

Paperwork Reduction Act of 1995

The title of this information collection is ''Catastrophic Risk Protection Plan and Related Requirements including, Common Crop Insurance Regulations; Fresh Market Pepper Crop Insurance Provisions.'' The information to be collected includes a crop insurance application and an acreage report. Information collected from the application and acreage report is electronically submitted to FCIC by the reinsured companies. Potential respondents to this information collection are producers of fresh market peppers that are eligible for Federal crop insurance.

The information requested is necessary for the reinsured companies and FCIC to provide insurance and reinsurance, determine eligibility, determine the correct parties to the agreement or contract, determine and collect premiums or other monetary amounts, and pay benefits.

All information is reported annually. The reporting burden for this collection of information is estimated to average 16.9 minutes per response for each of the 3.6 responses from approximately 1,755,015 respondents. The total annual burden on the public for this information collection is 2,676,932 hours.

FCIC is requesting comments on the following: (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 the burden 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 through the use of automated collection techniques or other forms of information gathering technology.

Comments regarding paperwork reduction should be submitted to the

Desk Officer for Agriculture, Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, D.C. 20503.

OMB is required to make a decision concerning the collections of information contained in these proposed regulations between 30 and 60 days after submission to OMB. Therefore, a comment to OMB is best assured of having full effect if OMB receives it within 30 days of publication. This does not affect the deadline for the public to comment on the proposed regulation.

Unfunded Mandates Reform Act of 1995

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104–4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on state, local, and tribal governments and the private sector. This rule contains no Federal mandates (under the regulatory provisions of title II of the UMRA) for state, local, and tribal governments or the private sector. Thus, this rule is not subject to the requirements of sections 202 and 205 of the UMRA.

Executive Order No. 12612

It has been determined under section 6(a) of Executive Order No. 12612, Federalism, that this rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment. The provisions contained in this rule will not have a substantial direct effect on states or their political subdivisions, or on the distribution of power and responsibilities among the various levels of government.

Regulatory Flexibility Act

This regulation will not have a significant impact on a substantial number of small entities. New provisions included in this rule will not impact small entities to a greater extent than large entities. Under the current regulations, a producer is required to complete an application and acreage report. If the crop is damaged or destroyed, the insured is required to give notice of loss and provide the necessary information to complete a claim for indemnity. This regulation does not alter those requirements. The amount of work required of the insurance companies delivering and servicing these policies will not increase significantly from the amount of work currently required. This rule does not have any greater or lesser impact on the producer. Therefore, this action is determined to be exempt from the provisions of the Regulatory Flexibility Act (5 U.S.C. 605), and no Regulatory Flexibility Analysis was prepared.

Federal Assistance Program

This program is listed in the Catalog of Federal Domestic Assistance under No. 10.450.

Executive Order No. 12372

This program is not subject to the provisions of Executive Order No. 12372, which require intergovernmental consultation with state and local officials. See the Notice related to 7 CFR part 3015, subpart V, published at 48 FR 29115, June 24, 1983.

Executive Order No. 12778

The Office of the General Counsel has determined that these regulations meet the applicable standards provided in sections 2(a) and 2(b)(2) of Executive Order No. 12778. The provisions of this rule will not have a retroactive effect prior to the effective date. The provisions of this rule will preempt state and local laws to the extent such state and local laws are inconsistent herewith. The administrative appeal provisions published at 7 CFR parts 11 and 780 must be exhausted before any action for judicial review may be brought.

Environmental Evaluation

This action is not expected to have a significant impact on the quality of the human environment, health, and safety. Therefore, neither an Environmental Assessment nor an Environmental Impact Statement is needed.

National Performance Review

This regulatory action is being taken as part of the National Performance Review Initiative to eliminate unnecessary or duplicative regulations and improve those that remain in force.

Background

FCIC proposes to add to the Common Crop Insurance Regulations (7 CFR part 457), a new section, 7 CFR § 457.148, Fresh Market Pepper Crop Insurance Provisions. The new provisions will be effective for the 1998 and succeeding crop years. These provisions will replace and supersede the current provisions for insuring fresh market peppers found at 7 CFR part 445 (Pepper Crop Insurance Regulations). FCIC also proposes to amend 7 CFR part 445 to limit its effect to the 1997 and prior crop years. FCIC will later publish a regulation to remove and reserve part 445.

This rule makes minor editorial and format changes to improve the Fresh Market Pepper Crop Insurance Regulations compatibility with the Common Crop Insurance Policy. In addition, FCIC is proposing substantive changes in the provisions for insuring peppers as follows:

1. Section 1—Add definitions for the terms ''bell pepper,'' ''box,'' ''days,'' ''FSA,'' ''good farming practices,'' ''interplanted,'' ''irrigated practice,'' ''mature bell pepper,'' ''planted acreage,'' ''practical to replant,'' ''row width,'' and ''written agreement'' for clarification.

The definition of ''county'' contained in the Common Crop Insurance Policy (§ 457.8), will be used to conform with other fresh market crop policies. This change will require acreage located in a local producing area bordering the county to be insured using the actuarial materials for the county where the land is physically located.

Clarify the definition of crop year to specify that the crop year begins on the first day of the earliest planting period for fall-planted peppers and continues through the end of the insurance period for spring-planted peppers.

Clarify the definition of excess rain to specify that it is an amount of precipitation that is sufficient to directly damage the crop. Previous regulations defined excessive rain as a minimum of 10 inches of rain within a 24-hour period. This change will provide coverage for crop damage that occurs when a lesser amount of precipitation is received.

Change the definition of freeze to specify that freeze occurs when low air temperatures cause ice to form in the cells of the plant or its fruit to encompass conditions found in both frost and freeze.

Change the definition of harvest to clarify and remove the term marketable. Peppers picked from the plant are considered harvested whether marketable or not.

2. Section 3(a)—Clarify that an insured may select only one coverage level (and the corresponding amount of insurance designated in the Actuarial Table for the applicable planting period and practice) for all the fresh market peppers in the county insured under the policy.

3. Section 3(b)—Clarify that the amounts of insurance the insured chooses for each planting period and practice must have the same percentage relationship to the maximum amount of insurance offered by FCIC for each planting period and practice.

4. Section 3(e)—Add language listing three stages of coverage for direct seeded and transplanted acreage. This language was previously contained in the actuarial documents.

5. Section 9(a)—Add a provision that provides coverage on newly cleared land or former pasture land that is planted to fresh market peppers. It is a recognized practice to plant the insured crop on tilled acreage that has been newly cleared or that has been pasture land to eliminate some of the risk of disease and insect damage. This change also will standardize current regulations for the fresh market vegetable crops.

6. Section 9(b)(2)—Allow an insured to elect not to replant damaged peppers that were initially planted within the fall or winter planting periods, provided the final planting date for the planting period has passed and damage occurs after 30 days of transplanting or after 60 days of direct seeding. With this election, the insured may collect an indemnity and that particular acreage will be uninsurable for the next planting period. The insured may also elect to replant such pepper acreage, collect a replanting payment under section 12, and maintain the initial planting period coverage. This change incorporates and standardizes procedures utilized in the fresh market vegetable crops.

7. Section 10(f)(1)—Change the calendar date for the end of the insurance period from 150 days to 165 days after the date of direct seeding or replanting with seed. This change will allow expansion of pepper crop insurance coverage into other areas.

8. Section 14(b)(2)—Modify claim for indemnity calculations by providing calculations for catastrophic risk protection coverage and for coverage other than catastrophic risk protection. This provision includes the use of the catastrophic risk protection price election equivalent to determine the total dollar of production to count for indemnity purposes. This change is necessary to assure that producers that are insured based on a dollar amount of insurance are indemnified comparable to producers that are insured based on an actual production history (APH) yield basis.

9. Section 14(c)(2)(iv)—Require the insured to continue to care for acreage when the insured does not agree with the appraisal on that acreage. Production to count for such acreage will be determined using the harvested production if the crop is harvested, or our reappraisal if the crop is not harvested.

10. Section 14(c)(3)—Change the value to count for harvested production to the dollar amount obtained by subtracting the allowable cost from the price received (this resulting price must not be less than the minimum value shown in the Special Provisions), and multiplying this result by the number of boxes harvested. Current regulations allow the value of sold production to be as low as zero. Also, clarify that harvested mature bell peppers that are damaged or defective due to insurable causes and are not marketable will not be counted as production. These changes are made to assure that the minimum value specified in the Special Provisions will be the lowest value considered for any marketable harvested production unless the insured selected the minimum value option.

11. Section 15—Add provisions for providing insurance coverage by written agreement. FCIC has a long standing policy of permitting certain modifications of the insurance contract by written agreement for some policies. This amendment allows FCIC to tailor the policy to a specific insured in certain instances. The new section will cover the procedures for and duration of written agreements.

12. Section 16—A minimum value option is added. The option allows the value of each harvested box to be as low as zero. This option is selected on the insurance application. This change will provide consistency in regulations found in other fresh market vegetable crops.

List of Subjects in 7 CFR Parts 445 and 457

Crop insurance, Pepper crop insurance regulations, Fresh market peppers.

Proposed Rule

Accordingly, as set forth in the preamble, the Federal Crop Insurance Corporation hereby proposes to amend 7 CFR parts 445 and 457 as follows:

PART 445—PEPPER CROP INSURANCE REGULATIONS

1. The authority citation for 7 CFR part 445 is revised to read as follows:

Authority: 7 U.S.C. 1506(l), 1506(p).

2. The subpart heading preceding § 445.1 is revised to read as follows:

Subpart—Regulations for the 1987 Through the 1997 Crop Years

3. Section 445.7 is amended by revising the introductory text of paragraph (d) to read as follows:

§ 445.7 The application and policy.

* * * * *

(d) The application for the 1987 and succeeding crop years is found at subpart D of part 400–General Administrative Regulations (7 CFR 400.37, 400.38). The provisions of the Pepper Crop Insurance Policy for the 1987 through 1997 crop years are as follows:

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PART 457—COMMON CROP INSURANCE REGULATIONS; REGULATIONS FOR THE 1994 AND SUBSEQUENT CONTRACT YEARS

4. The authority citation for 7 CFR part 457 continues to read as follows:

Authority: 7 U.S.C. 1506(l), 1506(p).

5. 7 CFR part 457 is amended by adding a new § 457.148 to read as follows:

§ 457.148 Fresh Market Pepper Crop Insurance Provisions.

The Fresh Market Pepper Crop Insurance Provisions for the 1998 and succeeding crop years are as follows:

FCIC policies:

UNITED STATES DEPARTMENT OF AGRICULTURE

Federal Crop Insurance Corporation

Reinsured policies:

(Appropriate title for insurance provider)

Both FCIC and reinsured policies:

FRESH MARKET PEPPER CROP PROVISIONS

If a conflict exists among the Basic Provisions (§ 457.8), these crop provisions, and the Special Provisions; the Special Provisions will control these crop provisions and the Basic Provisions; and these crop provisions will control the Basic Provisions.

1. Definitions.

Acre—43,560 square feet of land when row widths do not exceed six feet, or if row widths exceed six feet, the land area on which at least 7,260 linear feet of rows are planted.

Bell pepper—An annual pepper (of the capsicum annuum species, grossum group), widely cultivated for its large, crisp, edible fruit.

Box—One and one-ninth (1⅑) bushels of the insured crop.

Crop year—In lieu of the definition of ''crop year'' contained in section 1 (Definitions) of the Basic Provisions (§ 457.8), crop year is a period of time that begins on the first day of the earliest planting period for fall-planted peppers and continues through the last day of the insurance period for spring-planted peppers. The crop year is designated by the calendar year in which spring-planted peppers are harvested.

Days—Calendar days.

Direct marketing—Sale of the insured crop directly to consumers without the intervention of an intermediary such as a wholesaler, retailer, packer, processor, shipper or buyer. Examples of direct marketing include selling through an on-farm or roadside stand, farmer's market, and permitting the general public to enter the field for the purpose of picking all or a portion of the crop.

Excess rain—An amount of precipitation sufficient to directly damage the crop.

FSA—The Farm Service Agency, an agency of the United States Department of Agriculture or a successor agency.

Freeze—The formation of ice in the cells of the plant or its fruit, caused by low air temperatures.

Good farming practices—The cultural practices generally in use in the county for the crop to make normal progress toward maturity, and are those recognized by the Cooperative State Research, Education, and Extension Service as compatible with agronomic and weather conditions in the county.

Harvest—The picking of peppers on the unit.

Interplanted—Acreage on which two or more crops are planted in a manner that does not permit separate agronomic maintenance or harvest of the insured crop.

Irrigated practice—A method of producing a crop by which water is artificially applied during the growing season by appropriate systems and at the proper times, with the intention of providing the quantity of water needed for the insured crop to make normal progress toward maturity.

Mature bell pepper—A pepper that has reached the stage of development that will withstand normal handling and shipping.

Plant stand—The number of live plants per acre prior to the occurrence of an insurable cause of loss.

Planted acreage—Land in which, for each planting period, transplants or seed have been placed manually or by a machine appropriate for the insured crop and planting method, at the correct depth, into soil that has been properly prepared for the planting method and production practice. For each planting period, peppers must initially be planted in rows. Acreage planted in any other manner will not be insurable unless otherwise provided by the Special Provisions or by written agreement.

Planting period—The period of time designated in the Actuarial Table in which the peppers must be planted to be considered fall, winter or spring-planted peppers.

Potential production—The number of boxes of mature bell peppers that the pepper plants will or would have produced per acre by the end of the insurance period, assuming normal growing conditions and practices.

Practical to replant—In lieu of the definition of ''Practical to replant'' contained in section 1 of the Basic Provisions (§ 457.8), practical to replant is defined as our determination, after loss or damage to the insured crop, based on factors, including but not limited to moisture availability, condition of the field, marketing windows, and time to crop maturity, that replanting to the insured crop will allow the crop to attain maturity prior to the calendar date for the end of the insurance period (inability to obtain plants or seed will not be considered when determining if it is practical to replant).

Replanting—Performing the cultural practices necessary to replace the pepper seed or transplants and then replacing the pepper seed or transplants in the insured acreage with the expectation of growing a successful crop.

Row width—The widest distance from the center of one row of plants to the center of an adjacent row of plants.

Tropical depression—A system identified by the U.S. Weather Service as a tropical depression, and for the period of time so designated, including tropical storms, gales, and hurricanes.

Written agreement—A written document that alters designated terms of a policy in accordance with section 15.

2. Unit Division.

(a) A unit as defined in section 1 (Definitions) of the Basic Provisions (§ 457.8), (basic unit) will be divided by planting period.

(b) Unless limited by the Special Provisions, these basic units may be further divided into optional units if, for each optional unit you meet all the conditions of this section or if a written agreement for such further division exists.

(c) If you do not comply fully with these provisions, we will combine all optional units that are not in compliance with these provisions into the basic unit from which they were formed. We will combine the optional units at any time we discover that you have failed to comply with these provisions. If failure to comply with these provisions is determined to be inadvertent, and the optional units are combined into a basic unit, that portion of the premium paid for the purpose of electing optional units will be refunded to you for the units combined.

(d) All optional units established for a crop year must be identified on the acreage report for that crop year.

(e) The following requirements must be met for each optional unit:

(1) You must have records, which can be independently verified, of planted acreage and production for each optional unit for at least the last crop year in which the insured crop was planted;

(2) You must plant the crop in a manner that results in a clear and discernable break in the planting pattern at the boundaries of each optional unit;

(3) You must have records of marketed production or measurement of stored production from each optional unit maintained in such a manner that permits us to verify the production from each optional unit, or the production from each unit must be kept separate until loss adjustment is completed by us; and

(4) Each optional unit must be located in a separate legally identified section. In the absence of sections, we may consider parcels of land legally identified by other methods of measure including, but not limited to Spanish grants, railroad surveys, leagues, labors, or Virginia Military Lands, as the equivalent of sections for unit purposes. In areas that have not been surveyed using the systems identified above, or another system approved by us, or in areas where such systems exist but boundaries are not readily discernable, each optional unit must be located in a separate farm identified by a single FSA Farm Serial Number.

3. Amounts of Insurance and Production Stages.

(a) In addition to the requirements of section 3 (Insurance Guarantees, Coverage Levels, and Prices for Determining Indemnities) of the Basic Provisions (§ 457.8), you may select only one coverage level (and the corresponding amount of insurance designated in the Actuarial Table for the applicable planting period and practice) for all the peppers in the county insured under this policy.

(b) The amount of insurance you choose for each planting period and practice must have the same percentage relationship to the maximum price offered by us for each planting period and practice. For example, if you choose 100 percent of the maximum amount of insurance for a specific planting period and practice, you must also choose 100 percent of the maximum amount of insurance for all other planting periods and practices.

(c) The amount of insurance available under the catastrophic risk protection plan of insurance will be specified in the Actuarial Table.

(d) The production reporting requirements contained in section 3 (Insurance Guarantees, Coverage Levels, and Prices for Determining Indemnities) of the Basic Provisions (§ 457.8) do not apply to fresh market peppers.

(e) The amounts of insurance per acre are progressive by stages as follows:

Stage	Percent of amount of insurance per acre that you selected	Length of time if direct seeded	Length of time if transplanted
1	65	From planting through the 74th day after planting	From planting through the 44th day after planting.
2	85	From the 75th day after planting until the beginning of stage 3.	From the 45th day after planting until the beginning of stage 3.
3	100	Begins the earlier of 110 days after planting, or the beginning of harvest.	Begins the earlier of 80 days after planting, or the beginning of harvest.

(f) Any acreage of peppers damaged in the first or second stage to the extent that the majority of producers in the area would not normally further care for it, will be deemed to have been destroyed. The indemnity payable for such acreage will be based on the stage the plants had achieved when the damage occurred.

4. Contract Changes.

In accordance with section 4 (Contract Changes) of the Basic Provisions (§ 457.8), the contract change date is April 30 preceding the cancellation date.

5. Cancellation and Termination Dates.

In accordance with section 2 (Life of Policy, Cancellation, and Termination) of the Basic Provisions (§ 457.8), the cancellation and termination dates are July 31.

6. Report of Acreage.

In addition to the requirements of section 6 (Report of Acreage) of the Basic Provisions (§ 457.8), you must report on or before the acreage reporting date contained in the Special Provisions for each planting period:

(a) All the acreage of peppers in the county insured under this policy in which you have a share; and

(b) The row width.

7. Annual Premium.

In lieu of the premium amount determinations contained in section 7 (Annual Premium) of the Basic Provisions (§ 457.8), the annual premium amount for each cultural practice (*e.g.* fall direct seeded irrigated) is determined by multiplying the third stage amount of insurance per acre by the premium rate for the cultural practice as established in the Actuarial Table, by the insured acreage, by your share at the time coverage begins, and by any applicable premium adjustment factors contained in the Actuarial Table.

8. Insured Crop.

In accordance with section 8 (Insured Crop) of the Basic Provisions (§ 457.8), the crop insured will be all the bell peppers in the county for which a premium rate is provided by the Actuarial Table:

(a) In which you have a share;

(b) That are:

(1) Planted to be harvested and sold as mature fresh market bell peppers;

(2) Planted within the planting periods designated in the Actuarial Table;

(3) Grown under an irrigated practice;

(4) Grown on acreage covered by plastic mulch except where the Special Provisions allow otherwise;

(5) Grown by a person who in at least one of the three previous crop years:

(i) Grew bell peppers for commercial sale; or

(ii) Participated in managing a bell pepper farming operation;

(c) That are not:

(1) Interplanted with another crop;

(2) Planted into an established grass or legume;

(3) Pimento peppers; or

(4) Grown for direct marketing.

9. Insurable Acreage.

(a) In lieu of the provisions of section 9 (Insurable Acreage) of the Basic Provisions (§ 457.8), that prohibit insurance attaching if a crop has not been planted in at least one of the three previous crop years, we will insure newly cleared land or former pasture land planted to fresh market peppers.

(b) In addition to the provisions of section 9 (Insurable Acreage) of the Basic Provisions (§ 457.8):

(1) You must replant any acreage of peppers damaged during the planting period in which initial planting took place whenever less than 50 percent of the plant stand remains: and

(i) It is practical to replant;

(ii) If, at the time the crop was damaged, the final day of the planting period has not passed; and

(iii) The damage occurs within 30 days of transplanting or 60 days of direct seeding.

(2) Whenever peppers initially are planted during the fall or winter planting periods and the conditions specified in sections 9(b)(1)(ii) and (iii) are not satisfied, you may elect:

(i) To replant such acreage and collect any replant payment due as specified in section 12. The initial planting period coverage will continue for such replanted acreage.

(ii) Not to replant such acreage and receive an indemnity based on the stage of growth the plants had attained at the time of damage. However, such an election will result in the acreage being uninsurable in the subsequent planting period.

(3) We will not insure any acreage which, in the preceding planting period was planted to peppers (except as allowed in sections 9(b)(1) and (2)), tomatoes, eggplants, or tobacco unless the soil has been fumigated or otherwise properly treated.

10. Insurance Period.

In lieu of the provisions of section 11 (Insurance Period) of the Basic Provisions

(§ 457.8), coverage begins on each unit or part of a unit the later of the date we accept your application, or when the peppers are planted in each planting period. Coverage ends at the earliest of:

(a) Total destruction of the peppers on the unit;

(b) Abandonment of the peppers on the unit;

(c) The date harvest should have started on the unit on any acreage which will not be harvested;

(d) Final adjustment of a loss on the unit;

(e) Final harvest; or

(f) The calendar date for the end of the insurance period as follows:

(1) 165 days after the date of direct seeding or replanting with seed; and

(2) 150 days after the date of transplanting or replanting with transplants.

11. Causes of Loss.

(a) In accordance with the provisions of section 12 (Causes of Loss) of the Basic Provisions (§ 457.8), insurance is provided only against the following causes of loss that occur during the insurance period:

(1) Excess rain;

(2) Fire;

(3) Freeze;

(4) Hail;

(5) Tornado;

(6) Tropical depression; or

(7) Failure of the irrigation water supply, if caused by an insured cause of loss that occurs during the insurance period.

(b) In addition to the causes of loss excluded in section 12 (Causes of Loss) of the Basic Provisions (§ 457.8), we will not insure against any loss of production due to:

(1) Disease;

(2) Insect infestation; or

(3) Failure to market the peppers, unless such failure is due to actual physical damage caused by an insured cause of loss that occurs during the insurance period.

12. Replanting Payments.

(a) In accordance with section 13 (Replanting Payment) of the Basic Provisions (§ 457.8), a replanting payment is allowed if, due to an insured cause of loss, more than 50 percent of the plant stand will not produce peppers and it is practical to replant.

(b) The maximum amount of the replanting payment per acre will be the result obtained by multiplying $300.00 by your insured share.

(c) In lieu of the provisions contained in section 13 (Replanting Payment) of the Basic Provisions (§ 457.8), limiting a replanting payment to one each crop year, only one replanting payment will be made for acreage planted during each planting period within the crop year.

13. Duties In The Event of Damage or Loss.

In addition to the requirements contained in section 14 (Duties In The Event of Damage or Loss) of the Basic Provisions (§ 457.8), if you intend to claim an indemnity on any unit you also must give us notice not later than 72 hours after the earliest of:

(a) The time you discontinue harvest of any acreage on the unit;

(b) The date harvest normally would start if any acreage on the unit will not be harvested; or

(c) The calendar date for the end of the insurance period.

14. Settlement of Claim.

(a) We will determine your loss on a unit basis. In the event you are unable to provide separate acceptable production records:

(1) For any optional unit, we will combine all optional units for which such production records were not provided; or

(2) For any basic unit, we will allocate any commingled production to such units in proportion to our liability on the harvested acreage for each unit.

(b) In the event of loss or damage covered by this policy, we will settle your claim by:

(1) Multiplying the insured acreage in each stage by the amount of insurance per acre for the final stage;

(2) Multiplying each result in section 14(b)(1) by the percentage for the applicable stage (see section 3(e));

(3) Total the results of section 14(b)(2);

(4) Subtracting either of the following values from the result of section 14(b)(3):

(i) For other than catastrophic risk protection coverage, the total value of production to be counted (see section 14(c)); or

(ii) For catastrophic risk protection coverage, the result of multiplying the total value of production to be counted (see section 14(c)) by:

(A) Sixty percent for the 1998 crop year; or

(B) Fifty-five percent for 1999 and subsequent crop years; and

(5) Multiplying the result of section 14(b)(4) by your share.

(c) The total value of production to count from all insurable acreage on the unit will include:

(1) Not less than the amount of insurance per acre for the stage for any acreage:

(i) That is abandoned;

(ii) Put to another use without our consent;

(iii) That is damaged solely by uninsured causes; or

(iv) For which you fail to provide acceptable production records;

(2) The value of the following appraised production will not be less than the dollar amount obtained by multiplying the number of boxes of appraised peppers times the minimum value per box shown in the Special Provisions for the planting period:

(i) Potential production on any acreage that has not been harvested the third time;

(ii) Unharvested mature bell peppers (unharvested production that is damaged or defective due to insurable causes and is not marketable will not be counted as production to count);

(iii) Production lost due to uninsured causes; and

(iv) Potential production on insured acreage that you intend to put to another use or abandon, if you and we agree on the appraised amount of production. Upon such agreement, the insurance period for that acreage will end when you put the acreage to another use or abandon the crop. If agreement on the appraised amount of production is not reached:

(A) We may require you to continue to care for the crop so that a subsequent appraisal may be made or the crop harvested to determine actual production (If we require you to continue to care for the crop and you do not do so, the original appraisal will be used); or

(B) You may elect to continue to care for the crop, in which case the amount of production to count for the acreage will be the harvested production, or our reappraisal if the crop is not harvested.

(3) The total value of all harvested production from the insurable acreage will be the dollar amount obtained by subtracting the allowable cost contained in the Special Provisions from the price received for each box of peppers (this result may not be less than the minimum value shown in the Special Provisions for any box of peppers), and multiplying this result by the number of boxes of peppers harvested. Harvested production that is damaged or defective due to insurable causes and is not marketable, will not be counted as production to count.

15. Written Agreements.

Designated terms of this policy may be altered by written agreement in accordance with the following:

(a) You must apply in writing for each written agreement no later than the sales closing date, except as provided in section 15(e);

(b) The application for a written agreement must contain all variable terms of the contract between you and us that will be in effect if the written agreement is not approved;

(c) If approved, the written agreement will include all variable terms of the contract, including, but not limited to, crop type or variety, and premium rate;

(d) Each written agreement will only be valid for one year (If the written agreement is not specifically renewed the following year, insurance coverage for subsequent crop years will be in accordance with the printed policy); and

(e) An application for a written agreement submitted after the sales closing date may be approved if, after a physical inspection of the acreage, it is determined that no loss has occurred and the crop is insurable in accordance with the policy and written agreement provisions.

16. Minimum Value Option.

(a) The provisions of this option are continuous and will be attached to and made a part of your insurance policy, if:

(1) You elect *either* Option I *or* Option II of the Minimum Value Option on your application, or on a form approved by us, on or before the sales closing date for the initial crop year in which you wish to insure fresh market peppers under this option, and pay the additional premium indicated in the Actuarial Table for this optional coverage; and

(2) You have not elected coverage under the Catastrophic Risk Protection Endorsement.

(b) In lieu of the provisions contained in section 14(c)(3), the total value of harvested production will be determined as follows:

(1) If you selected Option I of the Minimum Value Option, the total value of harvested production will be as follows:

(i) For sold production, the dollar amount obtained by subtracting the allowable cost contained in the Special Provisions from the price received for each box of peppers (this result may not be less than $2.75 for any box of peppers), and multiplying this result by the number of boxes of peppers sold; and

(ii) For marketable production that is not sold, the dollar amount obtained by multiplying the number of boxes of such peppers on the unit by the minimum value shown in the Special Provisions for the planting period (harvested production that is damaged or defective due to insurable causes and is not marketable will not be counted as production).

(2) If you selected Option II of the Minimum Value Option, the total value of harvested production will be as provided in section 16(b)(1), except that the dollar amount specified in section 16(b)(1)(i) may not be less than zero.

(c) This option may be canceled by either you or us for any succeeding crop year by giving written notice on or before the cancellation date preceding the crop year for which the cancellation of this option is to be effective.

Signed in Washington, D.C., on December 24, 1996.

Kenneth D. Ackerman,

Manager, Federal Crop Insurance.

[FR Doc. 97–61 Filed 1–2–97; 8:45 am]

BILLING CODE 3410–FA–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 94–ANE–44]

RIN 2120–AA64

Airworthiness Directives; Certain Textron Lycoming 320 and 360 Series Reciprocating Engines

AGENCY: Federal Aviation Administration, DOT.

ACTION: Supplemental notice of proposed rulemaking.

SUMMARY: This notice revises an earlier proposed airworthiness directive (AD), which would have been applicable to all Textron Lycoming 235 series and 290 series, and certain 320 and 360 series reciprocating engines, that would have required initial and repetitive inspections of the crankshaft inner diameter (ID) for corrosion and cracks, and replacement of cracked crankshafts with a serviceable part. In addition, that proposed AD would have permitted operation of engines with crankshafts that were found to have corrosion pits but were free of cracks, provided repetitive inspections were performed by only certain qualified individuals until the next engine overhaul or 5 years after the initial inspection, whichever occurred first, at which time the proposed AD would have required those crankshafts with corrosion pits but no cracks to be replaced with serviceable crankshafts. That proposal was prompted by reports of crankshaft breakage originating from corrosion pits on the inside wall. This action revises the proposal by limiting the applicability of the proposed AD to only certain Textron Lycoming 320 and 360 series reciprocating engines, excluding additional engines installed in helicopters; permitting any certificated mechanic holding an airframe or powerplant rating to perform the Fluorescent Penetrant Inspection (FPI); permitting continued use of a pitted crankshaft as long as repetitive FPI inspections are performed; and deleting the five year limit on the use of crankshafts that are pitted but not cracked. Also, the FAA has received new cost information, and has revised the economic analysis with respect to the initial inspection time, the time to remove and replace crankshafts, the cost of the replacement crankshafts, and the cost for repetitive FPI inspections. Finally, this revised proposal introduces a public reporting survey to provide the FAA with a broader database on the

condition of crankshafts when observed during the initial inspections. The actions specified by this proposed AD are intended to prevent crankshaft failure, which can result in engine failure, propeller separation, forced landing, and possible damage to the aircraft.

DATES: Comments must be received by April 3, 1997.

ADDRESSES: Submit comments in triplicate to the Federal Aviation Administration (FAA), New England Region, Office of the Assistant Chief Counsel, Attention: Rules Docket No. 94–ANE–44, 12 New England Executive Park, Burlington, MA 01803–5299. 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 Textron Lycoming, 652 Oliver St., Williamsport, PA 17701; telephone (717) 327–7080, fax (717) 327–7100. 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: Raymond Reinhardt or Pat Perrotta, Aerospace Engineers, New York Aircraft Certification Office, FAA, Engine and Propeller Directorate, 10 Fifth St., Valley Stream, NY 11581–1200; telephone (516) 256–7532 or (516) 256–7534, fax (516) 568–2716.

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 94–ANE–44.'' 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. 94–ANE–44, 12 New England Executive Park, Burlington, MA 01803–5299.

Discussion

On October 18, 1993, the Civil Aviation Authority (CAA), which is the airworthiness authority of the United Kingdom, received a report that a Piper PA–28–161 aircraft, with a Textron Lycoming O–320–D3G reciprocating engine installed, executed a forced landing due to an engine crankshaft failure which caused the propeller to separate from the aircraft. The cause of the crankshaft failure was determined to be due to a high cycle fatigue mechanism that had initiated from a number of corrosion pits in the crankshaft bore. After the cracks had progressed through a substantial proportion of the crankshaft section, the rate of advance had increased until the remaining unseparated portion had failed as a result of overload. The cracking occurred in high cycle fatigue and it had progressed over an extended period of service. At the time of the accident the engine had operated for 1,950 hours time in service (TIS) since overhaul and had accumulated 4,429 hours total time since new over a period of 16 years. In addition, the Federal Aviation Administration (FAA) has confirmed that four other failures in the United States and 10 in foreign countries were due to cracks initiating from corrosion pits in the crankshaft bore on certain Textron Lycoming 320 and 360 reciprocating engines with ratings of 160 horsepower or greater. Of the 10 failures in foreign countries, four resulted in the propeller separating from the aircraft inflight. Three of these four were from 1993 to 1996. The FAA utilized metallurgical failure analysis reports and other information to conclude that these failures were due to cracks originating from corrosion pits. This condition, if not corrected, could result in crankshaft failure, which can result in engine failure, propeller separation, forced landing, and possible damage to the aircraft.

A proposal to amend part 39 of the Federal Aviation Regulations (14 CFR part 39) to include an AD that would apply to Textron Lycoming 235 Series and 290 Series, and certain 320 and 360 series reciprocating engines was published in the Federal Register on November 28, 1995 (60 FR 58580); the comment period was reopened in a reprinting of the original proposal on April 8, 1996 (61 FR 15430). That action proposed to require initial and repetitive inspections of the crankshaft inner diameter (ID) for corrosion and cracks, and replacement of cracked crankshafts with a serviceable part. In addition, the proposed AD would have permitted operation of engines with crankshafts that were found to have corrosion pits but were free of cracks provided repetitive inspections were performed until the next engine overhaul or 5 years after the initial inspection, whichever occurred first, at which time the proposed AD would have required those crankshafts with corrosion pits but no cracks to be replaced with serviceable crankshafts. Those proposed actions would be performed in accordance with Textron Lycoming Mandatory Service Bulletin (MSB) No. 505A, dated October 18, 1994.

The FAA had determined that Fluorescent Penetrant Inspections (FPI) were warranted if corrosion pits were found. The FPI inspection was developed due to reports from Textron Lycoming and other approved repair stations that most of the crankshafts that are pitted do not contain cracks. The FAA determined that visual inspections alone were not sufficient to detect a crack. The FPI inspection was based on crack propagation data developed by the FAA in conjunction with Textron Lycoming and with consideration of the technical base in the U.S. for performing Non-Destructive Inspections. The FPI process was shown to be reliable for detection of cracks down to 0.050 inches deep and 0.100 inches in length. The FPI inspection interval was based on the crack propagation data such that a crack could be reliably be detected before the crankshaft failed. If an installed engine was found to have a pitted crankshaft, the FAA did not propose to allow the removal of metal to remove the corrosion pits due to possible contamination of the engine oil supply with metal filings and to ensure that the concentricity of the crankshaft would not be compromised.

Interested persons have been afforded an opportunity to participate in the making of this amendment. Over 200

comments were received in response to the initial NPRM. The following comment groups comprise the information received from the various commenters from around the U.S. and overseas:

A group of commenters state that the Textron Lycoming Model 0–360–A4A and other models that incorporate solid crankshafts should be exempted from the proposed rule's applicability. Also, the commenters state that the Textron Lycoming Model 0–360–J2A engine, installed in the Robinson helicopter, should also be exempted from the proposed rule's applicability, as the –J2A model was not specifically designed as a helicopter engine. The FAA concurs. All these engines have been deleted from the applicability of the revised proposal.

Another group of commenters state that inspections are too costly, that there are not enough failures to justify an AD, and not enough data and studies were developed before issuance of the NPRM. The FAA does not concur. The FAA received data and studies which substantiated the need for an AD. These data confirm the crankshaft fracture occurred at a stress concentration caused by a corrosion pit on the inside of the crankshaft. In addition, since the NPRM was issued, six additional crankshaft failures on 160 horsepower Textron Lycoming engines are being investigated. The FAA has, however, performed additional analysis to limit the population of engines impacted by this proposed AD and has deleted the five year life limit on pitted crankshafts undergoing repetitive FPI inspections. These measures will decrease the cost of this AD to the public.

Another group of commenters state that the 5-year limit on the fluorescent penetrant inspection (FPI) after which the pitted crankshaft must be removed from service should be deleted from the AD. The FAA concurs, and the proposal AD has been revised to delete the 5-year life limit on pitted crankshafts undergoing repetitive FPI inspections.

Another group of commenters state that the crankshaft failures used to justify the proposed AD occurred after a propeller strike, and that the propeller strike history is the main reason for crankshaft failures. The commenters recommend inspecting crankshafts only after a propeller strike. The FAA does not concur. There is insufficient evidence to show that propeller strikes were the primary cause or even a major contributing factor in the investigated crankshaft failures. Severe propeller strikes are normally associated with stress rupture or low cycle fatigue failures, whereas the corrosion failures addressed in this proposal are associated with high cycle fatigue.

Another group of commenters state that any AD should allow airframe or powerplant rated mechanics to perform the required FPI inspections, not just specially rated individuals. The FAA concurs and the proposed AD has been revised accordingly.

Another group of commenters state that instead of the proposed initial and repetitive inspections, the inspections should be required at the next overhaul or 2000 hours TIS since last overhaul, and reinspection accomplished at reasonable TIS intervals. The FAA does not concur. Most overhauls do not include a detailed examination of the crankshaft internal bore for corrosion and cracks. The proposed initial inspection at 1,000 hours TIS since remanufacture or overhaul is necessary due to service failures which have occurred shortly after 1,000 hours TIS since new or overhaul. With regard to the repetitive inspection intervals, the 100 hours TIS interval is based on the crack propagation rate when the crack, detectable by FPI, exists in the internal bore.

Another group of commenters state that the proposed inspections may cause more problems by, for example, improper plug replacement, a rag left in the shaft bore, improper torque on propeller bolts, or metal particles falling into the oil system. The FAA concurs. The NPRM and Textron Lycoming's Mandatory SB cautioned operators about some of these conditions, and the proposed AD has been revised to require, for example, removal of cloths used during the FPI inspections.

Another group of commenters state that all new crankshafts should be exempt from the inspections required by the proposed AD for 10 years. The FAA concurs in part. The original proposal recognized this issue and already incorporates this provision. Paragraph (b) of the current proposal allows initial inspection within 10 years of the original ship date, or 6 months from the effective date of the AD, whichever occurs later. However, there are other events that may require crankshaft inspection prior to reaching 10 years, for example, an overhaul or engine disassembly as specified in Paragraph (b) of the proposed AD.

Another group of commenters state that FPI inspection chemicals may interfere with corrosion prevention treatments being initiated. The commenters recommend delaying FPI inspection for 1 year. The FAA does not concur. When corrosion protection treatments are available, the FAA will evaluate the need for future rulemaking.

In addition, the FAA has removed from the proposed AD's applicability engines with less than 160 maximum rated horsepower (hp) because the lower power engines, which utilize the same size crankshaft, develop lower stress levels at the location of the corrosion pitting. The lower stress levels result in predicted fatigue life which will not initiate cracking from the stress concentrations associated with the corrosion pitting. In addition, service history of cracks developing from the location of corrosion pitting has been limited to the higher rated power (160 hp and above) engines.

Also, the FAA has determined the need to acquire more data on the extent of crankshaft corrosion. A crankshaft inspection survey has been included as an appendix to this proposed AD. The inspection survey will be utilized by the FAA to determine: the number of engines under repetitive FPI inspections, the number of crankshafts that are found to be cracked, if another failure mechanism is contributing to the crankshaft failures, and possible adjustment of the repetitive inspection interval. The information obtained by this survey may lead to future rulemaking.

Finally, the economic analysis of this proposed AD is revised to address the changes in the scope of the proposal. The total number of engines impacted worldwide has dropped from 77,100 to 16,357 (11,000, 160 hp, 320 series; and 5,357, 360 Series). The FAA estimates that 60% of that number, 9,814 engines are installed on aircraft of U.S. registry, and would be affected by this proposed AD. The FAA estimates that it would take approximately 8 work hours per engine to accomplish the proposed initial visual inspection, and that the average labor rate is $60 per work hour; therefore the estimated cost impact for the proposed initial visual inspections would be $4,710,720. The FAA also estimates, based on information received from the UK CAA regarding the number of engines undergoing repetitive inspections in the UK due to the UK CAA AD on the same subject, that 12%, or 1,178, of the affected engines would contain crankshafts that require FPI. The FAA estimates that each FPI would take approximately 8 hours, and that operators with corroded crankshafts would perform one FPI per year. The estimated cost for the repetitive FPI, therefore, is $565,286 annually. Lastly, the FAA estimates that 5 crankshafts will require replacement per year due to cracks, and that it would take 38 work hours per engine to replace cracked crankshafts. Assuming that a replacement crankshaft would cost

approximately $6,000 per engine, the estimated cost for replacement of 5 crankshafts would be $41,400 annually. Therefore, the total estimated cost impact of this proposal is $5,317,406 for the first year, and $606,686 each year thereafter.

Since these changes expand the scope of the originally proposed AD, the FAA has determined that it is necessary to publish this Supplemental Notice of Proposed Rulemaking to provide an opportunity for public comment on the revised proposal.

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 USC 106(g), 40113, 44701.

§ 39.13 [Amended]

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

Textron Lycoming: Docket No. 94–ANE–44.

Applicability: Textron Lycoming 320 series limited to 160 horsepower, and 360 series, four-cylinder reciprocating engines with fixed pitch propellers; except for the following installed in helicopters or with solid crankshafts: HO–360 series, HIO–360 series, LHIO–360 series, VO–360 series, and IVO–360 series, and Models O–320–B2C, O–360–J2A, AEIO–360–B4A, O–360–A4A, –4G, –A4J, –A4K, –A4M, and –C4F. These engines are installed on but not limited to reciprocating engine powered aircraft manufactured by Cessna, Piper, Beech, American Aircraft Corporation, Grumman American Aviation, Mooney, Augustair Inc., Maule Aerospace Technology Corporation, Great Lakes Aircraft Co., and Commander Aircraft Co.

Note 1: 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 request approval for an alternative method of compliance in accordance with paragraph (g) 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 crankshaft failure, which can result in engine failure, propeller separation, forced landing, and possible damage to the aircraft, accomplish the following:

(a) For engines shipped new from Textron Lycoming prior to and including December 31, 1984, and that have never been overhauled, or any engine remanufactured or overhauled and that has accumulated 1,000 hours or more time in service (TIS) since remanufacture or overhaul, visually inspect the inner diameter (ID) of the crankshaft for corrosion pits within the next 100 hours TIS after the effective date of this AD, or 6 months after the effective date of this AD, whichever occurs first, in accordance with Textron Lycoming Mandatory Service Bulletin (MSB) No. 505A, dated October 18, 1994.

(1) The propeller must be removed in accordance with the aircraft manufacturer's procedures to perform this inspection.

(2) If corrosion pits are found during this inspection, prior to further flight perform a Fluorescent Penetrant Inspection (FPI) in accordance with paragraph (e) of this AD.

(3) Within 48 hours after these inspections, report the finding of the inspection in accordance with paragraph (f) of this AD.

(b) For engines shipped new from Textron Lycoming after December 31, 1984, and that have never been overhauled, or any engine remanufactured or overhauled and that has accumulated less than 1,000 hours TIS since remanufacture or overhaul, visually inspect the ID of the crankshaft for corrosion pits, at the earliest occurrence of any event specified in subparagraph (4) of this paragraph, and in accordance with Textron Lycoming MSB No. 505A, dated October 18, 1994.

(1) The propeller must be removed in accordance with the aircraft manufacturer's procedures to perform this inspection.

(2) If corrosion pits are found during this inspection, prior to further flight perform an FPI in accordance with paragraph (e) of this AD.

(3) Within 48 hours after these inspections, report the finding of the inspection in accordance with paragraph (f) of this AD.

(4) Visually inspect the ID of the crankshaft for corrosion pits at the earliest of the following:

(i) The next engine overhaul or disassembly.

(ii) Within 10 years of the original shipping date or 6 months from the effective date of this AD, whichever occurs later.

(iii) Within 1,000 hours TIS since remanufacture or overhaul, or 6 months from the effective date of this AD, whichever occurs later.

(c) Thereafter, if no corrosion pits or cracks are found on the ID of the crankshaft during the initial visual inspection, perform a visual inspection at intervals not to exceed 5 years since last inspection, or at the next engine overhaul or disassembly, whichever occurs first, in accordance with Textron Lycoming MSB No. 505A, dated October 18, 1994. If corrosion pits but no cracks are found on the ID of the crankshaft during the initial visual inspection, repeat the FPI at intervals not to exceed 100 hours TIS since last FPI inspection until a serviceable crankshaft is installed in the engine..

(d) Prior to further flight, remove from service and replace with a serviceable part any crankshaft found cracked during FPI performed in accordance with paragraph (e) of this AD.

(e) An engine, installed in the aircraft having a corroded crankshaft, may be returned to service without disassembly provided an FPI confirms the bore to be crack free. The process and materials utilized for the FPI must comply with the classification contained in MIL–I–25135. The FPI must be fluorescent solvent removable (Method C) utilizing a Type 1 penetrant system with a penetrant sensitivity Level 3 or higher and a Form D-Nonaqueous Developer. Spray containers of the materials are acceptable for this inspection. An individual having a mechanic certificate with at least an Airframe or Powerplant Rating who has the capability to perform the FPI inspection method is authorized to perform the FPI inspection. This FPI process involves the removal of penetrant material from the inspection surface. To ensure that contaminants from the cleaning process and the FPI do not enter the engine oil supply, block off the area of the crankshaft bore that is aft of the area being inspected by using a clean, dry, lint-free cloth. When the FPI is completed remove the lint-free cloth from the crankshaft bore before installing the front crankshaft plug. The FPI must be performed using the following steps:

(1) Cleaning—The crankshaft bore surface must be cleaned of visible corrosion prior to the FPI process using Scotchbrite or an

equivalent material. Metal-removing processes must not be used for visible corrosion cleaning. In addition, clean all surfaces to be inspected utilizing a cleaner, such as Magnaflux Spot Check Cleaner/Remover SKC–NF or equivalent, on the ID of the crankshaft bore. Let the cleaner/remover dry for 5 minutes minimum. Wipe clean with a lint-free cloth.

(2) Penetrant Application—Spray penetrant, such as ZYGLO ZL–22A Magnaflux Corp. or equivalent Type 1 with a penetrant sensitivity Level 3 or higher, on the ID bore.

(3) Penetrant Dwell—Allow a minimum of 10 minutes dwell. For dwell times exceeding 60 minutes the penetrant shall be reapplied to prevent drying.

(4) Penetrant Removal—Remove all bulk surface penetrant by wiping with a clean, dry lint-free cloth. Make a single wipe and then fold the cloth to provide a clean surface for succeeding wipes.

(i) Solvent Wipe—After the bulk of the surface penetrant has been removed, lightly moisten a fresh lint-free cloth with cleaner/remover and again wipe the surface. The cloth must not be saturated and the inspection surface must not be flooded with solvent. Excessive solvent will wash penetrant from defects.

(ii) During wiping, the inspection surface shall be illuminated with black light. Repeat the solvent wipe as necessary until no residual trace of penetrant remains on the inspection surface.

(5) Nonaqueous Developer (solvent suspended)—Following the cleaner/remover wipe apply nonaqueous developer by spraying a developer, such as Magnaflux Spot Check Developer SKD–NF or Form D-Nonaqueous equivalent, on the ID bore. Apply a thin uniform layer to the bore surface. The optimum coating thickness is indicated by the visibility of the part surface. If the metallic luster cannot be seen the developer is too thick.

(6) Dwell—Developer dwell is required to allow the developer time to draw entrapped penetrant from any small defects. The minimum development time shall be 10 minutes. The maximum dwell time for nonaqueous developer shall be 60 minutes.

(7) Inspection shall be performed within the allotted dwell time. Components that are not inspected within the allotted dwell time must be reprocessed.

(i) Examine crankshaft bore in a darkened enclosure under ultraviolet (black) light. Allow 1 minute for eyes to adapt to darkened environment prior to inspecting crankshaft bore. Use of photochromic lenses or permanent darkened lenses is prohibited.

(ii) During inspection make sure that the black light intensity is a minimum of 1200 microwatts/cm^2 at the bore surface. This can be accomplished by positioning the black light as close as necessary to the bore to achieve 1200 microwatts/cm^2. White light background shall not exceed 20 1×/m^2 (2 foot-candles). A photographic light meter may be used to determine the white light background reading.

(iii) Crankshaft bores having no crack indications are acceptable.

(iv) Magnification (10X maximum) and/or white light may be used to determine discontinuity type. Indications, on parts exhibiting fluorescent background which interferes with evaluation of questionable indications, shall be evaluated as follows:

(A) Lightly wipe the area once with a soft brush or cotton swab applicator dampened with ethyl alcohol. Do not permit alcohol to flood the surface.

(B) After the alcohol evaporates from the surface, re-inspect. If an indication reappears, evaluate it immediately. If the indication does not reappear, reapply developer. The redevelopment time shall equal the original development time. Thereafter, re-inspect.

(8) After inspection, clean residual penetrants and developers from the crankshaft bore. Remove the lint-free cloth from the crankshaft bore prior to installing front crankshaft plug. Failure to do so may result in oil restriction within the engine and in turn cause engine failure. Reinstall the front crankshaft plug in accordance with Textron Lycoming MSB No. 505A, dated October 18, 1994. Failure to install the plug properly may result in engine oil loss and in turn cause engine failure.

(f) After accomplishing the initial visual inspection and, if necessary, the FPI, required by this AD, complete Appendix 1 of this AD and submit to the Manager, New York Aircraft Certification Office, FAA, Engine and Propeller Directorate, 10 Fifth St., Valley Stream, NY 11581; fax (516) 568–2716. Reporting requirements have been approved by the Office of Management and Budget and assigned OMB control number 2120–0056.

Appendix 1

Textron Lycoming Crankshaft Inspection Survey

AD DOCKET NO. 94–ANE–44

Date of Inspection _____

Inspector's Information

Name _____

Address _____

State _____ Zip Code _____

Telephone No. _____

Facsimile No. _____

Engine Model Number _____

Engine Serial Number (S/N) _____

Date of Manufacture _____ (M/D/YR)

Total Time (TT) _____ hrs

Time Since Major Overhaul (SMOH) _____ hrs

Crankshaft Part Number (located on prop flange) _____ S/N _____

Aircraft Make and Model

_____

Frequency of Flights _____ per month (average) Duration _____ hrs per Flight

How was aircraft being utilized? _____ Training, _____ Personal, _____ Banner Towing, _____ Glider Towing, _____ Agricultural, Other (please explain) Q_____

Propeller Make and Model

_____

Has the aircraft ever experienced a propeller strike during service? _____ Yes _____ No

Was propeller ever removed for servicing or overhaul? _____ Yes _____ No

If yes, describe reason for removal in detail.

_____

_____

_____

What was the condition of the crankshaft internal bore?

Corroded _____ Yes _____ No

If corroded, how many pits? ____ 1 to 5, ____ 6 to 10, _____ More than 10

Was a crack found? _____ Yes _____ No

If crack was found, complete the following:

_____ Distance from crankshaft end (Inches)

_____ Crack Length (Inches)

Comments:

_____

_____

_____

_____

_____

_____

(g) An alternative method of compliance or adjustment of the compliance time that provides an acceptable level of safety may be used if approved by the Manager, New York Aircraft Certification Office. The request should be forwarded through an appropriate FAA Maintenance Inspector, who may add comments and then send it to the Manager, New York Aircraft Certification Office.

Note 2: Information concerning the existence of approved alternative methods of compliance with this airworthiness directive, if any, may be obtained from the New York Aircraft Certification Office.

(h) 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.

Issued in Burlington, Massachusetts, on December 26, 1996.

Jay J. Pardee,

Manager, Engine and Propeller Directorate, Aircraft Certification Service.

[FR Doc. 97–32 Filed 1–2–97; 8:45 am]

BILLING CODE 4910–13–U

14 CFR Part 71

[Airspace Docket No. 96–AEA–16]

Proposed Establishment of Class E Airspace; Johnstown, NY

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking.

SUMMARY: This proposed rule would establish Class E Airspace at Johnstown, NY. The development of two new Standard Instrument Approach Procedures (SIAP) at Fulton County Airport based on the Global Positioning System (GPS) has made this proposal necessary. Additional controlled

airspace extending upward from 700 feet above the surface (AGL) is needed to accommodate these SIAPs and for Instrument Flight Rules (IFR) operations to the airport. The area would be depicted on aeronautical charts for pilot reference.

DATES: Comments must be received on or before January 30, 1997.

ADDRESSES: Send comments on the proposed rule in triplicate to: Manager, Operations Branch, AEA–530, Docket No. 96–AEA–16, F.A.A. Eastern Region, Federal Building #111, John F. Kennedy Int'l Airport, Jamaica, NY 11430. The official docket may be examined in the Office of the Assistant Chief Counsel, AEA–7, F.A.A. Eastern Region, Federal Building #111, John F. Kennedy International Airport, Jamaica, New York 11430.

An informal docket may also be examined during normal business hours in the Operations Branch, AEA–530, F.A.A. Eastern Region, Federal Building #111, John F. Kennedy International Airport, Jamaica, NY 11430.

FOR FURTHER INFORMATION CONTACT: Mr. Francis T. Jordan, Jr., Airspace Specialist, Operations Branch, AEA–530, F.A.A. Eastern Region, Federal Building #111, John F. Kennedy International Airport, Jamaica, New York 11430; telephone: (718) 553–4521.

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–AEA–16''. The postcard will be date/time stamped and returned to the commenter.

All communications received 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 in the Rules Docket both before and after the closing date for comments. A report summarizing each substantive public contact with the FAA personnel concerned with this rulemaking will be filed in the docket.

Availability of NPRMs

Any person may obtain a copy of this Notice of Proposed Rulemaking (NPRM) by submitting a request to the Office of the Assistant Chief Counsel, AEA–7, F.A.A. Eastern Region, Federal Building #111, John F. Kennedy International Airport, Jamaica, NY 11430. Communications must identify the notice number of this NPRM. Persons interested in being placed on a mailing list for future NPRMs 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 extending upward from 700 feet above the surface (AGL) at Johnstown, NY. A GPS RWY 10 SIAP and a GPS RWY 28 SIAP has been developed for Fulton County Airport. Additional controlled airspace extending upward from 700 feet above the surface (AGL) is needed to accommodate these SIAPs and for IFR operations at the airport. The area would be depicted on appropriate aeronautical charts. Class E airspace designations for airspace extending upward from 700 feet above the surface are published in Paragraph 6005 of FAA Order 7400.9D, dated September 4, 1996, and effective September 16, 1996, 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. Therefore, this proposed regulation—(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 would only affect air traffic procedures and air navigation, it is certified that this proposed rule would 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 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.

2. The incorporation by reference in 14 CFR 71.1 of the Federal Aviation Administration Order 7400.9D, dated September 4, 1996, and effective September 16, 1996, is proposed to be amended as follows:

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

* * * * *

AEA NY E5 Johnstown, NY [New]

Fulton County Airport, NY
(Lat. 42°59′54″ N, long. 74°19′46″ W)

That airspace extending upward from 700 feet above the surface within a 9.5-mile radius of Fulton County Airport, excluding that portion that coincides with the Albany, NY Class E airspace area.

* * * * *

Issued in Jamaica, New York, on December 18, 1996.

James K. Buckles,

Acting Manager, Air Traffic Division, Eastern Region.

[FR Doc. 97–78 Filed 1–2–97; 8:45 am]

BILLING CODE 4910–13–M

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14 CFR Part 71

[Airspace Docket No. 96–AEA–15]

Proposed Establishment of Class E Airspace; Stuart, VA

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking.

SUMMARY: This proposed rule would establish Class E Airspace at Stuart, VA. The development of a new Standard Instrument Approach Procedure (SIAP) at Micro Airport based on the Global Positioning System (GPS) has made this proposal necessary. Additional controlled airspace extending upward

from 700 feet above the surface (AGL) is needed to accommodate this SIAP and for Instrument Flight Rules (IFR) operations to the airport. The area would be depicted on aeronautical charts for pilot reference.

DATES: Comments must be received on or before January 30, 1997.

ADDRESSES: Send comments on the proposed rule in triplicate to: Manager, Operations Branch, AEA–530, Docket No. 96–AEA–15, F.A.A. Eastern Region, Federal Building #111, John F. Kennedy Int'l Airport, Jamaica, NY 11430. The official docket may be examined in the Office of the Assistant Chief Counsel, AEA–7, F.A.A. Eastern Region, Federal Building #111, John F. Kennedy International Airport, Jamaica, New York 11430.

An informal docket may also be examined during normal business hours in the Operations Branch, AEA–530, F.A.A. Eastern Region, Federal Building #111, John F. Kennedy International Airport, Jamaica, NY 11430.

FOR FURTHER INFORMATION CONTACT:

Mr. Francis T. Jordan, Jr., Airspace Specialist, Operations Branch, AEA–530, F.A.A. Eastern Region, Federal Building #111, John F. Kennedy International Airport, Jamaica, New York 11430; telephone: (718) 553–4521.

SUPPLEMENTARY INFORMATION:

Comments Invited

Interested parties are invited to participate in this proposed rulemaking by submitting such written data, views, or argument 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 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–AEA–15''. The postcard will be date/time stamped and returned to the commenter.

All communications received 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 in the Rules Docket both before and after the closing date for comments. A report summarizing each substantive public contact with the FAA personnel concerned with this rulemaking will be filed in the docket.

Availability of NPRMs

Any person may obtain a copy of this Notice of Proposed Rulemaking (NPRM) by submitting a request to the Office of the Assistant Chief Counsel, AEA–7, FAA Eastern Region, Federal Building #111, John F. Kennedy International Airport, Jamaica, NY 11430. Communications must identify the notice number of this NPRM. Persons interested in being placed on a mailing list for future NPRMs 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 extending upward from 700 feet above the surface (AGL) at Stuart, VA. A GPS RWY 26 SIAP has been developed for Micro Airport. Additional controlled airspace extending upward from 700 feet above the surface (AGL) is needed to accommodate this SIAP and for IFR operations at the airport. The area would be depicted on appropriate aeronautical charts. Class E airspace designations for airspace extending upward from 700 feet above the surface are published in Paragraph 6005 of FAA Order 7400.9D, dated September 4, 1996, and effective September 16, 1996, 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. Therefore, this proposed regulation—(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 would only affect air traffic procedures and air navigation, it is certified that this proposed rule would 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 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.

2. The incorporation by reference in 14 CFR 71.1 of the Federal Aviation Administration Order 7400.9D, dated September 4, 1996, and effective September 16, 1996, is proposed to be amended as follows:

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

* * * * *

AEA VA E5 Stuart, VA [New]

Micro Airport, VA
(lat. 36° 44′07″N, long. 80° 26′56″W)
That airspace extending upward from 700 feet above the surface within a 8-mile radius of Micro Airport and within 4.5 miles each side of the 252° bearing to the airport from the 8-mile radius to 15 miles northeast of the airport.

* * * * *

Issued in Jamaica, New York, on December 18, 1996.

James K. Buckles,

Acting Manager, Air Traffic Division, Eastern Region.

[FR Doc. 97–79 Filed 1–2–97; 8:45 am]

BILLING CODE 4910–13–M

SOCIAL SECURITY ADMINISTRATION

20 CFR Part 404

[Regulation No. 4]

RIN 0960–AE44

Federal Old-Age, Survivors and Disability Insurance; Report of Earnings Under the Social Security Earnings Test

AGENCY: Social Security Administration.

ACTION: Proposed rule.

SUMMARY: This proposed rule would amend our regulations regarding reports of earnings to the Social Security Administration (SSA) required of beneficiaries who work and earn more

than the applicable exempt amount. Beneficiaries under age 70, who work and earn more than the applicable exempt amount, are required by law to report their earnings to SSA within three months and 15 days following the close of their tax year (usually April 15). As a result of our ongoing efforts both to improve customer service and to reduce the public's paperwork burden, we propose to change our regulations to state that we can accept the W–2 report filed by the employer with SSA, and/or the self-employment income tax return filed by the beneficiary with the Internal Revenue Service (IRS), as the report of earnings. We will use the information (wages and net earnings from self-employment) contained in those reports together with other pertinent information to adjust benefits under the earnings test.

DATES: To be sure that your comments are considered, we must receive them no later than February 3, 1997.

ADDRESSES: Comments should be submitted in writing to the Commissioner of Social Security, P.O. Box 1585, Baltimore, MD 21235, sent by telefax to (410) 966–2830, sent by E-mail to ''regulations@ssa.gov,'' or delivered to the Division of Regulations and Rulings, Social Security Administration, 3–B–1 Operations Building, 6401 Security Boulevard, Baltimore, MD 21235, between 8:00 A.M. and 4:30 P.M. on regular business days. Comments may be inspected during these same hours by making arrangements with the contact person shown below.

The electronic file of this document is available on the Federal Bulletin Board (FBB) at 9:00 A.M. on the date of publication in the Federal Register. To download the file, modem dial (202) 512–1387. The FBB instructions will explain how to download the file and the fee. This file is in WordPerfect format and will remain on the FBB during the comment period.

FOR FURTHER INFORMATION CONTACT: Robert Augustine, Division of Regulations and Rulings, Social Security Administration, 6401 Security Blvd., Baltimore, MD 21235, (410) 966–5121. For information on eligibility, claiming benefits, or coverage of earnings, call our national toll-free number, 1–800–772–1213.

SUPPLEMENTARY INFORMATION: Under the Social Security earnings test set out in section 203 of the Social Security Act (the Act), benefits are reduced if the annual earnings of a beneficiary (receiving other than disability benefits), under age 70, exceed certain exempt amounts. The exempt amounts are established by law. Individuals who are entitled to a monthly benefit (other than a disability benefit) during the year and who earn over the exempt amount are required to file a report of earnings with the SSA within three months and 15 days following the close of their tax year (usually April 15). The reports may be filed on a form prescribed by SSA, or in person, or by telephone. The report may be filed by someone other than the beneficiary, provided the report contains the required information. Failure to file a report as required will result in a monetary penalty, unless we find that there was good cause for filing late. There are 330,833 public reporting burden hours associated with the completion and filing of these annual earnings reports.

Working beneficiaries are also required to report their income to the IRS during the same time period. SSA receives and processes W–2 information from employers. We also receive limited information from IRS from individual self-employment income tax returns that are filed. Wages and net-earnings from self-employment are ''posted'' to individual earnings records as part of our mission to maintain accurate earnings records for benefit payment. Until recently, we have been unable to use the earnings information we receive from W–2 forms and self-employment tax returns as the annual report because it took several years for SSA to receive and process the earnings information from the W–2 forms and the tax returns. For that reason, we provided in § 404.452(b) of our regulations that the filing of tax returns with the IRS was not such a report as is required to be filed for the annual earnings test, even where the tax returns showed the same wages and net earnings from self-employment that must be reported to us for purposes of the annual earnings test. Although SSA was unable to use earnings information from W–2 forms and self-employment tax returns to adjust benefits on a timely basis, we have traditionally used this information as a check to ensure beneficiary compliance with the reporting requirements of the annual earnings test.

Recent improvements in employer reporting practices and in SSA's Annual Wage Reporting (AWR) process have made it feasible and desirable for SSA to change its process for obtaining earnings information from working beneficiaries. For the majority of beneficiaries, information from the W–2 report and/or the self-employment tax return is now processed quickly enough that it is sufficient to serve as the ''annual report'' without need for further action by the beneficiary. Therefore, as part of the ''reinventing government'' initiative and in order to reduce the reporting burden on the public, improve customer service and save administrative costs, we propose to revise § 404.452 to state that the form W–2 filed by the employer with SSA and/or the self-employment income tax return filed by beneficiaries with IRS may serve as the annual report of earnings. Because of this change, SSA will no longer print and mail Annual Report of Earnings forms. For most beneficiaries, the process will be totally automated, with SSA receiving and processing earnings information reported for tax purposes and using that information in conjunction with other relevant information to adjust the Social Security benefits payable accordingly.

Certain situations will require more information than is contained on the form W–2 and self-employment income tax return. When these situations occur, a beneficiary will still have to contact SSA to provide the information in order to ensure the correct amount of benefits are paid, unless the information was otherwise provided to us. In addition, some beneficiaries may wish to file a report directly with SSA, in order to have their benefits adjusted sooner. (Most adjustments now occur during the period February through May, based on reports filed directly with us, but would take place June through October if based on reports filed through IRS.) In these instances, we will accept a report of earnings in writing, in person, or over the telephone, from beneficiaries who still need or wish to file a report.

For example, under IRS regulations, wages are reported on forms W–2 for the year in which they are paid. Under the Social Security earnings test, wages are counted for the year in which services are performed. Therefore, if the form W–2 shows wages that were earned in a year or years prior to the year for which the report is made, e.g., deferred compensation, the beneficiary will need to report to us the correct amount of earnings for the year reported.

There is a similar provision for the self-employed (applicable to years after the initial year of entitlement) that may require contact when no services have been performed in the year for which net earnings from self-employment are reported. Furthermore, in the year in which the monthly earnings test applies (frequently the year of retirement), a beneficiary who has not already done so will need to provide monthly earnings information to SSA that cannot be discerned from the form W–2 or the self-employment income tax return.

Additional examples of situations where other pertinent information must be provided are:

- The beneficiary earned wages above the exempt amount and also had a net loss from self-employment;
- There were wages reported on a W–2 that will be included on a self-employment tax return (e.g., ministers and certain church workers);
- The beneficiary is self-employed and reports earnings on a fiscal year basis which is not the calendar year;
- The beneficiary had Federal agricultural program payments or income from carry-over crops that is included on the SE return;
- The beneficiary estimated earnings over the exempt amount and some benefits were withheld, but there were no earnings for the year, i.e., no wages reported, no self-employment.

SSA already has methods of collecting some of the supplemental information needed to correctly adjust benefits under the earnings test when that information is needed. Much of the information can be gathered in the initial claims process. We also work with employers and payroll groups to have them report directly to us certain payments that should not be counted under the earnings test. We will continue to use these methods as well as develop other means to obtain supplemental information needed to correctly adjust benefits without a separate report of earnings from the beneficiary. We will provide an explanation of the process during the claims interview, and we will provide written information through our public information materials that will allow beneficiaries to understand what earnings should be counted under the earnings test and the situations in which we would need additional information. When we adjust benefits based on the earnings posted to the beneficiary's record, we will, in our notice to the beneficiary, provide full information regarding the earnings that we used and the situations in which those earnings may not be correct. This will ensure that beneficiaries have full knowledge of our actions. Our notice will also tell beneficiaries how to obtain a reconsideration of our determination if they feel we were wrong, and will advise them of their responsibility to give us any further information that could be pertinent to their benefit adjustment.

It should be noted that we are not revising our regulations regarding extension of time for filing a report (§ 404.452(f)). The deadline for filing employer reports (W–2 forms) is well within the timeframes for required annual reports. In relying on these, as well as the SE tax return information, SSA will assume that posted earnings are based on timely filed reports. However, when a beneficiary requests an extension of time from IRS for filing a self-employment tax return, the beneficiary must either file a timely report of earnings with SSA, or request an extension of time for filing such a report from SSA. An extension granted by IRS will not be considered an extension of time granted by SSA.

This change in our rules is proposed in the spirit of improved service to our beneficiaries. First, this proposed rule would reduce the burden associated with the double filing of information with both SSA and IRS. Second, SSA would be able to shift resources devoted to the solicitation and processing of reports from beneficiaries under the current annual report process to other priority workloads, such as processing claims for benefits and responding to telephone inquiries. Finally, this proposed rule supports the President's request in his remarks on May 22, 1995 on signing the Paperwork Reduction Act of 1995, that agencies review their regulations with the goal of reducing by half the frequency of reports required from citizens. This proposed rule would eliminate the annual report of earnings form and the need for most working beneficiaries to file a separate report of earnings with SSA, resulting in a savings of up to 330,833 public burden hours each year.

We also propose to revise paragraphs (a)(1) and (a)(2) of § 404.452 by changing age 72 to age 70. These revisions would reflect the statutory change in the Social Security Amendments of 1977 that reduced from age 72 to 70, the age at which beneficiaries become exempt from the annual earnings test. This change was originally scheduled to take effect in 1982 but, due to a provision in the Omnibus Budget Reconciliation Act of 1981, it did not become effective until 1983. Since the statutory provisions were self-implementing, we exempted working beneficiaries age 70 and over from the annual earnings test beginning in 1983. However, we have not previously updated this regulation to take account of this statutory change.

Regulatory Procedures

Executive Order 12866

The Office of Management and Budget (OMB) has reviewed this proposed rule and determined that it meets the criteria for a significant regulatory action within the meaning of Executive Order 12866. As indicated earlier in this preamble, failure to file a timely report of earnings will result in a monetary penalty, unless we find that there was good cause for filing late. Since, for most beneficiaries, the W–2 and/or self-employment tax return information will be considered the annual report of earnings required by section 203(f) of the Act, we anticipate that there will be very few penalties imposed on beneficiaries for failing to report their earnings. The loss of penalty dollars is estimated to be $60–75 million for the 5-year period of fiscal years 1997 through 2001. However, we believe that the loss of penalty income should not be given undue consideration because this income results from beneficiaries' failure to timely report their earnings to SSA. It has always been the goal of SSA to achieve maximum reporting compliance and if this goal was achieved, there would be no penalties imposed. Furthermore, we believe that the loss of penalty revenue is more than offset by the benefits that both the public and SSA would realize under the proposed rule. These benefits include the fact that up to 1.3 million beneficiaries will no longer be required to complete the annual report of earnings forms resulting in a reduction in the public reporting burden of up to 330,833 hours. In addition, this initiative will shift the annual report workload from SSA's peak workload period (January through March) until later in the year and thus, will allow SSA to divert scarce resources to other priority workloads, such as processing claims for benefits and responding to telephone inquiries, resulting in better overall service to the public.

Administrative savings for this initiative are estimated to be 540 workyears and $23.2 million for fiscal years 1997 through 2001.

Regulatory Flexibility Act

We certify that this proposed rule will not have a significant economic impact on a substantial number of small entities since it affects only individuals. Therefore, a regulatory flexibility analysis as provided in Public Law 96–354, the Regulatory Flexibility Act, is not required.

Paperwork Reduction Act

This proposed regulation will impose no new reporting or recordkeeping requirements requiring OMB clearance. As indicated earlier in this preamble, we estimate that the proposed Annual Report of Earnings process will reduce the annual public reporting burden by up to 330,833 hours. This is the annual reporting burden currently associated with the completion and filing of forms SSA–777 and SSA–7770 (OMB Control Number 0960–0057). Although this proposed regulation would eliminate those forms, SSA will continue to

collect earnings information, through a number of other collection instruments already approved by OMB. In most cases, we will obtain this information through forms W–2 and schedule SEs approved for use by IRS. In those cases where additional information is required, we expect to obtain that information during the initial claims interview through forms approved for use by SSA (primarily the SSA–1 (Application for Retirement Benefits; OMB Approval Number 0960–0007) and the SSA–795 (Statement of Claimant or Other Person; OMB Approval Number 0960–0045)). In addition, SSA has developed a new form to collect the additional information needed from employers to correctly adjust benefits in special wage payment situations. We will submit this form to OMB for its review under section 3507(d) of the Paperwork Reduction Act of 1995.

(Catalog of Federal Domestic Assistance Program Nos. 96.001 Social Security—Disability Insurance; 96.002 Social Security—Retirement Insurance; 96.004 Social Security—Survivors Insurance)

List of Subjects in 20 CFR Part 404

Administrative practice and procedure, Blind, Disability benefits, Old-Age, Survivors, and Disability Insurance, Reporting and recordkeeping requirements, Social security.

Dated: November 1, 1996.

Shirley S. Chater,

Commissioner of Social Security.

For the reasons set out in the preamble, part 404 of chapter III of title 20 of the Code of Federal Regulations is proposed to be amended as follows:

PART 404—FEDERAL OLD-AGE, SURVIVORS AND DISABILITY INSURANCE

1. The authority citation for subpart E of part 404 continues to read as follows:

Authority: Secs. 202, 203, 204 (a) and (e), 205 (a) and (c), 222(b), 223(e), 224, 225, and 702(a)(5) of the Social Security Act (42 U.S.C. 402, 403, 404 (a) and (e), 405(a) and (c), 422(b), 423(e), 424a, 425, and 902(a)(5)).

2. Section 404.452 is amended by revising paragraphs (a)(1) and (a)(2), revising the last sentence of paragraph (b), and revising paragraph (d) to read as follows:

§ 404.452 Reports to Social Security Administration of earnings; wages; net earnings from self-employment.

(a) * * *

(1) The individual attained the age of 70 in or before the first month of entitlement to benefits in the taxable year, or

(2) The individual's benefit payments were suspended under the provisions described in § 404.456 for all months in a taxable year in which the individual was entitled to benefits and was under age 70.

(b) * * * The filing of an income tax return or a form W–2 with the Internal Revenue Service may serve as the report required to be filed under the provisions of this section where the income tax return or form W–2 shows the same wages and net earnings from self-employment that must be reported to the Administration under this section.

* * * * *

(d) *Information to be provided to us.* The report should show the name and social security claim number of the beneficiary about whom the report is made; identify the taxable year for which the report is made; show the total amount of wages for which the beneficiary rendered services during the taxable year (if applicable), the amount of net earnings from self-employment for such year (if applicable); and show the name and address of the individual making the report. To overcome the presumption that the beneficiary rendered services for wages exceeding the allowable amount and rendered substantial services in self-employment in each month (see § 404.435), we must also be told the specific months in which the beneficiary did not render services in employment for wages of more than the allowable amount (as described in § 404.435) and did not render substantial services in self-employment (as described in §§ 404.446 and 404.447).

* * * * *

[FR Doc. 97–100 Filed 1–2–97; 8:45 am]

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20 CFR Parts 404 and 416

[Regulations Nos. 4 and 16]

RIN 0960–AD73

Federal Old-Age, Survivors, and Disability Insurance and Supplemental Security Income for the Aged, Blind, and Disabled; Standards of Conduct for Claimant Representatives

AGENCY: Social Security Administration.

ACTION: Proposed rules.

SUMMARY: These proposed rules would revise our regulations governing representation of claimants seeking Social Security or supplemental security income (SSI) benefits under title II or XVI of the Social Security Act (the Act). They would establish standards of conduct and responsibility for persons serving as representatives and further define our expectations regarding their obligations to those they represent and to us. They would include statutorily and administratively imposed requirements and prohibitions.

DATES: To be sure that your comments are considered, we must receive them no later than March 4, 1997.

ADDRESSES: Comments should be submitted in writing to the Commissioner of Social Security, P.O. Box 1585, Baltimore, MD 21235, sent by telefax to (410) 966–2830, sent by E-mail to ''regulations@ssa.gov'', or delivered to the Division of Regulations and Rulings, Social Security Administration, 3–B–1 Operations Building, 6401 Security Boulevard, Baltimore, MD 21235, between 8:00 a.m. and 4:30 p.m. on regular business days. Comments received may be inspected during these hours by making arrangements with the contact person shown below.

FOR FURTHER INFORMATION CONTACT: Richard M. Bresnick, Legal Assistant, Division of Regulations and Rulings, Social Security Administration, 6401 Security Boulevard, Baltimore, MD 21235, (410) 965–1758.

SUPPLEMENTARY INFORMATION

Purpose and Scope

Existing regulations governing representatives' conduct (§§ 404.1740, *et seq.* and 416.1540, *et seq.*) under titles II and XVI primarily reiterate various statutory provisions set forth in the Act. Sections 404.1745 and 416.1545 also provide that a representative may be suspended or disqualified if he or she has violated those rules, been convicted of a violation of section 206 of the Act or ''otherwise refused to comply with our rules and regulations on representing claimants in dealings with us.'' This is consistent with section 206(a)(1) of the Act, which provides that the Commissioner of Social Security (the Commissioner) may ''suspend or prohibit from further practice before him any such person, agent, or attorney who refuses to comply with the Commissioner's rules and regulations * * *.'' Since their inception, the regulations have reflected the Commissioner's (formerly the Secretary of Health and Human Services' (the Secretary's)) broad authority over matters involving representatives' activities in their dealings with us.

These proposed rules specifically provide enforceable standards governing aspects of practice, performance and conduct for all persons who act as claimants' representatives. The proposed rules also recognize potential changes in the procedures used by the

Social Security Administration (SSA) to process claims, the increased participation of compensated representatives in the adjudicative process, the special circumstances presented by SSA's nonadversarial hearings, and statutory amendments, such as the anti-fraud provisions of the Social Security Independence and Program Improvements Act of 1994, Public Law (Pub. L.) 103–296. The existing regulations pertaining to representatives' conduct have been largely unchanged since their promulgation in 1980, and do not adequately address actual and potential problems resulting from the participation of representatives in the claims process.

Although we realize that most representatives do a conscientious job in assisting their clients, our experience has convinced us that there are sufficient instances of questionable conduct to warrant promulgation of additional regulatory authority. The existing regulations do not address a representative's willful or negligent delay, refusal to cooperate, failure to adequately prepare and present the claimant's case and other deficiencies. The proposed rules correct these omissions and are necessary to protect the claimant and the process from those individuals who are incapable of providing, or unwilling to provide, meaningful assistance in expeditiously resolving pending claims.

Although there are disparities in the levels of skill, experience, education and professional status among those who serve as representatives, we believe all such individuals must be bound by the same set of rules. In determining appropriate standards, we considered the requirements and intent of the Act and its implementing regulations, administrative law principles applicable to adjudication and the American Bar Association's (ABA) Model Rules of Professional Conduct and Model Code of Professional Responsibility.

There are comparable rules in part 410, subpart F (§§ 410.684, *et seq.*) governing representative conduct under the Black Lung benefits program. We are not revising those rules, however. Executive Order 12866, Regulatory Planning and Review, issued by the President on October 4, 1993 (58 FR 51735), provides that ''Federal agencies should promulgate only such regulations as are required by law, are necessary to interpret the law, or are made necessary by compelling public need * * *.'' Because we have found no problems with representative conduct in claims involving Black Lung benefits comparable to those that have led to these proposed rules for titles II and XVI, there is no compelling need to revise the Black Lung rules.

We expect that the proposed rules will further clarify our expectations regarding the obligations of representatives to provide competent representation of their clients, in accordance with procedural and evidentiary requirements of the claims process. Moreover, the proposed regulations, when published, will constitute official notice concerning our requirements and prohibitions.

To address the concerns of claimants and others with a stake or interest in the issue of claimant representation in drafting the proposed rules, we obtained information from various sources. We conducted focus groups with claimants and beneficiaries as part of our disability process redesign initiative. We also used information gathered in investigating nearly 600 complaints of representative misconduct made by claimants from 1988 to date.

Communication With Claimants

Participants in the public dialogue conducted in conjunction with our disability process redesign initiative frequently complained about the lack of timely or effective assistance on the part of claimants' representatives. They felt that some representatives delayed submitting evidence until the case reached the hearing level in order to increase the amount of past-due benefits and thereby increase the amount of their fees. Others did not believe that all representatives provided adequate assistance in the preparation or presentation of the case. In the latter category, there were recurring complaints that the claimant did not see or have any contact with the representative until shortly before the hearing when the representative, allegedly for the first time, would review the file. These claimants did not believe that the representative was adequately prepared to present their case, or had provided any assistance in ensuring that the record was complete. Some individuals complained that their representatives' failure to obtain medical documentation for inclusion in the record, despite being informed that the evidence was available and material, forced them personally to obtain the required documentation. The dissatisfaction with the quality and effectiveness of representatives' services was strong enough to prompt the Disability Process Redesign Team to include within its recommendations provisions aimed at correcting shortcomings in the representatives' performance.

The comments received from focus groups and at public meetings are consistent with written complaints we receive about representatives who do not participate or cooperate in the processing of claims. We have seen instances where a representative demands that all communications with the claimant be made through his or her office and refuses, at lower levels of adjudication, to produce available medical evidence or make his or her client available for a consultative examination. Some representatives, as a matter of practice, do not submit available evidence until the day of the hearing even though in some cases the matter might have been favorably decided some time before on the basis of new medical reports. In addition to delaying payment unnecessarily in some cases, this practice can further delay disposition of a claim when the administrative law judge or expert witnesses do not have an opportunity to review and consider the new evidence prior to the hearing.

Consultation With the Representative Community

In February 1995 we requested comments on a draft proposal from 33 separate groups and organizations comprising the attorney and non-attorney representative community. These groups included professional organizations, interest groups, think tanks, the Legal Services Corporation, and various private representative organizations.

We received 92 individual responses. Many were supportive, especially regarding the need to provide standards for non-attorney representatives. Many, however, were opposed to more regulation of their professional conduct. We carefully considered all of the individual views and concerns in formulating these proposed rules. A summary of the major views and concerns and our responses follows.

1. A common complaint was that the proposed standards used terms that were too vague and ambiguous, such as ''timely,'' ''diligence,'' ''as soon as possible'' and ''matters at issue.'' To be responsive to these concerns and further clarify our requirements, we have modified the language that was most often identified as ambiguous.

For example, the earlier language in what are now proposed §§ 404.1740(b)(1) and (2) and 416.1540(b)(1) and (2) called for representatives to diligently develop the record and submit evidence as soon as possible. In these proposed rules, we ask representatives to submit evidence ''as soon as practicable, but no later than

the due date designated by the Agency, except for good cause shown.'' We believe this standard is more specific, and gives representatives some discretion in the submission of information and evidence. Also, in place of the phrase ''matters at issue'' in what are now proposed §§ 404.1740(b)(2)(ii) and 416.1540(b)(2)(ii), we say ''pertaining to specifically identified issues.'' In proposed §§ 404.1740(b)(3)(i) and 416.1540(b)(3)(i), we narrowed the ''matters at issue'' to those matters ''establishing entitlement or eligibility to the claimed right or benefit.''

Some individuals found the entire substance of the proposed standards to be ambiguous, although one believed they were drawn too narrowly and should be expanded. Several argued that the proposals did not provide adequate notice to representatives of the exact types of conduct we would find to violate these regulations.

It is our position that the proposed rules define with specificity the types of conduct subject to regulation. Similar to other codes of conduct (e.g., the ABA Model Rules), the proposed regulations do not list every act or omission which might constitute a violation. Such a listing would be virtually impossible given the limitless factual situations involved in claims processing. Rather, we intend to deal with each complaint on a case-by-case basis to determine whether under the attending circumstances, a representative engaged in actionable misconduct. In making this determination we will apply an objective test, that is, whether a reasonable person, in light of all the circumstances, would consider the act or omission violative of the rule in question.

This has been our practice in the past. In all but the most egregious instances of potential misconduct, we give representatives notice of the alleged wrongdoing and an opportunity to respond before formal charges are ever proposed. Once it is determined that a formal complaint is warranted, the Deputy Commissioner for Programs, Policy, Evaluation and Communications (or other official the Commissioner may designate) reviews the proposal independently from the investigative component and makes a decision whether to file a complaint.

We believe that the internal checks and balances within our operating procedures provide adequate safeguards against abuse of discretion or arbitrary action. Even after a complaint is served, a representative is entitled to file an answer and petition for withdrawal of the complaint. Thereafter, the accused party has a right to a full evidentiary hearing, and a right to request review of the resulting decision. In view of these elaborate safeguards, administered at each step by independent decision makers, it is unlikely that an honest mistake or a reasonable misunderstanding on the part of a representative would result in sanctions.

2. A majority of responding attorneys complained that, since their conduct already is governed by their individual State bar codes of conduct and ethical rules, a separate SSA code of conduct is redundant. Several individuals expressed the opinion that SSA simply can refer an attorney to his or her State bar disciplinary authority when we suspect misconduct. Another recognized that State bar rules are not applicable to representatives who are not attorneys, but opined that there are not enough non-attorney representatives to warrant standards of conduct for non-attorneys.

Bar rules differ in language and format among the 50 States, the District of Columbia and the U.S. territories. As the administrator of a national program, however, SSA should not be expected or required to apply local rules, or local interpretations of the rules, to problems which extend beyond the boundaries of local jurisdictions. Furthermore, if we applied local rules or local interpretations rather than a national standard, it is conceivable that attorneys in one area could be subject to discipline for conduct that another jurisdiction would not find actionable. We do not believe it benefits the attorneys, the claimants or SSA to have this type of inconsistency in effecting the Commissioner's statutory obligation to regulate the conduct of representatives.

Moreover, attorneys often represent claimants in jurisdictions other than those in which they are licensed to practice law. In those instances, it would be unclear which jurisdiction's rules would apply, which could lead to inconsistent application of the rules among attorneys practicing in the same geographical area.

Also, under existing laws, referral of suspected attorney misconduct to a State bar disciplinary authority could possibly constitute a violation of the provisions of section 1106 of the Act and, under certain circumstances, the Privacy Act (5 U.S.C. 552a) on maintaining the confidentiality of personal information that we maintain in our files.

A major concern is the fact that currently there is no external authority enforcing standards or rules of conduct for representatives who are not attorneys. Contrary to one individual's opinion, individual non-attorney representatives and representative organizations represent a substantial number of claimants. Within the last 7 years, suspension/disqualification actions against non-attorneys comprised approximately 36 percent of SSA's representative disciplinary actions. Therefore, it is essential to provide rules that will govern the conduct of non-attorneys who practice before us. Moreover, it is only fair and equitable to hold all representatives who practice before us to the same standards.

3. A majority of responding individuals objected to the earlier wording of what now are proposed §§ 404.1740(b)(1) and 416.1540(b)(1), which required representatives to ''[e]xercise diligence in developing the record on behalf of his or her client by obtaining and submitting, as soon as possible, all information and evidence intended for inclusion in the record.''

They argued that SSA was attempting to improperly delegate to claimants and representatives its own duty to develop the record, which could place representatives at the mercy of arbitrary or unreasonable SSA requests for information. They also pointed out that the original language did not allow for discretion in situations involving uncooperative treating physicians and uncooperative or uneducated claimants.

The claimant has a right to receive benefits under the Act only after establishing that he or she satisfies the underlying statutory and regulatory requirements.

Historically, SSA has assisted claimants in gathering evidence and perfecting the claim. Current workloads and revised processing procedures will require, however, that the claimant take a more active role in establishing entitlement or eligibility. The representative, as the designated agent of the claimant, will be called upon to respond to our requests just as an unrepresented claimant will be required to cooperate.

Our intention is for the representative to ensure that the claimant's evidence is available for inclusion in the record when the claim is ready for adjudication, unless there is a valid reason for the delay. This is consistent with the ABA Model Rules, which state at Rule 3.2—Expediting Litigation, that ''[a] lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client.'' The comment accompanying the rule states that ''[d]elay should not be indulged merely for the convenience of the advocates,'' and ''[r]ealizing financial or other

benefit from otherwise improper delay in litigation is not a legitimate interest of the client.''

It is in the best interests of the claimant to have full adjudication of the claim as early in the adjudicative process as possible. Although there will be instances when evidence is not readily available despite reasonable effort, we believe that in most cases the information can be secured timely.

In our experience, some representatives do not submit evidence promptly and fail to cooperate with our attempts to obtain necessary information and evidence. Under our current rules at §§ 404.1715(a) and 416.1515(a), we are required to send the representative requests for information and evidence. Since we may not contact a represented claimant directly, the claimant often does not even know the claim is being delayed by the representative. Although this practice is not pervasive, when it does occur we are required to engage in unwarranted and time-consuming efforts to develop the evidence. More importantly, however, the claimant is harmed by delay in the disposition of the claim.

We do not believe that our proposed rules unduly burden claimants or representatives. The duties in question only require a good faith effort to assist the claimant in timely submission of material information and evidence that the claimant wants included in the record.

Many individuals complained that compliance with what are now proposed §§ 404.1740(b)(2) and 416.1540(b)(2), which originally asked representatives to ''[p]romptly comply, at every stage of the administrative review process, with our requests for information and evidence,'' might place them in violation of their own State bar rules requiring zealous advocacy and protection of confidential client information.

We recognize that State bar rules vary in their interpretation of an attorney's duty to maintain the confidences and secrets of the client. We believe that our proposed rules, as we have modified them in response to individual representatives' concerns, will permit an attorney to satisfy our requirements without risking unauthorized disclosures of information.

Under the ABA Model Rules, an attorney may reveal information that is ''impliedly authorized in order to carry out the representation.'' Moreover, Rule 1.6a provides that the attorney is not barred from making disclosures if ''the client consents after consultation.'' We believe that an attorney can act in accordance with State bar rules by informing the client that SSA requires certain information and evidence from claimants, and that as the claimant's representative, the attorney must either comply with these requests or tell SSA that the claimant declines to furnish the data. Taking these rules into consideration, we have modified proposed §§ 404.1740(b)(2) and 416.1540(b)(2) to permit representatives to protect a client's confidentiality by notifying SSA that ''the claimant does not consent to release of some or all of the [requested] material.''

We do not believe, however, that deliberate and purposeful withholding from us of information or evidence is justifiable under the various State bar rules. In fact, such actions may be illegal and subject to severe penalty. Section 206 of Public Law 103–296 adds a new section 1129 to the Social Security Act, providing that: ''Any person * * * who makes, or causes to be made, a statement or representation of a material fact for use in determining [the right to benefits under title II or title XVI] that the person knows or should know is false or misleading or knows or should know omits a material fact * * * shall be subject to, in addition to any other penalties that may be prescribed by law, a civil money penalty of not more than $5,000 * * *.'' A material fact is defined as ''one which the Commissioner of Social Security may consider in evaluating whether an applicant is entitled to benefits * * *.'' (See sections 1129(a) (1) and (2) of the Act.)

Further, section 205(u)(1)(A) of the Act, as added by section 206(d) of Public Law 103–296, provides that the Commissioner ''shall immediately redetermine the entitlement of individuals to monthly insurance benefits under * * * [title II] if there is reason to believe that fraud or similar fault was involved in the application of the individual for such benefits * * *.'' Section 1631(e)(6)(A)(i) of the Act, which also was added by section 206(d) of Public Law 103–296, is a comparable provision covering eligibility for title XVI benefits. Similar fault is defined in sections 205(u)(2) and 1631(e)(6)(B) of the Act as knowingly making ''an incorrect or incomplete statement that is material to the determination'' or knowingly concealing ''information that is material to the determination.'' Moreover, section 205(a) of the Act provides that the Commissioner shall adopt ''reasonable and proper rules and regulations to regulate and provide for the nature and extent of the proofs and evidence and the method of taking and furnishing the same in order to establish the right to benefits hereunder.'' This section is made applicable to the title XVI program by section 1631(d)(1) of the Act.

In our view, the provisions of proposed §§ 404.1740(b)(2) and 416.1540(b)(2) require the representative to comply with our requests made under statutory authority for full and accurate disclosure of material facts to the same extent that the claimant is required to do so. In assessing any allegation raised against a representative regarding failure to comply with our request for information, we will consider the reasonableness of the request, the relevance of the information requested, and any factors that may interfere with the procurement of requested information.

4. A few individuals questioned the need for any rules or standards of conduct, expressing their opinion that representatives rarely engage in misconduct sufficient to warrant formalized investigative and disciplinary procedures. Several speculated that only representatives who were not attorneys engaged in misconduct warranting SSA attention.

From August 1988 through August 1995, the Office of Hearings and Appeals received approximately 566 referrals of representative misconduct. Some of these referrals complained of questionable conduct which warranted corrective action, but which was not covered by any existing regulatory authority. Of the remaining referrals, we were able to close many without formal disciplinary action. In approximately 160 claims, we closed the disciplinary referral upon the representative's refund to a claimant or to SSA of monies collected without authorization or as a result of Agency overpayments to representatives. As of August 15, 1995, we have collected from these representatives a total of $279,411.98, returning $176,096 of this amount to the claimants who had been overcharged, and the remainder to SSA.

We also have filed approximately 136 formal complaints against representatives. We were able to resolve many complaints before a formal hearing. The remainder, however, have resulted in the suspension or disqualification of 57 representatives. Approximately 64 percent of the suspended or disqualified representatives were attorneys.

We believe these general statistics provide ample evidence of the need to continue our investigative and disciplinary role. We expect the proposed rules and standards to provide the representative community with improved notice of the conduct we view as inappropriate, and supply SSA with

the tools to address representatives' conduct that falls below our published standards.

5. Several individuals were confused about the addition of the word ''retain'' in what are now proposed §§ 404.1740(c)(2) and 416.1540(c)(2), which state that a representative shall not ''[k]nowingly charge, collect or retain * * * any fee for representational services in violation of applicable law or regulation.'' They questioned whether this was a change in SSA's policy permitting representatives to collect money toward payment of their fees before any fee is authorized, as long as the collection is placed in a trust or escrow account.

This is not a policy change. Social Security Ruling (SSR) 82–39 still permits representatives to solicit from claimants a deposit of money into a trust or escrow account as a means of assuring payment of the fees for services in connection with such representation, as long as the claimant willingly enters into the trust or escrow agreement and willingly deposits the money in the trust or escrow account; none of the money in the account is paid over to the representative unless and until SSA authorizes a fee, and then only in an amount up to, but not exceeding, the authorized fee; and any funds in the account in excess of the authorized fee are refunded promptly to the claimant.

We have added the word ''retain'' to cover those situations in which the representative has charged or collected a fee and has improperly retained the fee despite a claimant's or SSA's request for refund. If a representative places the money charged and collected from a claimant into a trust or escrow account, and complies with the conditions set forth in SSR 82–39, we will not consider that money to be an improperly retained fee.

6. A few individuals were concerned with what are now proposed §§ 404.1740(c)(3) and 416.1540(c)(3), which prohibit representatives from knowingly making or participating in the making or presentation of false oral or written statements, assertions or representations about a material fact concerning a matter within our jurisdiction. They suggested that it required them to be a guarantor of a claimant's testimony, or to impeach their own client if they suspected that the client was presenting false evidence or testimony.

This prohibition applies only to knowing presentations of false statements. There already exist both criminal and civil penalties for knowingly making or participating in the making of false representations to a claimant or to SSA. (See 18 U.S.C. 1001 and sections 208 and 1129 of the Act.) By incorporating this prohibition in our rules of conduct, we place representatives on notice that, in addition to the criminal and civil sanctions possible for this misconduct, the making or presentation of such false statements also may lead to their suspension or disqualification from representing claimants in matters before us.

We do not place an affirmative duty on representatives to impeach their clients or guarantee a client's honesty. Nonetheless, we do expect representatives who practice before us not to knowingly prompt, encourage or engage in false or misleading representations about material facts in connection with the representation of a claimant.

7. Several individuals expressed concern about what are now proposed §§ 404.1740(c)(4) and 416.1540(c)(4), which prohibit willfully or negligently delaying, or causing to be delayed, the processing of a claim. They suggested that it was overly broad, and could be interpreted to prohibit even such reasonable delays as scheduling conflicts, illness, family emergency and claimants' continuing treatment.

Black's Law Dictionary defines an act or omission as willfully done ''if done voluntarily and intentionally and with the specific intent to do something the law forbids, or with the specific intent to fail to do something the law requires to be done.'' It includes actions engaged in with a bad motive or purpose, with indifference to the natural consequences, or without justifiable excuse. A negligent action involves the failure to exhibit the conduct or care a reasonable person would exhibit under similar circumstances. It is characterized chiefly by inadvertence, thoughtlessness and inattention.

Under our proposed standard prohibiting willful or negligent delay, SSA does not intend to penalize reasonable or justifiable delays, or delays that may occur even when reasonable care is taken in claim preparation. In determining whether a representative has violated this rule we will look to the gravity of the act or omission, the consequences for the claimant, whether the behavior reflects a pattern or practice, and other factual circumstances particular to the matter.

8. The draft proposal had language prohibiting representatives from engaging in disruptive, defiant or confrontational behavior or repeated challenges to the presiding official's authority, which clearly exceed the bounds of zealous advocacy. Many individuals found this provision to be vague and an interference with their duty to provide zealous advocacy.

In response to these concerns, we modified the language in proposed §§ 404.1740(c)(7)(ii) and 416.1540(c)(7)(ii) to prohibit ''[w]illful behavior which has the effect of improperly disrupting proceedings or obstructing the adjudicative process.'' We envision actionable conduct under this provision to include grossly undignified or discourteous behavior and inflammatory language directed at the presiding official which prejudice the orderly presentation and reception of evidence.

This rule is not intended to inhibit zealous advocacy or vigorous dissent, but to prevent conduct or language which significantly exceeds the bounds of civility, and disrupts a proceeding. In determining whether a representative has violated this provision, we will look at the totality of the circumstances, including the egregiousness of the conduct, its impact on the claimant or the Agency, possible provocation and whether the behavior reflects a pattern or practice.

9. The draft proposal included a prohibition against soliciting or accepting from SSA direct payment of fees from past-due benefits, in violation of law or regulation, for services performed by a person other than an attorney. Many individuals misunderstood the intent of this provision, believing that it meant either that non-attorney representatives could not be paid for their representational services, or that attorneys could not receive direct payment from SSA for persons other than attorneys who provided representational services under their direct supervision.

Because of the confusion involving this provision, and the fact that SSA currently is considering separate regulations to address direct payment of fees in more detail, this provision is not included in these proposed rules.

10. The draft proposal contained a prohibition against making off-the-record communications relevant to the merits of an adjudication to anyone involved in the administrative review process. Many individuals found this provision to be vague and undefined. They were concerned that it prohibited communications to SSA in claims that had extenuating circumstances, such as claimants who were terminally ill or suicidal. In their opinion, it would unduly formalize nonadversarial proceedings, would foster inefficiency by requiring increased documentation of SSA contacts, and would be in conflict

with SSA's goal of expediting claims processing.

We agreed that the provision was confusing and possibly counterproductive, so it is not included in these proposed rules.

11. The draft proposal also contained a prohibition against engaging in dilatory tactics or neglectful actions which are prejudicial to the fair or orderly conduct of oral proceedings. Some individuals pointed out that it was vague and duplicated an existing provision. We agreed, and this provision is not included in these proposed rules.

Explanation of Revisions

These proposed regulations would revise §§ 404.1740, 404.1745, 404.1750, 404.1765, 404.1770, 404.1799, 416.1540, 416.1545, 416.1550, 416.1565, and 416.1599.

Proposed §§ 404.1740(b) and 416.1540(b) describe affirmative duties, which are certain obligations that a representative must actively perform in his or her representation of claimants in matters before us. We expect these affirmative duties to promote efficiency and timeliness in assisting the claimant to meet the burden of proving eligibility for benefits.

Proposed §§ 404.1740(b)(1) and 416.1540(b)(1) require the representative to exercise diligence in obtaining and submitting that evidence which the claimant wants the decision maker to consider in ruling on a claim.

Proposed §§ 404.1740(b)(2)(i) and 416.1540(b)(2)(i) require that the representative provide, upon request, information regarding the claimant's medical treatment, vocational factors or other specifically identified matters, or provide notification that the claimant does not consent to release the information.

Proposed §§ 404.1740(b)(2)(ii) and 416.1540(b)(2)(ii) require that the representative provide, upon request, evidence material to identified issues which the representative or claimant already has or may readily obtain. This rule requires furnishing evidence already in the possession of the representative or claimant, or obtaining copies of existing evidence not already of record. The provision also mandates that the representative and claimant furnish all the pertinent evidence requested, even if it is ostensibly unfavorable to the claimant, or provide notification by the representative that the claimant does not consent to its release.

Proposed §§ 404.1740(b)(3) and 416.1540(b)(3) are intended to establish minimum requirements governing the competency and behavior of representatives in their dealings with us. They seek to ensure that the representative does not become a hindrance, either through ignorance or willful obstruction, in our attempts to provide a fair and expeditious disposition of the claim for benefits.

We have weighed the possibility of testing or other formal certification procedures for non-attorney representatives, but rejected the idea as infeasible at this time. Nonetheless, in order to identify those persons who do not possess the requisite qualifications, we are considering possible revisions to §§ 404.1705 and 416.1505 to define in greater detail the minimum requirements to serve as a representative.

Any individual who provides services as a representative for a fee shall be expected to demonstrate, in the performance of those services, sufficient knowledge of the claims process to be of assistance to the claimant. Ignorance of substantive provisions of law or procedural requirements shall not be considered a mitigating factor for acts or omissions which impede or disrupt the efficient and orderly disposition of a claim.

Proposed §§ 404.1740(b)(3)(i) and 416.1540(b)(3)(i) essentially state that the representative must understand what the claimant must prove in order to qualify for benefits, and know how to obtain and submit evidence regarding the claim.

Proposed §§ 404.1740(b)(3)(ii) and 416.1540(b)(3)(ii) require the representative to promptly answer our requests and communications pertaining to the pending claim. It is not permissible for the representative to ignore official communications.

Proposed §§ 404.1740(b)(3)(iii) and 416.1540(b)(3)(iii) require cooperation in developing the record, which may typically include transactions requiring the participation of the claimant, such as consenting to a treating source's release of medical records, scheduling consultative examinations and scheduling conferences or hearing dates.

Proposed §§ 404.1740(c) and 416.1540(c) describe prohibited actions, which are certain acts or activities that a representative must avoid. In part, the prohibited actions incorporate various statutory provisions set forth in the Act and other legislation.

Proposed §§ 404.1740(c)(1) and 416.1540(c)(1) are based on the prohibitions set forth in section 206(a)(5) of the Act and are self-explanatory. A representative's honest mistake would not be construed as knowingly misleading a claimant. In determining whether a representative knowingly misled a claimant, we will consider whether the action involved matters that the representative should have known were untrue.

Proposed §§ 404.1740(c)(2) and 416.1540(c)(2) are based on the provisions of sections 206 (a) and (b) of the Act and apply to all fee collections. With regard to section 206(a)(4) of the Act, we will assume in the absence of evidence to the contrary that work performed by support staff in a law office is performed under the supervision of an attorney, thereby permitting the attorney to validly claim direct payment from past-due benefits for those services in a title II claim. This assumption will not apply, however, when a person other than an attorney appears alone at a hearing to provide representation on behalf of a claimant.

In those cases, the person shall be considered the representative and will be required to file a fee petition or fee agreement for his or her services, and will not be entitled to receive direct payment from past-due benefits for the representation at the hearing.

Proposed §§ 404.1740(c)(3) and 416.1540(c)(3) are based generally on the criminal prohibitions in 18 U.S.C. 1001 and the provisions governing civil monetary penalties and assessments set forth in section 1129 of the Act and are self-explanatory.

Proposed §§ 404.1740(c)(4) and 416.1540(c)(4) are directed against practices where willful or negligent acts or omissions have the effect of delaying the disposition of a claim for benefits.

Proposed §§ 404.1740(c)(5) and 416.1540(c)(5) are based on the provisions of section 1106 of the Act, which prohibit disclosure by any person of information obtained by the Agency in conjunction with a claim, except as may be authorized by regulations prescribed by us.

Proposed §§ 404.1740(c)(6) and 416.1540(c)(6) prohibit a representative from offering or giving anything of value to persons involved in the adjudication except as remuneration to a witness for legitimate expenses or for services rendered. The intent is to prevent the fact or the appearance of attempting to influence the disposition of a claim by bestowing gifts or favors on individuals in a position to materially affect the outcome.

Proposed §§ 404.1740(c)(7) and 416.1540(c)(7) are directed at conduct undertaken during the course of oral proceedings which is disruptive and detrimental to due process and the administration of justice.

Proposed §§ 404.1740(c)(7)(i) and 416.1540(c)(7)(i) prohibit repeated instances of unexcused absences or

tardiness because such conduct adversely affects claimants, diminishes the ability of the Agency to operate efficiently and harms other applicants by disrupting hearing schedules and work flow.

Proposed §§ 404.1740(c)(7)(ii) and 416.1540(c)(7)(ii) address deliberate acts which have the effect of disrupting the proceedings or diverting the attention of the participants from the purpose of the hearing to matters irrelevant to the merits of the case.

Proposed §§ 404.1740(c)(7)(iii) and 416.1540(c)(7)(iii) are based in part on the provisions of section 206(a)(5) of the Act, 18 U.S.C. 111 and 28 CFR 64.2(x). They prohibit threatening or intimidating the participants in an oral proceeding or the employees assigned to our offices. Actual or implied threats of violence will not be tolerated.

Proposed §§ 404.1745 and 416.1545 explain that we may begin proceedings to suspend or disqualify a person who does not meet our qualifications for a representative or who violates our rules and standards governing representatives in their dealings with us.

Proposed §§ 404.1750 (a) and (d), 404.1765 (a) and (e), 404.1799 (c) and (e), 416.1550 (a) and (d), 416.1565 (a) and (e), and 416.1599 (c) and (e) are being modified to reflect current Agency official titles and organizational changes.

Proposed §§ 404.1765(g)(3) and 416.1565(g)(3) are being revised to remove the first word ''not'' from each paragraph. This corrects errors made when the regulations on representation of parties were reorganized, renumbered and republished on August 5, 1980 (45 FR 52078). When the original regulation was published as § 404.983(f) on April 26, 1969 (34 FR 6973, 6974), it provided that ''[i]f the individual has filed an answer and if the hearing officer believes that there is relevant and material evidence available which has not been presented at the hearing, the hearing officer may at any time prior to the mailing of notice of the decision, or submittal of a recommended decision, reopen the hearing for the receipt of such evidence.'' This is consistent with the preceding language in § 404.983(f), which states that if a representative ''has filed no answer he shall have no right to present evidence * * *.''

In the 1980 final rule, the former § 404.983(f) was renumbered as § 404.1765(f), with a parallel SSI provision at § 416.1565(f). Paragraph (f)(2) addressed representatives who do not answer charges and paragraph (f)(3) addressed those who do. Paragraph (f)(3) (45 FR 52078, 52093, 52108) contained a misprint, however, which read, ''If the representative did not file an answer to the charges * * *.'' Thus, paragraphs (f)(2) and (f)(3) were inconsistent and conflicting. Subsequently, in 1991, paragraph (f) of §§ 404.1765 and 416.1565 was redesignated as paragraph (g) (56 FR 24129, 24131, 24132).

The 1980 misprint substantively changed the meaning of current paragraph (g)(3). As specifically explained in the preamble to those rules, however, SSA never intended to make any substantive changes in those regulations. The regulations were rewritten for the purpose of reorganizing and restating them more clearly in simpler language. The misprint has created confusion in the representative disciplinary process. Consequently, we are taking this opportunity to correct the error to reflect the original intent of the regulations.

We also are correcting another minor misprint in the current § 404.1765(g)(3) by making ''decisions'' singular for correctness and consistency with § 416.1565(g)(3).

Finally, in proposed § 404.1770, paragraphs (a)(3) and (b)(3) are being amended to correct a publication error that occurred after paragraph (a)(3) was revised in 1991. As correctly published in final rules on May 29, 1991 (56 FR 24129, 24132), paragraph (a)(3) was revised to show that the hearing officer shall mail a copy of the decision to the parties at their last known addresses. When codified in the 1992 volume of the Code of Federal Regulations, however, the revised language of paragraph (a)(3) was erroneously placed in paragraph (b)(3), superseding that existing language addressing the effect of a final decision imposing a suspension upon a representative. With this correction, we will accurately reflect the language and purpose of paragraphs (a)(3) and (b)(3) and bring § 404.1770 into conformity with its equivalent § 416.1570.

Electronic Versions

The electronic file of this document is available on the Federal Bulletin Board (FBB) at 9:00 a.m. on the date of publication in the Federal Register. To download the file, modem dial (202) 512–1387. The FBB instructions will explain how to download the file and the fee. This file is in WordPerfect and will remain on the FBB during the comment period.

Regulatory Procedures

Executive Order 12866

We have consulted with the Office of Management and Budget (OMB) and determined that these rules do not meet the criteria for a significant regulatory action under Executive Order 12866. Thus, they were not subject to OMB review.

Regulatory Flexibility Act

We certify that the proposed rules, if promulgated, will not have a significant economic impact on a substantial number of small entities. The provisions of the proposed rules that involve entities were developed to allow them to provide representational services without generating any supplemental reporting requirements. The proposed rules will not result in any increased legal accounting or consulting costs to small businesses or small organizations, will not adversely affect competition in the marketplace, or create barriers to entry on the part of small entities. In fact, these rules may facilitate such entry into the representation sphere. The regulations will provide uniform standards applicable to all entities who engage in the business and tend to disqualify the unscrupulous and the incompetent practitioners, thereby expanding demand for others willing and able to perform the service. Therefore, a regulatory flexibility analysis as provided in Public Law 96–354, the Regulatory Flexibility Act, is not required.

Paperwork Reduction Act

These regulations impose no reporting/recordkeeping requirements necessitating clearance by OMB.

(Catalog of Federal Domestic Assistance Program Nos. 96.001, Social Security-Disability Insurance; 96.002, Social Security-Retirement Insurance; 96.004, Social Security-Survivors Insurance; 96.006, Supplemental Security Income)

List of Subjects

20 CFR Part 404

Administrative practice and procedure, Blind, Disability benefits, Old-Age, Survivors and Disability Insurance, Reporting and recordkeeping requirements, Social Security.

20 CFR Part 416

Administrative practice and procedure, Aged, Blind, Disability benefits, Public assistance programs, Reporting and recordkeeping, Supplemental Security Income (SSI) requirements.

Dated: December 23, 1996.

Shirley S. Chater,

Commissioner of Social Security.

For the reasons set forth in the preamble, part 404, subpart R, chapter III of title 20 of the Code of Federal

Regulations is proposed to be amended as set forth below.

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

1. The authority citation for subpart R of part 404 continues to read as follows:

Authority: Secs. 205(a), 206, and 702(a)(5) of the Social Security Act (42 U.S.C. 405(a), 406, and 902(a)(5)).

2. Section 404.1740 is revised to read as follows:

§ 404.1740 Rules of conduct and standards of responsibility for representatives.

(a) *Purpose and scope.* (1) All attorneys or other persons acting on behalf of a party seeking a statutory right or benefit shall, in their dealings with us, faithfully execute their duties as agents and fiduciaries of a party. A representative shall provide competent assistance to the claimant and recognize the authority of the Agency to lawfully administer the process. The following provisions in this section set forth certain affirmative duties and prohibited actions which shall govern the relationship between the representative and the Agency, including matters involving our administrative procedures and fee collections.

(2) Moreover, all representatives shall be forthright in their dealings with us and with the claimant and shall comport themselves with due regard for the nonadversarial nature of the proceedings by complying with our rules and standards, which are intended to ensure orderly and fair presentation of evidence and argument.

(b) *Affirmative duties.* A representative shall:

(1) Promptly obtain all information and evidence which the claimant wants to submit in support of the claim and forward the same for consideration as soon as practicable, but no later than the due date designated by the Agency, except for good cause shown;

(2) Comply with our requests for information or evidence at any stage of the administrative review process as soon as practicable, but no later than the due date designated by the Agency, except for good cause shown. This includes the obligation to:

(i) Provide, upon request, identification of all known medical sources, updated information regarding medical treatment, new or corrected information regarding work activity, other specifically identified information pertaining to the claimed right or benefit, or notification by the representative after consultation with the claimant that the claimant does not consent to the release of some or all of the material; and

(ii) Provide, upon request, all evidence and documentation pertaining to specifically identified issues which the representative or the claimant either has within his or her possession or may readily obtain, or notification by the representative after consultation with the claimant that the claimant does not consent to the release of some or all of the material;

(3) Conduct his or her dealings in a manner which does not obstruct the efficient, fair or orderly conduct of the administrative review process, including duties to:

(i) Be cognizant of the matters at issue in establishing entitlement or eligibility to the claimed right or benefit, and knowledgeable of our evidentiary and procedural requirements in order to provide competent assistance to the party he or she represents;

(ii) Provide timely and responsive answers to requests from the Agency for information pertinent to processing of the claim; and

(iii) Cooperate with our attempts to obtain information and documentation, or complete processing requirements for a claimed right or benefit.

(c) *Prohibited actions.* A representative shall not:

(1) In any manner or by any means threaten, coerce, intimidate, deceive or knowingly mislead a claimant, or prospective claimant or beneficiary, regarding benefits or other rights under the Act;

(2) Knowingly charge, collect or retain, or make any arrangement to charge, collect or retain, from any source, directly or indirectly, any fee for representational services in violation of applicable law or regulation;

(3) Knowingly make or present, or participate in the making or presentation of, false oral or written statements, assertions or representations about a material fact concerning a matter within our jurisdiction;

(4) Willfully or negligently delay, or cause to be delayed, by any act or omission, without good cause, the processing of a claim at any stage of the administrative review process;

(5) Divulge, except as may be authorized by regulations prescribed by us, any information we furnish or disclose about a claim or prospective claim of another person;

(6) Attempt to influence, directly or indirectly, the outcome of a decision, determination or other administrative action by offering or granting a loan, gift, entertainment or anything of value to a presiding official, Agency employee or witness who is or may reasonably be expected to be involved in the administrative review process, except as reimbursement for legitimately incurred expenses or lawful compensation for the services of an expert witness retained on a non-contingency basis to provide evidence; or

(7) Engage in actions or behavior prejudicial to the fair and orderly conduct of oral proceedings, including but not limited to:

(i) Repeated instances of unauthorized absences, or persistent tardiness at scheduled proceedings;

(ii) Willful behavior which has the effect of improperly disrupting proceedings or obstructing the adjudicative process; and

(iii) Threatening or intimidating language, gestures or actions directed at a presiding official, witness or Agency employee.

3. Section 404.1745 is revised to read as follows:

§ 404.1745 Violations of our requirements, rules, or standards.

When we have evidence that a representative fails to meet our qualification requirements or has violated the rules governing dealings with us, we may begin proceedings to suspend or disqualify that individual from acting in a representational capacity before us. We may file charges seeking such sanctions when we have evidence that a representative:

(a) Does not meet the qualifying requirements described in § 404.1705;

(b) Has violated the affirmative duties or engaged in the prohibited actions set forth in § 404.1740; or

(c) Has been convicted of a violation under section 206 of the Act.

4. Section 404.1750 is amended by revising paragraphs (a) and (d) to read as follows:

§ 404.1750 Notice of charges against a representative.

(a) The Deputy Commissioner for Programs, Policy, Evaluation and Communications (or other official the Commissioner may designate), or his or her designee, will prepare a notice containing a statement of charges that constitutes the basis for the proceeding against the representative.

* * * * *

(d) The Deputy Commissioner for Programs, Policy, Evaluation and Communications (or other official the Commissioner may designate), or his or her designee, may extend the 30-day period for good cause.

* * * * *

5. Section 404.1765 is amended by revising paragraph (a), the second

sentence of paragraph (e), and paragraph (g)(3) to read as follows:

§ 404.1765 Hearing on charges.

(a) *Scheduling the hearing.* If the Deputy Commissioner for Programs, Policy, Evaluation and Communications (or other official the Commissioner may designate), or his or her designee, does not take action to withdraw the charges within 15 days after the date on which the representative filed an answer, we will hold a hearing and make a decision on the charges.

* * * * *

(e) *Parties.* * * * The Deputy Commissioner for Programs, Policy, Evaluation and Communications (or other official the Commissioner may designate), or his or her designee, shall also be a party to the hearing.

* * * * *

(g) * * *

(3) If the representative did file an answer to the charges, and if the hearing officer believes that there is material evidence available that was not presented at the hearing, the hearing officer may at any time before mailing notice of the hearing decision reopen the hearing to accept the additional evidence.

* * * * *

6. Section 404.1770 is amended by revising the first sentence of paragraph (a)(3) and by revising paragraph (b)(3) to read as follows:

§ 404.1770 Decision by hearing officer.

(a) * * *

(3) The hearing officer shall mail a copy of the decision to the parties at their last known addresses. * * *

(b) * * *

(3) If the final decision is that a person is suspended for a specified period of time from being a representative in dealings with us, he or she will not be permitted to represent anyone in dealings with us during the period of suspension unless authorized to do so under the provisions of § 404.1799.

7. Section 404.1799 is amended by revising the first sentence of paragraph (c) and the second sentence of paragraph (e) to read as follows:

§ 404.1799 Reinstatement after suspension or disqualification—period of suspension not expired.

* * * * *

(c) The Appeals Council shall allow the Deputy Commissioner for Programs, Policy, Evaluation and Communications (or other official the Commissioner may designate), or his or her designee, upon notification of receipt of the request, 30 days in which to present a written report of any experiences with the suspended or disqualified person subsequent to that person's suspension or disqualification. * * *

* * * * *

(e) * * * It shall also mail a copy to the Deputy Commissioner for Programs, Policy, Evaluation and Communications (or other official the Commissioner may designate), or his or her designee.

* * * * *

For the reasons set forth in the preamble, part 416, subpart O, chapter III of title 20 of the Code of Federal Regulations is proposed to be amended as set forth below.

PART 416—SUPPLEMENTAL SECURITY INCOME FOR THE AGED, BLIND, AND DISABLED

8. The authority citation for subpart O of part 416 continues to read as follows:

Authority: Secs. 702(a)(5) and 1631(d) of the Social Security Act (42 U.S.C. 902(a)(5) and 1383(d)).

9. Section 416.1540 is revised to read as follows:

§ 416.1540 Rules of conduct and standards of responsibility for representatives.

(a) *Purpose and scope.* (1) All attorneys or other persons acting on behalf of a party seeking a statutory right or benefit shall, in their dealings with us, faithfully execute their duties as agents and fiduciaries of a party. A representative shall provide competent assistance to the claimant and recognize the authority of the Agency to lawfully administer the process. The following provisions in this section set forth certain affirmative duties and prohibited actions which shall govern the relationship between the representative and the Agency, including matters involving our administrative procedures and fee collections.

(2) Moreover, all representatives shall be forthright in their dealings with us and with the claimant and shall comport themselves with due regard for the nonadversarial nature of the proceedings by complying with our rules and standards, which are intended to ensure orderly and fair presentation of evidence and argument.

(b) *Affirmative duties.* A representative shall:

(1) Promptly obtain all information and evidence which the claimant wants to submit in support of the claim and forward the same for consideration as soon as practicable, but no later than the due date designated by the Agency, except for good cause shown;

(2) Comply with our requests for information or evidence at any stage of the administrative review process as soon as practicable, but no later than the due date designated by the Agency, except for good cause shown. This includes the obligation to:

(i) Provide, upon request, identification of all known medical sources, updated information regarding medical treatment, new or corrected information regarding work activity, other specifically identified information pertaining to the claimed right or benefit, or notification by the representative after consultation with the claimant that the claimant does not consent to the release of some or all of the material; and

(ii) Provide, upon request, all evidence and documentation pertaining to specifically identified issues which the representative or the claimant either has within his or her possession or may readily obtain, or notification by the representative after consultation with the claimant that the claimant does not consent to the release of some or all of the material;

(3) Conduct his or her dealings in a manner which does not obstruct the efficient, fair or orderly conduct of the administrative review process, including duties to:

(i) Be cognizant of the matters at issue in establishing entitlement or eligibility to the claimed right or benefit, and knowledgeable of our evidentiary and procedural requirements in order to provide competent assistance to the party he or she represents;

(ii) Provide timely and responsive answers to requests from the Agency for information pertinent to processing of the claim; and

(iii) Cooperate with our attempts to obtain information and documentation, or complete processing requirements for a claimed right or benefit.

(c) *Prohibited actions.* A representative shall not:

(1) In any manner or by any means threaten, coerce, intimidate, deceive or knowingly mislead a claimant, or prospective claimant or beneficiary, regarding benefits or other rights under the Act;

(2) Knowingly charge, collect or retain, or make any arrangement to charge, collect or retain, from any source, directly or indirectly, any fee for representational services in violation of applicable law or regulation;

(3) Knowingly make or present, or participate in the making or presentation of, false oral or written statements, assertions or representations about a material fact concerning a matter within our jurisdiction;

(4) Willfully or negligently delay, or cause to be delayed, by any act or

omission, without good cause, the processing of a claim at any stage of the administrative review process;

(5) Divulge, except as may be authorized by regulations prescribed by us, any information we furnish or disclose about a claim or prospective claim of another person;

(6) Attempt to influence, directly or indirectly, the outcome of a decision, determination or other administrative action by offering or granting a loan, gift, entertainment or anything of value to a presiding official, Agency employee or witness who is or may reasonably be expected to be involved in the administrative review process, except as reimbursement for legitimately incurred expenses or lawful compensation for the services of an expert witness retained on a non-contingency basis to provide evidence; or

(7) Engage in actions or behavior prejudicial to the fair and orderly conduct of oral proceedings, including but not limited to:

(i) Repeated instances of unauthorized absences, or persistent tardiness at scheduled proceedings;

(ii) Willful behavior which has the effect of improperly disrupting proceedings or obstructing the adjudicative process; and

(iii) Threatening or intimidating language, gestures or actions directed at a presiding official, witness or Agency employee.

10. Section 416.1545 is revised to read as follows:

§ 416.1545 Violations of our requirements, rules, or standards.

When we have evidence that a representative fails to meet our qualification requirements or has violated the rules governing dealings with us, we may begin proceedings to suspend or disqualify that individual from acting in a representational capacity before us. We may file charges seeking such sanctions when we have evidence that a representative:

(a) Does not meet the qualifying requirements described in § 416.1505;

(b) Has violated the affirmative duties or engaged in the prohibited actions set forth in § 416.1540; or

(c) Has been convicted of a violation under section 1631(d) of the Act.

11. Section 416.1550 is amended by revising paragraphs (a) and (d) to read as follows:

§ 416.1550 Notice of charges against a representative.

(a) The Deputy Commissioner for Programs, Policy, Evaluation and Communications (or other official the Commissioner may designate), or his or her designee, will prepare a notice containing a statement of charges that constitutes the basis for the proceeding against the representative.

* * * * *

(d) The Deputy Commissioner for Programs, Policy, Evaluation and Communications (or other official the Commissioner may designate), or his or her designee, may extend the 30-day period for good cause.

* * * * *

12. Section 416.1565 is amended by revising paragraph (a), the second sentence of paragraph (e), and paragraph (g)(3) to read as follows:

§ 416.1565 Hearing on charges.

(a) *Scheduling the hearing.* If the Deputy Commissioner for Programs, Policy, Evaluation and Communications (or other official the Commissioner may designate), or his or her designee, does not take action to withdraw the charges within 15 days after the date on which the representative filed an answer, we will hold a hearing and make a decision on the charges.

* * * * *

(e) *Parties.* * * * The Deputy Commissioner for Programs, Policy, Evaluation and Communi cations (or other official the Commissioner may designate), or his or her designee, shall also be a party to the hearing.

* * * * *

(g) * * *

(3) If the representative did file an answer to the charges, and if the hearing officer believes that there is material evidence available that was not presented at the hearing, the hearing officer may at any time before mailing notice of the hearing decision reopen the hearing to accept the additional evidence.

* * * * *

13. Section 416.1599 is amended by revising the first sentence of paragraph (c) and the second sentence of paragraph (e) to read as follows:

§ 416.1599 Reinstatement after suspension or disqualification—period of suspension not expired.

* * * * *

(c) The Appeals Council shall allow the Deputy Commissioner for Programs, Policy, Evaluation and Communications (or other official the Commissioner may designate), or his or her designee, upon notification of receipt of the request, 30 days in which to present a written report of any experiences with the suspended or disqualified person subsequent to that person's suspension or disqualification. * * *

* * * * *

(e) * * * It shall also mail a copy to the Deputy Commissioner for Programs, Policy, Evaluation and Communications (or other official the Commissioner may designate), or his or her designee.

* * * * *

[FR Doc. 97–38 Filed 1–2–97; 8:45 am]

BILLING CODE 4190–29–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[REG–252233–96]

RIN 1545–AU73

Continuity of Interest and Business Enterprise

AGENCY: Internal Revenue Service (IRS), Treasury.

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

SUMMARY: This document proposes rules providing that for certain reorganizations, transfers by the acquiring corporation of target assets or stock to certain controlled corporations, and under prescribed conditions, transfers of target assets to partnerships, will not disqualify the transaction from satisfying the continuity of interest and continuity of business enterprise requirements. This document also provides notice of a public hearing on these proposed regulations.

DATES: Comments must be received by April 3, 1997. Requests to speak and outlines of topics to be discussed at the public hearing scheduled for Wednesday, May 7, 1997 must be received by Wednesday, April 16, 1997.

ADDRESSES: Send submissions to: CC:DOM:CORP:R (REG–252233–96), room 5228, Internal Revenue Service, POB 7604, Ben Franklin Station, Washington, DC 20044. Submissions may be hand delivered between the hours of 8 a.m. and 5 p.m. to CC:DOM:CORP:R (REG–252233–96), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue, NW., Washington, DC. Alternatively, taxpayers may submit comments electronically via the Internet by selecting the ''Tax Regs'' option on the IRS Home Page, or by submitting comments directly to the IRS Internet site at http://www.irs.ustreas.gov/prod/tax__regs/comments.html. The public hearing will be held in the Auditorium, Internal Revenue Building, 1111 Constitution Avenue NW., Washington DC.

FOR FURTHER INFORMATION CONTACT: Concerning the regulations, Marlene Peake Oppenheim, (202) 622–7750; concerning submissions and the hearing, Christina Vasquez, (202) 622–6808 (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

Background

This document contains proposed amendments to the Income Tax Regulations (26 CFR part 1) under section 368. The proposed regulations establish rules providing that for certain reorganizations transfers by the acquiring corporation of target corporation assets or stock to certain controlled corporations and under prescribed conditions transfers of target assets to partnerships, will not disqualify the transaction from satisfying the continuity of interest and continuity of business enterprise requirements.

Explanation of Proposed Regulations

A. Remote Continuity of Interest

1. Overview

The Internal Revenue Code of 1986 (Code) provides general nonrecognition treatment for reorganizations specifically described in section 368 of the Code. Literal compliance with the statutory requirements is not sufficient, however, for nonrecognition treatment.

The Supreme Court, in *Groman* v. *Commissioner,* 302 U.S. 82 (1937), and *Helvering* v. *Bashford,* 302 U.S. 454 (1938), established the basis of what has become known as the ''remote continuity of interest doctrine.'' Under this doctrine, stock consideration received by the target corporation's (T) shareholders does not provide continuity unless the target assets or stock are ultimately held by the corporation that issued the stock. Thus, if T transfers its assets to an acquiring corporation (P), in exchange for stock of the corporation controlling P (see *Groman*), or if P acquires the T assets but pursuant to the plan of reorganization transfers them to a controlled subsidiary (S) (see *Bashford*), the continuity of interest requirement is not satisfied.

Congress has substantially limited the remote continuity of interest doctrine. In 1954, Congress enacted section 368(a)(2)(C) which provides that P's transfer of T assets acquired in a reorganization under section 368(a)(1)(A) (merger or consolidation) or section 368(a)(1)(C) (asset acquisition) to S does not disqualify the reorganization. Section 368(a)(1)(C) was also amended to provide that P can acquire T assets directly in exchange for voting stock of a corporation in control of P (a triangular C reorganization).

In the 1960's, the Treasury Department and IRS issued several revenue rulings attempting to clarify to what extent the remote continuity doctrine had remaining vitality. Where the guidance held that the remote continuity doctrine applied to disqualify the transaction from reorganization treatment, Congress at times responded by amending the relevant Code section and overturning the result. For example, Rev. Rul. 63–234 (1963–2 C.B. 148) held that remote continuity remained an issue for section 368(a)(1)(B) reorganizations. The following year Congress responded by amending section 368(a)(1)(B), permitting P to acquire T's stock in exchange for stock of the corporation controlling P (a triangular B reorganization). Congress also amended section 368(a)(2)(C) to provide that P can transfer T stock acquired in a reorganization under section 368(a)(1)(B) to S without disqualifying the reorganization.

Similarly, when Rev. Rul. 67–326 (1967–2 C.B. 143) held that a merger of T into S in exchange for stock of the corporation controlling S (a forward triangular merger) violated the continuity of interest doctrine, Congress responded in the following year by enacting section 368(a)(2)(D), which provides that a forward triangular merger qualifies as a section 368(a)(1)(A) reorganization.

In contrast, Rev. Rul. 64–73 (1964–1 C.B. 142) held that a transaction qualified as a section 368(a)(1)(C) reorganization where P and P's second tier subsidiary acquired all the T assets in exchange for P stock. The transaction was viewed as an acquisition of substantially all the T assets by P.

2. Transfers of T Assets or Stock to Controlled Corporations

The proposed regulations curtail the remote continuity of interest doctrine by providing that assets can be transferred among members of a ''qualified group.'' A qualified group consists of one or more chains of corporations connected through stock ownership with the ''issuing corporation,'' but only if the issuing corporation owns directly stock meeting the requirements of section 368(c) in at least one other corporation, and stock meeting the requirements of section 368(c) in each of the corporations (except the issuing corporation) is owned directly by one of the other corporations. The issuing corporation is the acquiring corporation (as that term is used in section 368(a)), except in transactions where use of stock of a corporation in control of the acquiring corporation is permitted. Where stock of the controlling corporation is used, the controlling corporation is the issuing corporation.

The proposed regulations generally permit transfers or successive transfers of assets or stock to members of the qualified group. Thus, continuity of interest is not violated where there are transfers or successive transfers of T stock (or transfers of the T assets after a T stock acquisition) or T assets (or transfers of the acquiring corporation's stock after a T asset acquisition) among members of the qualified group. The Treasury Department and IRS solicit comments on whether the qualified group should be defined other than by reference to section 368(c).

The proposed regulations are limited to asset or stock transfers following transactions that otherwise qualify as section 368(a)(1) (A), (B), (C), or (G) (meeting the requirements of sections 354(b)(1)(A) and (B)) reorganizations (covered reorganizations). Section 368(a)(2)(C) by its terms does not apply to acquisitive section 368(a)(1)(D) or section 368(a)(1)(F) reorganizations. The Treasury Department and IRS solicit comments as to whether the rules in the proposed regulations should be extended to these other reorganization provisions or to section 355 divisive transactions.

3. Transfer of T Assets to a Partnership

Whether the transfer of assets to a partnership (PRS) by the corporate transferor partner (PTR) disqualifies an otherwise qualifying covered reorganization depends in part on whether PRS is viewed as an aggregate of its partners or as an entity separate from the partners. The treatment of PRS as an aggregate or entity must be determined on the basis of the characterization most appropriate for the situation. H.R. Conf. Rep. No. 2543, 83d Cong., 2d Sess. 59 (1954). Cf. § 1.701–2(e)(1) of the Income Tax Regulations.

The Treasury Department and IRS believe it is appropriate to treat PRS as an aggregate of its partners in analyzing a transaction with respect to continuity of interest. Thus, the proposed regulations provide that PTR's transfer of T assets to PRS does not violate the continuity of interest requirement.

The proposed regulations do not permit the transfer of stock to PRS where the Code imposes a control requirement in section 368. See sections 368(a)(1)(B) and (C), sections 368(a)(2)(D) and (E), and section 368(a)(2)(C). In addition, the transfer of

T assets to PRS may violate the continuity of business enterprise (COBE) requirement.

B. Continuity of Business Enterprise

1. Overview

Section 1.368–1(b) requires that reorganizations afford a continuity of business enterprise under modified corporate form. COBE requires that P either (i) continue T's historic business (business continuity) or (ii) use a significant portion of T's historic business assets in a business (asset continuity). § 1.368–1(d)(2). The proposed regulations provide a framework for applying the existing COBE regulations to situations where the T assets or stock are transferred to certain controlled corporations or assets are transferred to partnerships.

2. Transfer of T Assets or Stock to a Controlled Corporation

The proposed regulations provide that, under prescribed conditions, COBE is not violated by reason of the fact that part or all of the T assets or stock are transferred among members of a qualified group. Thus, the COBE requirement is not violated where there are transfers or successive transfers of T stock (or transfers of the T assets after a T stock acquisition) or T assets (or transfers of the acquiring corporation's stock after a T asset acquisition) among members of the qualified group.

3. Transfer of T Assets to a Partnership

The proposed regulations provide that, under prescribed conditions, COBE is not violated by reason of the fact that part or all of the T assets are transferred to PRS by PTR. The proposed regulations adopt an aggregate approach in determining whether COBE has been satisfied when T assets are transferred to PRS following a T asset or T stock acquisition. Thus, the proposed regulations provide that for purposes of the business continuity test, PTR will be treated as conducting a business of PRS if PTR has active and substantial management functions as a partner with regard to the business (cf. Rev. Rul. 92–17 (1992–1 C.B. 142)) or if PTR's partnership interest in PRS represents a significant interest in the PRS business. Furthermore, in determining whether PTR satisfies the asset continuity test (i) PTR will be treated as owning the assets of PRS in accordance with PTR's interest in PRS, and (ii) PTR will be treated as conducting a business of PRS under the rules applicable to business continuity.

COBE requires a facts and circumstances analysis. Thus, the proposed regulations also state that the fact that PTR meets the business continuity requirements of § 1.368–1(d)(2)(i) and 1(d)(3) through active and substantial management of a PRS business tends to establish COBE, but the fact that PTR conducts a PRS business is not alone sufficient.

C. Effect on Other Authorities

The proposed regulations apply only for the purpose of determining the effect that transfers of assets or stock following a reorganization have on the continuity of interest and COBE requirements. They do not address any other issues concerning the qualification of a transaction as a reorganization.

Thus, the proposed regulations do not expand the scope of triangular reorganizations. Under current law, a T asset or stock acquisition in exchange for stock of a grandparent (or higher tier) corporation does not qualify as a reorganization. See Rev. Rul. 74–564 (1974–2 C.B. 124) and Rev. Rul. 74–565 (1974–2 C.B. 125). The proposed regulations do not change this result.

The proposed regulations do not provide guidance on whether the ''solely for voting stock'' requirement is satisfied in a section 368(a)(1)(C) reorganization when a corporation other than the acquiring corporation assumes target liabilities. See generally Rev. Rul. 70–107 (1970–1 C.B. 78).

Furthermore, the proposed regulations do not modify the section 381 regulations which provide rules concerning which entity inherits the tax attributes of T in an asset acquisition.

The Treasury Department and IRS solicit comments on these issues.

Proposed Effective Date

The revisions and additions in the proposed regulations apply to transactions occurring after these regulations are published as final regulations in the Federal Register, except that they shall not apply to transactions occurring pursuant to a written agreement which is (subject to customary conditions) binding on or before these regulations are published as final regulations in the Federal Register.

Effect on Other Documents

The Treasury Department and IRS solicit comments on what IRS publications should be modified or obsoleted when the proposed regulations are published as final regulations.

Special Analyses

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) does not apply to these regulations, and because the regulations do not impose a collection of information on small entities, the Regulatory Flexibility Act (5 U.S.C. chapter 6) does not apply. Pursuant to section 7805(f) of the Internal Revenue Code, this notice of proposed rulemaking will be submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

Comments and Public Hearing

Before these proposed regulations are adopted as final regulations, consideration will be given to any written comments (a signed original and eight copies) that are submitted timely to the Internal Revenue Service. Alternatively, taxpayers may submit comments electronically via the Internet by selecting the ''Tax Regs'' option on the IRS Home Page, or by submitting comments directly to the IRS Internet site at http://www.irs.ustreas.gov/prod/tax__regs/comments.html. All comments will be available for public inspection and copying.

A public hearing has been scheduled for Wednesday, May 7, 1997, beginning at 10 a.m., in the Auditorium, Internal Revenue Building, 1111 Constitution Avenue, NW., Washington, DC. Because of access restrictions, visitors will not be admitted beyond the Internal Revenue Building lobby more than 15 minutes before the hearing starts.

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

Persons who wish to present oral comments at the hearing must request to speak, and submit an outline of topics to be discussed and the time to be devoted to each topic by Wednesday, April 16, 1997.

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

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

Drafting Information

The principal author of the proposed regulations is Marlene Peake Oppenheim of the Office of Assistant Chief Counsel (Corporate), IRS. However, other personnel from the Treasury and IRS participated in their development.

List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

Proposed Amendments to the Regulations

Accordingly, 26 CFR Part 1 is proposed to be amended as follows:

PART 1—INCOME TAXES

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

Authority: 26 U.S.C. 7805 * * *

Par. 2. Section 1.368–1 as proposed to be amended at 61 FR 67514 is amended by:

1. Adding two sentences after the sixth sentence of paragraph (b).
2. Redesignating paragraph (d)(5) as paragraph (d)(6).
3. Adding a new paragraph (d)(5).
4. Adding three sentences to the end of newly designated paragraph (d)(6) introductory text.
5. Adding *Example 6* through *Example 10* to newly designated paragraph (d)(6).
6. Adding paragraph (f).

The additions read as follows:

§ 1.368–1 Purpose and scope of exception of reorganization exchanges.

* * * * *

(b) * * * Rules concerning continuity of interest as applied to section 368(a)(1)(A), (B), (C), or (G) (meeting the requirements of sections 354(b)(1)(A) and (B)) are in paragraph (f) of this section. The preceding sentence applies to transactions occurring after these regulations are published as final regulations in the Federal Register except that it shall not apply to any transactions occurring pursuant to a written agreement which is (subject to customary conditions) binding on or before these regulations are published as final regulations in the Federal Register. * * *

* * * * *

(d) * * *

(5) *Transfers of assets or stock to controlled corporations and partnerships*—(i) *Scope.* The following rules in paragraphs (d)(5) (ii) through (vi) of this section apply in determining whether the continuity of business enterprise requirement of paragraph (d)(1) of this section is satisfied with respect to transactions otherwise qualifying as reorganizations under section 368(a)(1)(A), (B), (C), or (G) (meeting the requirements of sections 354(b)(1)(A) and (B)).

(ii) *Transfers to members of a qualified group.* Continuity of business enterprise continues to be satisfied where there are transfers or successive transfers of target (T) stock (or transfers of T assets after a stock acquisition) or T assets (or transfers of the acquiring corporation's stock after a T asset acquisition) among members of a qualified group as defined in paragraph (d)(5)(iii) of this section.

(iii) *Qualified group.* A qualified group is one or more chains of corporations connected through stock ownership with the issuing corporation as defined in paragraph (d)(5)(iv) of this section, but only if the issuing corporation owns directly stock meeting the requirements of section 368(c) in at least one other corporation, and stock meeting the requirements of section 368(c) in each of the corporations (except the issuing corporation) is owned directly by one of the other corporations.

(iv) *Issuing corporation.* The issuing corporation is the acquiring corporation (as that term is used in section 368(a)), except in transactions where the use of stock of a corporation in control of the acquiring corporation is permitted. Where stock of the controlling corporation is used, the controlling corporation is the issuing corporation.

(v) *Partnerships*—(A) For purposes of the business continuity test of paragraph (d)(3) of this section, the corporate transferor partner (PTR) will be treated as conducting a business of a partnership (PRS) where—

(*1*) PTR has active and substantial management functions as a partner with respect to the PRS business; or

(*2*) PTR's interest in PRS represents a significant interest in the PRS business.

(B) For purposes of the asset continuity test of paragraph (d)(4) of this section—

(*1*) PTR will be treated as owning the assets of PRS in accordance with PTR's interest in PRS; and

(*2*) PTR will be treated as conducting a PRS business if PTR meets the requirement of paragraph (d)(5)(v)(A) (*1*) or (*2*) of this section.

(C) The fact that PTR is treated as conducting a business of PRS under paragraph (d)(5)(v)(A) of this section tends to establish the requisite continuity, but is not alone sufficient.

(vi) This paragraph (d)(5) applies to transactions occurring after these regulations are published as final regulations in the Federal Register except that it shall not apply to any transactions occurring pursuant to a written agreement which is (subject to customary conditions) binding on or before these regulations are published as final regulations in the Federal Register.

(6) * * * All corporations have only one class of common stock outstanding. *Example 6* through *Example 10* of this paragraph (d)(6) apply to transactions occurring after these regulations are published as final regulations in the Federal Register except that they shall not apply to any transactions occurring pursuant to a written agreement which is (subject to customary conditions) binding on or before these regulations are published as final regulations in the Federal Register. The examples are as follows:

* * * * *

Example 6. *Qualified group and business continuity.* (a) *Facts.* T operates a bakery which makes and supplies delectable pastries and cookies to a few select locations. The acquiring corporate group consists of numerous corporations which produce a variety of baked goods for distribution around the world. Holding Company (HC) owns 80 percent of the stock of P. Pursuant to a plan, T transfers all of its assets to P solely in exchange for HC voting stock, which T distributes to its shareholders. P owns 80 percent of the stock of S1; S1 owns 80 percent of the stock of S2, which also makes and supplies pastries and cookies. To amalgamate the T business into HC's affiliated group, P would like to operate T's business in S2. Pursuant to the plan, P transfers the T assets to S1; S1 then transfers the T assets to S2.

(b) *Continuity of business enterprise.* HC, P, S1, and S2 are members of a qualified group as defined in paragraph (d)(5)(iii) of this section. Under paragraph (d)(5)(ii) of this section, continuity of business enterprise continues to be satisfied where T's historic business is transferred to a member of the qualified group. The same results would occur if T had been acquired by P for HC voting stock in a reorganization described in section 368(a)(1)(B) and the T stock had been transferred from P to S1 and from S1 to S2.

Example 7. *Transfers of assets to multiple controlled corporations.* (a) *Facts.* T operates an auto parts distributorship. Pursuant to a plan, T merges into P and the T shareholders receive solely P stock. P owns 80 percent of the stock of S1. S1 owns 80 percent of the stock of ten subsidiaries, S2 through S11. S2 through S11 each separately operate a full service gas station. As part of the plan, P transfers T's auto parts to S1, which in turn transfers some of the parts to each of its ten subsidiaries. No one subsidiary receives a significant portion of T's historic business assets. Each of S1's subsidiaries will use the T assets received in the operation of its full service gas station. No S1 subsidiary will be an auto parts distributor.

(b) *Continuity of business enterprise.* P, S1, and the respective subsidiaries are members of a qualified group as defined in paragraph (d)(5)(iii) of this section. Under paragraph (d)(5)(ii) of this section, continuity of business enterprise continues to be satisfied where all of T's historic business assets are transferred among members of the qualified group. Even though no one corporation is using a significant portion of T's historic

business assets in a business, the continuity of business enterprise requirement is satisfied because the qualified group is using a significant portion of T's historic business assets in a business.

Example 8. *Transfer of a historic T business to PRS—active and substantial management.* (a) *Facts.* T manufactures custom ski boots. T transfers all of its assets to P solely in exchange for P voting stock, which T then distributes to its shareholders. P plans to continue manufacturing ski boots and to expand this operation. As part of the expansion, P and R (an unrelated party) form a new partnership (PRS). As part of the plan of reorganization, P (PTR) transfers T's ski boot business to PRS in exchange for a 20 percent interest in PRS. R transfers cash in exchange for its interest in PRS. PTR performs active and substantial management functions for PRS including the decision-making regarding significant business decisions of PRS and regular participation in the overall supervision, direction and control of the employees of PRS in operating the ski boot business.

(b) *Continuity of business enterprise.* Under paragraph (d)(5)(v)(A)(*1*) of this section, PTR is treated as conducting T's historic business because the officers of PTR perform active and substantial management functions for the ski boot business in PRS. Thus, the continuity of business enterprise requirement is satisfied because PTR is treated as continuing to conduct T's historic business.

(c) *Continuity of interest.* Under paragraph (f)(1)(ii) of this section, the continuity of interest requirement is satisfied even though the assets are transferred to PRS in exchange for an interest in PRS.

Example 9. *Transfer of a historic T business to PRS—significant interest.* (a) *Facts.* The facts are the same as in Example 8 except that PTR's officers do not operate the ski boot business, and PTR owns a 33⅓ percent interest in PRS.

(b) *Continuity of business enterprise.* Under paragraph (d)(5)(v)(A)(*2*) of this section, PTR is treated as conducting T's historic ski boot business because PTR's 33⅓ percent interest in PRS represents a significant interest in the PRS ski boot business.

(c) *Continuity of interest.* Under paragraph (f)(1)(ii) of this section, the continuity of interest requirement is satisfied even though the assets are transferred to PRS in exchange for an interest in PRS.

Example 10. *Transfer of T's historic assets to PRS.* (a) *Facts.* T manufactures silk. T transfers all of its assets to P solely in exchange for P voting stock, which T then distributes to its shareholders. P manufactures clothing and has been buying silk from T. P (PTR) and R (an unrelated party) own interests in a partnership (PRS) which owns and maintains warehouse facilities. As part of the plan of reorganization, PTR transfers the T assets to PRS, increasing PTR's percentage interest in PRS from 20 to 33⅓ percent. PTR decides to buy its silk from a different manufacturer and converts T's plant facilities into warehouses.

(b) *Continuity of business enterprise.* Under paragraph (d)(5)(v)(A)(*2*), PTR is treated as being in the business of owning and maintaining warehouse space because of PTR's significant interest in PRS. Furthermore, under paragraph (d)(5)(v)(B) of this section, PTR is treated as owning the assets of PRS in accordance with its interest in the partnership. Thus, the continuity of business enterprise requirement is satisfied because PTR continues to use a significant portion of T's historic assets in a business.

(c) *Continuity of interest.* Under paragraph (f)(1)(ii) of this section, the continuity of interest requirement continues to be satisfied even though the assets are transferred to PRS in exchange for an interest in PRS.

* * * * *

(f) *Continuity of interest and asset or stock transfers.* (1) *Scope.* The following rules apply to transactions otherwise qualifying as a reorganization under section 368(a)(1)(A), (B), (C), or (G) (meeting the requirements of sections 354(b)(1) (A) and (B)):

(i) *Transfers to members of a qualified group.* Continuity of interest is satisfied where there are transfers or successive transfers of target (T) stock (or transfers of T assets after a stock acquisition) or T assets (or transfers of the acquiring corporation's stock after a T asset acquisition) among members of a qualified group as defined in paragraph (d)(5)(iii) of this section.

(ii) *Partnerships.* Continuity of interest is satisfied even where T assets (or transfers of T assets following a T stock acquisition) are transferred to a partnership in exchange for a partnership interest.

(2) *Example.* The rules of this paragraph (f) are illustrated by the following example. P represents the acquiring corporation and T represents the target corporation. Also see *Example 8* through *Example 10* in paragraph (d)(6) of this section.

The example is as follows:

Example. *Transfers to corporations in the qualified group.* (a) *Facts.* T manufactures playground equipment, including launch ramps and half pipes for skateboarding, in-line skating, and bicycling. The P affiliated group is engaged in architectural design and construction. A holding company (HC) owns 80 percent of the stock of each of P and S1. S1 in turn, owns 80 percent of the stock of S2, and S2 owns 80 percent of the stock of S3. T transfers all of its assets to P in exchange for HC voting stock, which T distributes to its shareholders. HC transfers all of the P stock to S1. S1 in turn transfers all of the P stock to S2, and S2 transfers the P stock to S3.

(b) *Continuity of interest.* HC, P, S1, S2 and S3 are members of a qualified group as defined in paragraph (d)(5)(iii) of this section. Under paragraph (f)(1)(i) of this section, the successive transfers of the P stock to other members of the qualified group do not violate the continuity of interest requirement.

Par. 3. In § 1.368–2, paragraph (f) is amended by removing the second sentence and adding two new sentences in its place to read as follows:

§ 1.368–2 Definition of terms.

* * * * *

(f) * * * A corporation remains a party to the reorganization even though assets are transferred among members of a qualified group as defined in § 1.368-1(d)(5)(iii). The preceding sentence applies to transactions occurring after these regulations are published as final regulations in the Federal Register except that it shall not apply to any transactions occurring pursuant to a written agreement which is (subject to customary conditions) binding on or before these regulations are published as final regulations in the Federal Register.

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Margaret Milner Richardson,

Commissioner of Internal Revenue.

[FR Doc. 97–83 Filed 1–2–97; 8:45 am]

BILLING CODE 4830–01–U

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 372

[OPPTS–400106B; FRL–5581–2]

RIN 2070–AD08

Addition of Community Right-to Know; Extension of Comment Period

AGENCY: Environmental Protection Agency (EPA).

ACTION: Advance notice of proposed rulemaking; extension of comment period.

SUMMARY: In the Federal Register of October 1, 1996, EPA issued an advance notice of proposed rulemaking (ANPR) to announce EPA's intention to expand its Community Right-to-Know initiatives to increase the information available to the public on chemical use, and to solicit comments on all aspects of chemical use data and its collection. Based on a request for additional time submitted by the U.S. Department of Energy's Office of Environmental Policy and Assistance, EPA is extending the comment period on the ANPR by 60 days.

DATES: Comments must be received by February 28, 1997.

ADDRESSES: Written comments should be submitted in triplicate to: OPPT Docket Clerk, TSCA Document Receipt Office (7407), Office of Pollution Prevention and Toxics, Environmental Protection Agency, Rm. E-G099, 401 M St., SW., Washington, DC 20460. Comments containing information claimed as confidential must be clearly marked as confidential business information (CBI). If CBI is claimed,

three additional sanitized copies must also be submitted. Nonconfidential versions of comments will be placed in the record for this action and will be available for public inspection. Comments should include the docket control number for the ANPR, OPPTS-400106 and the EPA contact. Unit II. of this document contains additional information on submitting comments containing information claimed as CBI.

Comments and data may also be submitted electronically by sending electronic mail (e-mail) to: oppt.ncic@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 OPPTS–400106. No CBI should be submitted through e-mail. Electronic comments on this ANPR may be filed online at many Federal Depository Libraries. Additional information on electronic submissions can be found in Unit IV. of this document.

FOR FURTHER INFORMATION CONTACT: Matt Gillen at 202-260-1801, e-mail: gillen.matthew@epamail.epa.gov for specific information regarding this Notice. For further information on EPCRA section 313 contact the Emergency Planning and Community Right-to-Know Hotline, Environmental Protection Agency, Mail Stop 5101, 401 M St., SW., Washington, DC 20460. Toll free: 1-800-535-0202, in Virginia and Alaska: 703-412-9877 or Toll free TDD: 800-553-7672.

SUPPLEMENTARY INFORMATION: Electronic Availability: An electronic copy of the documents listed in Unit I of this document are available from the EPA Public Access gopher (gopher.epa.gov) at the Environmental SubSet entry under ''Rules and Regulations.''

I. Introduction

In 1986, Congress enacted the Emergency Planning and Community Right-to-Know Act (EPCRA). Section 313 of EPCRA requires certain businesses to submit reports each year on the amounts of toxic chemicals their facilities release into the environment or otherwise manage. The information is placed in a publicly accessible data base known as the Toxics Release Inventory (TRI). The purpose of this requirement is to inform the public, government officials, and industry about the chemical management practices of specified toxic chemicals.

EPA is interested in expanding the information available via TRI to include chemical use information such as materials accounting data. The Agency began reviewing this issue in 1993 and held public meetings in 1994 and 1995. On August 8, 1995, President Clinton directed EPA to develop and implement, on an expedited schedule, a process for consideration of reporting use information under TRI. In response, EPA has begun the regulatory development process for additional review of chemical use reporting, which the Agency believes may provide a more detailed and comprehensive picture to the public about environmental performance and about toxic chemicals in their communities. EPA published the ANPR on October 1, 1996 (61 FR 51322) (FRL–5387–6), to give notice of EPA's consideration of this issue and to solicit comments on all aspects of chemical use and the collection of chemical use data. At the same time, the Agency also released ''Issues Paper No. 3'' which describes previous stakeholder comments on chemical use reporting. EPA also held three public meetings in October and December of 1996 to provide public forums for interested parties to provide input on the issues raised by the ANPR. This issues paper and ANPR can be obtained from the EPCRA hotline at the telephone numbers listed in the FOR FURTHER INFORMATION CONTACT unit of this document, or electronically via the EPA's TRI Homepage at: http://www.epa.gov/opptintr/tri.

The original comment period for the ANPR was due to expire on December 30, 1996. However, on November 26, 1996, the Department of Energy submitted a request for an extension of the comment period to allow time to gather and consolidate comments from various DOE facilities, and to account for DOE's need to comment on another EPA reporting initiative during the same period. EPA has decided to grant this request and to extend the comment period for an additional 60 days, or until February 28, 1997.

II. Rulemaking Record and Electronic Filing of Comments

A record has been established for the ANPR under docket number ''OPPTS-400106'' (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 noon to 4 p.m., Monday through Friday, excluding legal holidays. The public record is located in the TSCA Nonconfidential Information Center, Room NE-B607, 401 M St., SW., Washington, DC 20460.

Any person who submits comments claimed as CBI must mark the comments as ''confidential,'' ''CBI,'' or other appropriate designation. Comments not claimed as confidential at the time of submission will be placed in the public file. Any comments marked as confidential will be treated in accordance with the procedures in 40 CFR part 2. Any person submitting comments claimed to be confidential must prepare a nonconfidential public version of the comments in triplicate that EPA can place in the public file.

Electronic comments can be sent directly to EPA at oppt.ncic@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 action, 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 record which will also include all comments submitted directly in writing. The official record is the paper record maintained at the address in ADDRESSES at the beginning of this document.

List of Subjects in 40 CFR Part 372

Environmental protection, Community right-to-know, Reporting and recordkeeping requirements, Toxic chemicals.

Dated: December 23, 1996.

Lynn R. Goldman,

Assistant Administrator for Prevention, Pesticides and Toxic Substances.

[FR Doc. 97–57 Filed 1–2–97; 8:45 am]

BILLING CODE 6560–50–F

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40 CFR Part 372

[OPPTS–400107; FRL–5581–1]

RIN 2070–AC00

Barium Compounds; Toxic Chemical Release Reporting; Community Right-to-Know

AGENCY: Environmental Protection Agency (EPA).

ACTION: Denial of petition.

SUMMARY: EPA is denying a petition to remove the barium compounds category from the list of chemicals subject to the reporting requirements under section 313 of the Emergency Planning and

Community Right-to-Know Act of 1986 (EPCRA) and section 6607 of the Pollution Prevention Act of 1990 (PPA). This action is based on EPA's conclusion that barium compounds do not meet the deletion criterion of EPCRA section 313(d)(3). Specifically, EPA is denying this petition because EPA's review of the petition and available information resulted in the conclusion that barium ion (Ba^{+2}) can become available from the barium compounds subject to reporting and that barium ion can reasonably be anticipated to cause chronic toxicity. Therefore, barium compounds meet the criteria for inclusion on the list of chemicals subject to reporting under section 313 of EPCRA.

FOR FURTHER INFORMATION CONTACT: Daniel R. Bushman, Acting Petitions Coordinator, 202-260-3882 or e-mail: bushman.daniel@epamail.epa.gov, for specific information regarding this document. For further information on EPCRA section 313, contact the Emergency Planning and Community Right-to-Know Information Hotline, Environmental Protection Agency, Mail Stop 5101, 401 M St., SW., Washington, DC 20460, Toll free: 1-800-535-0202, in Virginia and Alaska: 703-412-9877, or Toll free TDD: 1-800-553-7672.

SUPPLEMENTARY INFORMATION:

I. Introduction

A. Statutory Authority

This action is taken under sections 313(d) and (e)(1) of the Emergency Planning and Community Right-to-Know Act of 1986 (EPCRA), 42 U.S.C. 11023. EPCRA is also referred to as Title III of the Superfund Amendments and Reauthorization Act of 1986 (SARA) (Pub. L. 99-499).

B. Background

Section 313 of EPCRA requires certain facilities manufacturing, processing, or otherwise using listed toxic chemicals to report their environmental releases of such chemicals annually. Beginning with the 1991 reporting year, such facilities also must report pollution prevention and recycling data for such chemicals, pursuant to section 6607 of the Pollution Prevention Act of 1990 (PPA), 42 U.S.C. 13106. Section 313 established an initial list of toxic chemicals that was comprised of more than 300 chemicals and 20 chemical categories. Barium-containing substances were included on the initial list, under the chemical category entitled ''barium compounds.'' Section 313(d) authorizes EPA to add or delete chemicals from the list, and sets forth criteria for these actions. EPA has added and deleted chemicals from the original statutory list. Under section 313(e)(1), any person may petition EPA to add chemicals to or delete chemicals from the list. Pursuant to EPCRA section 313(e)(1), EPA must respond to petitions within 180 days, either by initiating a rulemaking or by publishing an explanation of why the petition is denied.

EPCRA section 313(d)(2) states that a chemical may be listed if any of the listing criteria are met. Therefore, in order to add a chemical, EPA must demonstrate that at least one criterion is met, but does not need to examine whether all other criteria are also met. Conversely, in order to remove a chemical from the list, EPA must demonstrate that none of the criteria are met.

EPA issued a statement of petition policy and guidance in the Federal Register of February 4, 1987 (52 FR 3479), to provide guidance regarding the recommended content and format for submitting petitions. On May 23, 1991 (56 FR 23703), EPA issued guidance regarding the recommended content of petitions to delete individual members of the section 313 metal compound categories. EPA has also published a statement clarifying its interpretation of the section 313(d)(2) criteria for adding and deleting chemical substances from the section 313 list (59 FR 61439, November 30, 1994) (FRL-4922-2).

II. Description of Petition and Regulatory Status of Barium and Barium Compounds

Barium-containing substances are on the list of toxic chemicals subject to the annual reporting requirements of EPCRA section 313 and PPA section 6607. Barium-containing substances comprise the ''barium compounds'' category on the EPCRA section 313 list of toxic chemicals. The presence of barium in a compound defines its inclusion in the barium compounds category. As with all the metal compound categories on the EPCRA section 313 list of toxic chemicals, the basis for inclusion of the individual metal-containing substances within these categories is the toxicity which may be exhibited by the intact substance, or by the metal or metal ion which may be liberated from the intact substance within an organism, by biological fluids, or in the environment. EPA published a detailed discussion on the Agency's policies related to the metal compound categories on the EPCRA section 313 list of toxic chemicals in the Federal Register of May 23, 1991 (56 FR 23703).

EPA recently deleted barium sulfate (also known as barite) from the barium compounds category (59 FR 33205, June 28, 1994) (FRL–4767–5). EPA concluded that barium sulfate does not meet the toxicity criteria of EPCRA sections 313(d)(2)(A), (B) or (C), and that barium ion is available from barium sulfate only under low sulfate, anaerobic conditions in stagnant water bodies that are cut-off from surface and ground waters (i.e., conditions that cannot reasonably be anticipated to cause ecotoxicity or lead to human exposure to the ion). EPA believes that the low toxicity of barium sulfate can be mainly ascribed to the very low water solubility (2.4 milligrams per liter (mg/L) at 25 °C) of barium sulfate, barium ion's strong affinity for sulfate, and correspondingly, the low availability of barium ion.

Barium is regulated under the Safe Drinking Water Act, (42 U.S.C. 300f-300j-26); the current maximum contaminant level (MCL) is 2 mg/L (2 parts per million (ppm)) (40 CFR 141.62(b)(3)).

On June 28, 1996, EPA received a petition from the Chemical Products Corporation (CPC) to delete the entire barium compounds category from the EPCRA section 313 list of toxic chemicals. With this action, CPC petitioned EPA to delete all barium compounds from the list of toxic chemicals subject to the annual reporting requirements of EPCRA section 313 and PPA section 6607. In the petition, data are presented from various toxicity studies on a limited number of barium compounds. The petitioner contends that all barium compounds should be deleted because the available toxicity data show that barium ion does not meet the criteria for inclusion on the list of EPCRA section 313 chemicals. The petitioner also asserts that under environmental conditions barium ion is largely unavailable from barium compounds because of the presence of sulfate ion in the environment; sulfate ion will react quickly with barium ion to form barium sulfate.

III. EPA's Technical Review of Barium Compounds

The technical review of the petition to delete barium compounds from the reporting requirements of EPCRA section 313 and PPA section 6607 included an analysis of the chemistry, health effects, ecological effects, and environmental fate data available for barium compounds.

A. Chemistry and Use

Barium is a metallic substance that occurs in nature as its divalent cation

(ion), Ba^{+2}. Barium compounds are those substances that contain barium as part of their molecular formula. EPA has published a discussion on the chemistry of barium ion (Ref. 1). Barium ion is highly electropositive, and reacts readily with anions (sulfate (SO_4^{-2}), chloride (Cl^{-1}), carbonate (CO_3^{-2}), nitrate (NO_3^{-2}), etc.) to form the corresponding barium salt. The water solubility of the salt and, therewith, its ability to dissociate to barium ion is largely dependent on the affinity between barium ion and the anion. Barium chloride is highly water soluble (317 grams per liter (g/L)), whereas barium carbonate and barium sulfate are considerably less soluble, having water solubilities of 24 mg/L and 2.4 mg/L, respectively (Ref. 2). Barium carbonate is soluble in diluted solutions of hydrochloric, nitric or acetic acid. These acids react with barium carbonate to form barium chloride, barium nitrate, and barium acetate, respectively, which are all freely soluble in water (Ref. 2).

Another important factor controlling the availability of barium ion from a barium compound is the presence of sulfate ion. In waters, the availability of barium ion from a barium compound is governed largely by the concentration of sulfate ion present in solution. The availability of barium ion is inversely related to the concentration of sulfate; barium ion availability is suppressed in the presence of sulfate, and enhanced when sulfate concentration is low. This is because sulfate has a high affinity for barium ion and will form barium sulfate which precipitates out of solution (Ref 1). A more detailed discussion of factors that control barium ion availability in waters is provided below in Unit III.C. of this notice ''Environmental Fate of Barium Compounds.''

The most common natural form of barium is barium sulfate (barite). The greater natural occurrence of barium sulfate with respect to other barium salts is likely to be due to the relatively stronger affinity between Ba^{+2} and SO_4^{-2}, when compared to the affinity between Ba^{+2} and other naturally occurring anions.

Barium carbonate is another naturally occurring barium compound. It is also produced commercially from barium sulfate. Barium carbonate is often added to brick and clay products to precipitate sulfates. Barium carbonate is used also in the production of ceramic materials and glass products, and to produce other barium compounds. Barium compounds produced from barium carbonate include: barium acetate; barium bromide; barium chloride; barium 2-ethylhexanoate; barium hydroxide; barium hydrosulfide; barium iodide; barium metaborate; barium nitrate; barium nitrite; barium oxide; barium peroxide; barium sodium niobium oxide; barium sulfide; barium titanate; and higher purity grades of barium sulfate (Ref. 3). The uses of most of these barium compounds are summarized in Ref. 3.

B. Toxicological Evaluation

EPA's toxicological evaluation of barium compounds consisted of an analysis of health and environmental data pertaining to barium-containing substances included on the EPCRA section list of toxic chemicals as part of the barium compounds category. Data were obtained from: studies found in the literature (Refs. 4-12); the Hazardous Substances Data Bank (Ref. 13); EPA's Integrated Risk Information System (IRIS) (Ref. 14); a previous Federal Register Notice on barium sulfate (Ref. 15); a 1992 report published by the U.S. Department of Health and Human Services' Agency for Toxic Substances and Disease Registry entitled *Toxicological Profile for Barium* (Ref. 16); a 1993 report published by the U.S. Department of Health and Human Services' National Toxicology Program entitled *Toxicology and Carcinogenesis Studies of Barium Chloride Dihydrate in F4344 Rats and B6C3F1 Mice* (Ref. 17); and a 1990 EPA document entitled *The Drinking Water Criteria Document for Barium* (Ref. 18). The health and environmental portions of these reference sources are summarized below. Detailed discussions can be found in the publications and in the technical reports (Refs. 19-22) prepared by the EPA scientists who reviewed the publications. EPA's toxicological evaluation of barium compounds also included a review of the analysis of health and environmental data stated in the petition and the petitioner's interpretation of such data.

1. *Acute mammalian toxicity*. In humans, symptoms of acute barium toxicity after accidental or intentional oral ingestion of 1-15 grams of soluble barium salts include: muscular paralysis; respiratory failure; arterial hypertension; cardiac arrhythmias; profound hypokalemia and death (Refs. 5 and 18). The threshold of a toxic oral dose in adults has been estimated to be 200-500 milligrams (mg) or 2.86 - 7.14 milligrams per kilogram (mg/kg) of body weight. This quantity applies to the equivalent weight of the barium ion absorbed from the gut from the barium compound. The digestive system is extremely permeable to the barium ion. Acute lethal oral doses for barium in adults have been estimated to be 3-4 grams (calculated 43 - 57 mg/kg) (Refs. 13 and 18). Animal studies support similar cardiotoxic effects following acute exposure.

Ogen, et al. summarized the results of two large outbreaks of food poisoning that occurred following consumption of sausage that contained barium carbonate which was accidentally substituted for potato starch during sausage preparation (Ref. 12). The authors estimate that the amount of barium carbonate ingested in most of the affected individuals was 2-3 grams per person. The characteristic symptoms occurred within 8 hours after ingestion of the contaminated sausage, and included: vomiting, diarrhea, general weakness, paresthesia, difficulty in breathing, and, in the more severe cases, paralysis of the limbs and respiratory muscles. Most of the 144 affected individuals received treatment and recovered within a few days, however, 19 individuals required hospitalization, and one patient died. The authors of the study attribute the observed toxicity of barium carbonate to its reaction with hydrochloric acid in the stomach to yield barium chloride, which dissociates readily to barium ion and is absorbed systemically. These authors cite other studies involving food poisoning from barium carbonate.

The acute oral lethality of barium in animals has been well documented. There is a wide variability in the lethal dose of barium among species and age, as well as between strains of the same species. Nevertheless, the acute lethality of various barium salts is a function of their solubility in water or acid. In rats, acute oral toxicities of barium chloride, fluoride, nitrate and acetate have median lethal dose (LD_{50}) values of 118, 250, 355 and 921 mg barium/kg, respectively (Refs. 4, 13, and 17).

2. *Subchronic and chronic mammalian toxicity*. EPA's review of the available toxicity data for barium compounds identified kidney toxicity as the toxicological endpoint of concern. There are also varying reports on cardiovascular effects in humans and test animals from subchronic and chronic exposure to barium.

The U.S. Department of Health and Human Services' National Toxicology Program (NTP) conducted toxicology and carcinogenicity studies in F344/N rats and B6C3F1 mice by administering barium chloride dihydrate (99 percent pure) in drinking water for 15 days, 13 weeks, and 2 years (Ref. 17). Under the conditions of the study, there was no evidence of carcinogenic activity in any of the test animals. There were chemical-related increased incidences of kidney toxicity (nephropathy) in male and female mice. The Lowest Observed Adverse Effect Level (LOAEL) for

kidney toxicity in mice is approximately 180 milligrams per kilogram per day (mg/kg/day) (Refs. 19 and 20). Kidney toxicity was observed in rats, but the data are conflicting (kidney effects were seen in the 13-week study, but not in the 2-year study). Test animals and their offspring were not observed for reproductive or developmental effects. The results of the NTP study are summarized below. A more detailed summary is provided in Ref. 19.

In groups of 60 male and 60 female mice receiving 0, 500, 1,250, or 2,500 mg/L barium chloride dihydrate in drinking water for 2 years, dose-related nephropathy was observed. The incidence of nephropathy was significantly increased in mice of both genders that received 2,500 mg/L. The nephropathy consisted of extensive regeneration of cortical and medullary renal tubule epithelium, tubule dilatation, hyaline cast formation, multifocal interstitial fibrosis and in some kidneys, glomerulosclerosis. These lesions were accompanied by brown crystals (barium precipitated salts) located within the kidney's tubules lumen and interstitium throughout the cortex and medulla. The kidney lesions were considered the cause of death in most animals. The absolute and relative spleen weights in female rats in the highest dose were lower compared to controls. Based on the renal toxicity, the LOAEL is 160 mg/kg/day for male mice and 200 mg/kg/day for female mice. The No Observed Adverse Effect Level (NOAEL) is 75 mg/kg/day for male mice and 90 mg/kg/day for female mice.

Groups of 10 male and 10 female F344/N rats received barium chloride dihydrate in drinking water at doses of 0, 125, 500, 1,000, 2,000 or 4,000 mg/L, 7 days a week for 13 weeks (Ref. 17). Drinking water levels were estimated to deliver daily doses of 10, 30, 65, 110, or 200 mg/kg for male rats and 10, 35, 65, 115, or 180 mg/kg body weight to females. Three male rats and one female rat that received 4,000 mg/L died during the last week of the study. A significant decrease in motor activity was observed in rats that received the highest dose.

The absolute and relative kidney weights of female rats that received 2,000 and 4,000 mg/L and the relative kidney weight of male rats in the 4,000 mg/L groups were greater than controls and were associated with barium-induced renal lesions. Barium-induced renal lesions occurred in three male and three female rats in the highest dose groups. Gross pathology revealed kidneys that were pale and had roughened surfaces. Microscopically, the kidney lesion appeared as a minimal to mild focal to multifocal dilatation of the proximal convoluted tubules in the outer medulla and the renal cortex. Tubule dilatation observed in this study was different from the common spontaneous lesions observed in the kidney of rats.

In a similar 13–week study on mice (Ref. 17), barium-induced nephropathy was observed in 10 male and 9 female mice in the highest dose group. Gross pathology revealed kidneys that were pale and had roughened surfaces. The nephropathy consisted of mild to moderate multifocal tubule dilatation, regeneration and atrophy with crystals in the lumens of the atrophic tubules. An increased amount of fibrous connective tissue was present in the affected kidneys. The LOAEL in male mice was 450 mg/kg/day and in female mice was 495 mg/kg/day based on the mortality, lower final mean body weights and water consumption, presence of renal, thymic and splenic lesions. The NOAEL was 205 mg/kg/day for male mice and 200 mg/kg/day for female mice.

In a 13-week drinking water study (Ref. 11), barium chloride dihydrate was given to groups of 10 male and 10 female F344/N rats and B6C3F1 mice at levels of 0, 125, 500, 1,000, 2,000, and 4,000 mg/L (ppm). The estimated average barium doses for rats were 0, 5.1, 20.0, 39.0, 70.0, and 128 mg/kg/day and for mice were 0, 12.0, 45.0, 83.0, 165, and 399 mg/kg/day. Mortality ranged from 60 to 70 percent in mice and from 10 to 30 percent in rats in the 4,000 mg/L groups. Deaths in mice were associated with barium-induced renal toxicity. Renal lesions in rats were much less severe than in mice and did not contribute to the barium-induced deaths seen in the high dose group. In both species the highest dose produced marginal decreases in motor activity, grip strength, and thermal sensitivity. The authors attributed these effects to secondary changes resulting from barium chloride toxicity at this dose. In mating trials, no anatomical effects on offspring of rats or mice were noted. Rats given 4,000 mg/L had marginal reductions in pup weights. No effects were noted on reproductive indices. Based on the mortality and renal toxicity at 4,000 mg/L in both rats and mice, the NOAEL was 70 mg/kg/day in rats and 165 mg/kg/day in mice.

Reports on the cardiovascular effects of subchronic and chronic exposure to barium in humans and animals vary. Brenniman et al. (Ref. 7) conducted an epidemiological study in which death-rates (established from death certificates) in communities with high levels of barium in their drinking water (2 -10 mg/L) were compared to communities that were exposed to low levels of barium in water (0.0 - 0.2 mg/L). While an initial analysis of the data indicated statistical differences in blood pressure between the communities, extensive analysis did not. No statistically significant differences were found in blood pressure between individuals in the two cities even when adjustments for duration of exposure, use of water softeners and the use of antihypertensive drugs were made (Ref. 17) .

In a human study conducted by Wones et al. (Ref. 8), 11 healthy men were enrolled in a 10-week barium drinking water dose-response protocol. Diet and lifestyle were controlled and the barium content of the drinking water was varied from 0 mg/L (first 2 weeks) to 5 mg/L (next 4 weeks) to 10 mg/L (last 4 weeks). There were no changes in morning or evening systolic or diastolic blood pressures, plasma cholesterol or lipoprotein, serum potassium or calcium or glucose levels. There were no arrythmias related to barium exposure. Consumption of barium in drinking water at a dose of 0.21 mg barium/kg/day did not appear to affect any of the cardiovascular parameters monitored in this study (Ref. 17). This study was considered limited by the EPA's Office of Drinking Water due to its small study population and short duration of exposure (4 weeks) and because there was no lowest effect dose.

Perry et al. (Ref. 9) studied the effect of barium in drinking water on blood pressure in rats. A total of 195 female weanling Long-Evans rats were subdivided into a control group of 26 animals (0 mg/L) and 3 exposure groups of 13 rats. Each group was provided drinking water containing 1, 10, or 100 mg/L of barium chloride for 1, 4, or 16 months. There were significant increases in mean systolic blood pressure in rats receiving the highest dose at 1 and 4 months (7.1 and 6.3 mg/kg/day, respectively). In the 16-month study, rats exposed to 0.51 and 5.1 mg/kg/day had significant increases in blood pressure as well. Also at the highest dose, there was a decrease in contractility and excitability of cardiac muscle fiber. The LOAEL for the 16-month study was 0.51 mg/kg/day as evidenced by increase in blood pressure and the NOAEL was 0.051 mg/kg/day. However, the test animals were maintained on a special contaminant-free diet that restricted their intake of certain beneficial trace metals, such as calcium and potassium. This restriction may have contributed to the observed hypertensive effects. Several other studies with rats and mice lasting from

13 weeks to 2 years show no increase in blood pressure or any other cardiovascular effects.

3. *Ecotoxicity*. Barium compounds have low toxicity to aquatic organisms and plants (Refs. 15 and 22). The low toxicity of barium compounds to aquatic species is attributable to the presence of sulfate in waters; barium ion liberated from a barium compound reacts with sulfate to form barium sulfate, which precipitates from solution.

C. Environmental Fate of Barium Compounds

EPA's environmental fate evaluation of barium compounds consisted of an analysis of environmental fate data pertaining to barium-containing substances included on the EPCRA section 313 list of toxic chemicals as part of the barium compounds category. Data were obtained from studies found in the literature (Refs. 23, 26-29, 31, and 32) and several government documents (Refs. 24, 25, and 30). The portions of these reference sources that are relevant to EPA's review of the environmental fate of barium compounds are summarized below. Detailed discussions can be found in the publications and in Ref. 33, EPA's technical review of these publications.

1. *Air*. Most barium compounds released to the environment from industrial sources are in forms that do not become widely dispersed (Ref. 23). In the atmosphere, barium compounds are likely to be present in particulate form. Although chemical reactions may cause changes in speciation of barium in air, the main mechanisms for the removal of barium compounds from the atmosphere are likely to be wet and dry deposition (Ref. 24).

Elemental barium is oxidized readily in moist air (Refs. 25 and 26). The residence time of barium in the atmosphere may be several days, depending on the size of the particulate formed, the chemical nature of the particulate, and environmental factors such as rainfall (Ref. 24).

2. *Water*. In aquatic media, barium compounds are likely to precipitate out of solution as barium sulfate ($BaSO_4$) or barium carbonate ($BaCO_3$). Waterborne barium may also adsorb to suspended particulate matter (Refs. 24, 27, and 28). Precipitation of barium sulfate is accelerated when rivers enter ocean waters. This is due to the higher sulfate content in ocean waters (Ref. 33). Sedimentation removes a large portion of barium compounds that are suspended in surface waters (Ref. 29).

Appreciable quantities of barium sulfate or carbonate precipitate may occur in aquatic environments. This is because natural waters usually contain sulfate or carbonate concentrations that are sufficient to react with barium ion to form barium sulfate or carbonate, which precipitates from solution (Ref. 30). In natural waters at pH levels of 9.3 or below, barium ion will react to form barium sulfate (Ref. 27). At pH above 9.3 formation of barium carbonate is favored.

3. *Soil*. Barium is not very mobile in most soils. The rate of transportation of barium in soils is dependent on soil characteristics. Soil properties that influence the transportation of barium to groundwaters are cation exchange capacity and calcium carbonate ($CaCO_3$) content. In soils with a high cation exchange capacity (e.g., fine textured mineral soils or soils with high organic matter content), barium mobility will be limited by adsorption (Ref. 28). High calcium carbonate content limits mobility by precipitation of the element as barium carbonate. In soils, barium will also precipitate as barium sulfate in the presence of sulfate ions (Refs. 27 and 28). Barium is more mobile and is more likely to be leached from soils in the presence of chloride due to the increased solubility of barium chloride as compared to other chemical compounds of barium (Ref. 28). Barium can form compounds with fatty acids (e.g., in acidic landfill leachate) with enhanced mobility in soils due to the lower charge of these compounds and subsequent reduction in adsorption capacity (Ref. 28). The significance of these mobility enhancing processes is thought to be minor overall, and it is likely that in the presence of sulfate or carbonate in soils, barium ion will react to form a solid (barium sulfate or barium carbonate) with relatively low mobility.

4. *Barium solubility in anaerobic environments*. Although the formation of barium sulfate precipitate is thought to be the major fate pathway for barium ion in aqueous environments containing adequate levels of sulfate, there is evidence indicating that under anaerobic, low sulfate conditions, enhanced barium solubility from barium sulfate can occur. Barium ion concentrations greater than those expected based on the solubility of barium sulfate can result through a series of steps in which available sulfate is reduced to sulfide by anaerobic bacteria (Ref. 31).

The existence of anaerobic, sulfate poor aquatic environments where enhanced barium solubility may occur has been documented (Ref. 32). However, these environments are often found in northern glaciated regions in water bodies that are isolated from flowing surface waters and groundwaters. As these areas tend to be remote, the likelihood of releases of barium compounds entering these environments with subsequent attainment of barium ion concentrations of environmental significance is low.

D. Acute Exposure

Because barium compounds have been associated with acute effects in humans, EPA conducted a limited exposure analysis. (See discussion of use of exposure in listing decisions, 59 FR 61440, November 30, 1994.) Based on the TRI data, EPA has determined that the concentration levels of barium compounds likely to exist beyond facility site boundaries are low compared to the levels that would be required to induce the acute toxicities discussed above. Therefore, EPA does not believe that adverse acute human health effects are reasonably likely to occur as a result of continuous, or frequently recurring releases of barium compounds from facilities (Ref. 33).

IV. Technical Summary

EPA's technical review shows that many barium compounds are known to produce toxic effects in humans and experimental animals with the main target organ being the kidneys. Several barium compounds are acutely toxic to humans; however, EPA's exposure analysis indicates that the concentrations required to produce these acute toxicities are not reasonably likely to exist beyond facility site boundaries as a result of continuous, or frequently recurring releases of barium compounds from facilities. With regard to chronic toxicity, the data from animal studies support a LOAEL of approximately 180 mg/kg/day for renal toxicity. Based on these data, EPA considers barium ion to have moderately high chronic toxicity. From its technical review EPA concludes that: barium ion is bioavailable from barium compounds, including some compounds with low water solubility (e.g, barium carbonate); and that barium ion is responsible for the toxic effects produced by barium compounds. Available data indicate that barium compounds are not ecotoxic. EPA's previous determination (59 FR 33205, June 28, 1994) (FRL-4767-5) that barium sulfate is essentially non-toxic to humans and the environment, and thus does not meet the EPCRA section 313(d)(2) criteria for listing remains unchanged.

V. Rationale for Denial

With the exception of barium sulfate, barium-containing substances are chemicals subject to EPCRA section 313

(listed under the category of ''barium compounds'') and PPA section 6607 reporting requirements. The petition to delist barium compounds is based on the petitioner's contention that barium compounds are not toxic and do not meet any of the statutory criteria under section 313(d)(2). In addition, the petitioner contends that due to an abundance of sulfate in the environment, barium ion is not available from barium compounds released into the environment because environmental sulfate will combine with barium ion to form barium sulfate.

EPA's review of available data has led the Agency to conclude that in experimental animals and humans: (1) Barium ion is available from barium compounds, including some compounds that have low water solubility; and (2) barium ion causes moderately high toxicity to the kidney.

Based on available data, EPA concludes that barium compounds can reasonably be anticipated to cause chronic toxicity in humans because of their ability to liberate barium ion, which in turn causes adverse chronic health effects. Therefore, barium compounds meet the criteria of EPCRA section 313(d)(2)(B). EPA concludes that barium compounds should not be deleted from the section 313 list of toxic chemicals, and the petition should be denied. Because barium compounds can reasonably be anticipated to cause moderately high chronic toxicity, EPA does not believe that an exposure assessment is necessary to conclude that barium compounds meet the toxicity criterion of EPCRA section 313(d)(2)(B). For a discussion of the use of exposure in EPCRA section 313 listing/delisting decisions, see 59 FR 61440, November 30, 1994.

EPA agrees with the petitioner that sulfate is a ubiquitous substance in the environment, and that sulfate reacts with barium ion to form barium sulfate. EPA also agrees that barium sulfate does not meet the criteria for listing on the section 313 list of toxic chemicals. EPA does not agree, however, that the presence of sulfate in the environment ensures that barium compounds cannot be toxic to humans. In its review of the toxicity of barium compounds, EPA concludes that environmental presence of barium ion is not a necessary prerequisite for toxicity from a barium compound. In the technical review portion of this notice, EPA describes studies in which adverse effects were observed following exposure to an intact barium compound. The toxicity occurs as a consequence of barium ion release *in vivo*. Therefore, exposure to an intact barium compound can reasonably be anticipated to cause toxicity as a result of the release of barium ion in the body.

In addition, EPA does not agree that the presence of sulfate in the environment automatically ensures that barium ion availability will not result from barium compounds released into the environment. EPA feels that continuous releases of a barium compound (particularly a highly soluble one) to a given area could deplete sulfate in that area. Once sulfate depletion takes place, continued release of the barium compound could lead to availability of barium ion.

EPA's denial of this petition is consistent with the Agency's published policy and guidance on metal compound categories under section 313 of EPCRA (56 FR 23703, May 23, 1991). This policy and guidance articulated EPA's determination that the toxicity of a metal-containing compound that dissociates or reacts to generate the metal ion can be expressed as a function of the toxicity induced by the intact species and the availability of the metal ion. Thus, EPA stated that for petitions to exempt individual metal-containing compounds from the EPCRA section 313 list of toxic chemicals, EPA bases its decisions on the evaluation of all chemical and biological processes that may lead to metal ion availability, as well as on the toxicity exhibited by the intact species. EPA stated that the Agency will deny petitions for chemicals that dissociate or react to generate the metal ion at levels which can reasonably be anticipated to cause adverse effects to human health or the environment and for which the metal ion availability cannot be properly characterized.

In summary, EPA's review of information pertaining to barium compounds resulted in the conclusion that in mammals: (1) Barium ion is available from barium compounds (including some compounds that have low water solubility); and (2) barium ion causes chronic toxic effects. Thus, barium compounds can reasonably be anticipated to cause chronic toxicity in humans because of their ability to liberate barium ion. EPA believes that the available data satisfy the criterion in EPCRA section 313(d)(2)(B). Accordingly, EPA is denying the petition.

VI. References

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VIII. Administrative Record

The record supporting this decision is contained in docket control number OPPTS–400107. All documents, including the references listed in Unit VI. above and an index of the docket, are available to the public in the TSCA Non-Confidential Information Center (NCIC), also known as the Public Docket Office, from noon to 4 p.m., Monday through Friday, excluding legal holidays. The TSCA NCIC is located at EPA Headquarters, Rm. NE-B607, 401 M St., SW., Washington, DC 20460.

List of Subjects in 40 CFR Part 372

Environmental protection, Community right-to-know, Reporting and recordkeeping requirements, and Toxic chemicals.

Dated: December 23, 1996.

Lynn R. Goldman,

Assistant Administrator, for Prevention, Pesticides and Toxic Substances.

[FR Doc. 97–56 Filed 1–2–97; 8:45 am]

BILLING CODE 6560–50–F

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[MM Docket No. 96–259; RM–8970]

Radio Broadcasting Services; Moscow, ID

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: This document requests comments on a petition for rule making filed by Darin L. Siebert requesting the allotment of Channel 277A to Moscow, Idaho, as that community's second local commercial FM service. Coordinates used for Channel 277A at Moscow are 46–42–24 and 116–55–08. As Moscow, Idaho, is located within 320 kilometers (199 miles) of the Canadian border, the Commission must obtain the concurrence of the Canadian government to this proposal.

DATES: Comments must be filed on or before February 18, 1997, and reply comments on or before March 5, 1997.

ADDRESSES: Secretary, Federal Communications Commission, Washington, D.C. 20554. In addition to filing comments with the FCC, interested parties should serve the petitioner, as follows: Darin L. Siebert, S. 605 Grand Ave., Pullman, WA 99163.

FOR FURTHER INFORMATION CONTACT: Nancy Joyner, Mass Media Bureau, (202) 418–2180.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's Notice of Proposed Rule Making, MM Docket No. 96–259, adopted December 20, 1996, and released December 27, 1996. The full text of this Commission decision is available for inspection and copying during normal business hours in the FCC's Reference Center (Room 239), 1919 M Street, NW, Washington, DC The complete text of this decision may also be purchased from the Commission's copy contractors, International Transcription Service, Inc., (202) 857–3800, 2100 M Street, NW., Suite 140,Washington, DC 20037.

Provisions of the Regulatory Flexibility Act of l980 do not apply to this proceeding.

Members of the public should note that from the time a Notice of Proposed Rule Making is issued until the matter is no longer subject to Commission consideration or court review, all *ex parte* contacts are prohibited in Commission proceedings, such as this one, which involve channel allotments. See 47 CFR 1.1204(b) for rules governing permissible *ex parte* contacts.

For information regarding proper filing procedures for comments, See 47 CFR 1.415 and 1.420.

List of Subjects in 47 CFR Part 73

Radio broadcasting.

Federal Communications Commission

John A. Karousos,

Chief, Allocations Branch, Policy and Rules Division, Mass Media Bureau.

[FR Doc. 97–49 Filed 1–2–97; 8:45 am]

BILLING CODE 6712–01–P

47 CFR Part 73

[MM Docket No. 96–258; RM–8967]

Radio Broadcasting Services; Valdez, AK

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: This document requests comments on a petition for rule making filed on behalf of North Wave Communications, Inc., seeking the allotment of FM Channel 227A to Valdez, Alaska, as that community's first local FM transmission service. Coordinates used for this proposal are 61–07–00 and 146–16–00. As Valdez, Alaska, is located within 320 kilometers (199 miles) of the Canadian border, the Commission must obtain the concurrence of the Canadian government to this proposal.

DATES: Comments must be filed on or before February 18, 1997, and reply comments on or before March 5, 1997.

ADDRESSES: Secretary, Federal Communications Commission, Washington, DC 20554. In addition to filing comments with the FCC, interested parties should serve the petitioner's counsel, as follows: Michael H. Bader, Esq., Haley Bader & Potts, P.L.C., 4350 North Fairfax Drive, Suite 900, Arlington, VA 22203–1633.

FOR FURTHER INFORMATION CONTACT: Nancy Joyner, Mass Media Bureau, (202) 418–2180.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's Notice of Proposed Rule Making, MM Docket No. 96–258, adopted December 20, 1996, and released December 27, 1996. The full text of this Commission decision is available for inspection and copying during normal business hours in the FCC's Reference Center (Room 239), 1919 M Street, NW, Washington, DC The complete text of this decision may also be purchased from the Commission's copy contractors, International Transcription Service, Inc., (202) 857–3800, 2100 M Street, NW., Suite 140, Washington, DC 20037.

Provisions of the Regulatory Flexibility Act of l980 do not apply to this proceeding.

Members of the public should note that from the time a Notice of Proposed Rule Making is issued until the matter is no longer subject to Commission consideration or court review, all *ex parte* contacts are prohibited in Commission proceedings, such as this one, which involve channel allotments. See 47 CFR 1.1204(b) for rules governing permissible *ex parte* contacts.

For information regarding proper filing procedures for comments, See 47 CFR 1.415 and 1.420.

List of Subjects in 47 CFR Part 73

Radio broadcasting.

Federal Communications Commission

John A. Karousos,

Chief, Allocations Branch, Policy and Rules Division, Mass Media Bureau.

[FR Doc. 97–48 Filed 1–2–97; 8:45 am]

BILLING CODE 6712–01–P

47 CFR Part 73

[MM Docket No. 96–260, RM–8965]

Radio Broadcasting Services; Mankato, Minnesota

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: This document requests comments on a petition filed by Mid-Minnesota Broadcsting Company proposing the allotment of Channel 231A to Mankato, Minnesota. The coordinates for Channel 231A at Mankato are 44–10–12 and 94–00–24.

DATES: Comments must be filed on or before February 18, 1997, and reply comments on or before March 5, 1997.

ADDRESSES: Federal Communications Commission, Washington, DC 20554. In addition to filing comments with the FCC, interested parties should serve the petitioner, or its counsel or consultant, as follows: Abdolmajid Khalizadeh, Philip A. Rubin & Associates, Inc., 1350 Connecticut Avenue, Suite 610, Washington, DC 20036.

FOR FURTHER INFORMATION CONTACT: Kathleen Scheuerle, Mass Media Bureau, (202) 418–2180.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's Notice of Proposed Rule Making, MM Docket No. 96–260, adopted December 20, 1996, and released December 27, 1996. The full text of this Commission decision is available for inspection and copying during normal business hours in the Commission's Reference Center (Room 239), 1919 M Street, NW., Washington, DC. The complete text of this decision may also be purchased from the Commission's copy contractors, International Transcription Services, Inc., 2100 M Street, NW., Suite 140, Washington, D.C. 20037, (202) 857–3800.

Provisions of the Regulatory Flexibility Act of 1980 do not apply to this proceeding.

Members of the public should note that from the time a Notice of Proposed Rule Making is issued until the matter is no longer subject to Commission consideration or court review, all *ex parte* contacts are prohibited in Commission proceedings, such as this one, which involve channel allotments. See 47 CFR 1.1204(b) for rules governing permissible *ex parte* contact.

For information regarding proper filing procedures for comments, see 47 CFR 1.415 and 1.420.

List of Subjects in 47 CFR Part 73

Radio broadcasting.

Federal Communications Commission

John A. Karousos,

Chief, Allocations Branch, Policy and Rules Division, Mass Media Bureau.

[FR Doc. 97–45 Filed 1–2–97; 8:45 am]

BILLING CODE 6712–01–P

47 CFR Part 73

[MM Docket No. 96–257, RM–8966]

Radio Broadcasting Services; Cloudcroft, New Mexico

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: The Commission requests comments on a petition filed by Robert J. Flotte seeking the allotment of Channel 250C1 to Cloudcroft, New Mexico, as the community's first local aural transmission service. Channel 250C1 can be allotted to Cloudcroft in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction, at coordinates 32–57–30 North Latitude and 105–44–42 West Longitude. Mexican concurrence in the allotment is required since the community is located within 320 kilometers (199 miles) of the U.S.-Mexican border.

DATES: Comments must be filed on or before February 18, 1997, and reply comments on or before March 5, 1997.

ADDRESSES: Federal Communications Commission, Washington, D.C. 20554.

In addition to filing comments with the FCC, interested parties should serve the petitioner, or its counsel or consultant, as follows: Barry D. Wood, Esq., Mark A. Brinton, Esq., Jones, Waldo, Holbrook & McDonough, P.C., 2300 M Street NW., Suite 900, Washington, DC 20037 (Counsel to petitioner).

FOR FURTHER INFORMATION CONTACT: Leslie K. Shapiro, Mass Media Bureau, (202) 418–2180.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's Notice of Proposed Rule Making, MM Docket No. 96–257, adopted December 20, 1996, and released December 27, 1996. The full text of this Commission decision is available for inspection and copying during normal business hours in the FCC Reference Center (Room 239), 1919 M Street, NW, Washington, D.C. The complete text of this decision may also be purchased from the Commission's copy contractor, International Transcription Services, Inc., (202) 857–3800, 2100 M Street NW., Suite 140, Washington, DC 20037.

Provisions of the Regulatory Flexibility Act of 1980 do not apply to this proceeding.

Members of the public should note that from the time a Notice of Proposed Rule Making is issued until the matter is no longer subject to Commission consideration or court review, all *ex parte* contacts are prohibited in Commission proceedings, such as this one, which involve channel allotments. See 47 CFR 1.1204(b) for rules governing permissible *ex parte* contacts.

For information regarding proper filing procedures for comments, see 47 CFR 1.415 and 1.420.

List of Subjects in 47 CFR Part 73

Radio broadcasting.

Federal Communications Commission.

John A. Karousos,

Chief, Allocations Branch, Policy and Rules Division, Mass Media Bureau.

[FR Doc. 97–40 Filed 1–2–97; 8:45 am]

BILLING CODE 6712–01–P

DEPARTMENT OF DEFENSE

48 CFR Parts 225, 231, and 242

[DFARS Case 95–D040]

Defense Federal Acquisition Regulation Supplement; Independent Research and Development/Bid and Proposal Costs for FY96 and Beyond

AGENCY: Department of Defense (DoD).

ACTION: Proposed rule with request for comment.

SUMMARY: The Department of Defense is proposing to amend the Defense Federal Acquisition Regulation Supplement (DFARS) to reflect proposed changes to the Federal Acquisition Regulation (FAR) to treat Independent Research and Development and Bid and Proposal cost for fiscal year 1996 and beyond as fully allowable, subject only to the FAR normal standards of reasonableness and allocability.

DATES: Comments on the proposed rule should be submitted in writing to the address shown below on or before March 4, 1997, to be considered in the formulation of the final rule.

ADDRESSES: Interested parties should submit written comments to, Defense Acquisition Regulations Council, Attn: Ms. Sandra G. Haberlin, PDUSD (A&T) DP (DAR), IMD 3D139, 3062 Defense Pentagon, Washington, DC 20301–3062, telefax number (703) 602–0350. Please cite DFARS Case 95–D040 in all correspondence related to this issue.

FOR FURTHER INFORMATION CONTACT: Ms. Sandra Haberlin, at (703) 602–0131. Please cite DFARS Case 95–D040.

SUPPLEMENTARY INFORMATION:

A. Background

The current Independent Research and Development (IR&D)/Bid and Proposal (B&P) cost principle at DFARS 231.205–18 covers the limited allowability of IR&D/B&P costs for major contractors through a 3-year transition period (fiscal years 1993–1995), based on the requirements of section 802 of the National Defense Authorization Act for fiscal years 1992 and 1993 (Pub. L. 102–190). Section 802 does not address the allowability of IR&D/B&P costs after fiscal year 1995. This proposed DFARS rule supplements a proposed FAR rule (FAR Case 95–032), which treats IR&D/B&P costs for fiscal year 1996 and beyond as 100 percent allowable for all contractors, subject only to the FAR normal standards of reasonableness and allocability. The proposed FAR rule was published in the Federal Register on November 14, 1996 (61 FR 58452). In addition, this DFARS rule continues to require, in accordance with 10 U.S.C. 2372, that IR&D/B&P activities of major contractors have a potential interest to DoD for the costs to be allowable.

The proposed DFARS rule revises 231.205–18 and 242.771 to delete (1) the requirement for advance agreement negotiations or formal IR&D technical reviews and evaluations after contractors' fiscal year 1992; and (2) the limited allowability restriction of IR&D/B&P costs for fiscal years 1993–1995. Also, the rule revises 225.7303–2(c) to indicate that the ''potential interest to DoD'' requirement of DFARS 231.205–18(c)(3) does not apply to contracts for foreign military sales.

B. Regulatory Flexibility Act

The proposed rule is not expected to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, because most contracts awarded to small entities use simplified acquisition procedures or are awarded on a competitive fixed-price basis and do not require application of the cost principle contained in this rule. An initial regulatory flexibility analysis, therefore, has not been performed. Comments are invited from small businesses and other interested parties. Comments from small entities concerning the affected DFARS subparts also will be considered in accordance with Section 610 of the Act. Such comments must be submitted separately and cite DFARS Case 95–D040 in correspondence.

C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the proposed rule does not impose any new recordkeeping, information collection requirements, or collections of information from offerors, contractors, or members of the public which require the approval of the Office of Management and Budget under 44 U.S.C. 3501, *et seq.*

List of Subjects in 48 CFR Parts 225, 231, and 242

Government procurement

Michele P. Peterson,

Executive Editor, Defense Acquisition Regulations Council.

Therefore, it is proposed that 48 CFR Parts 225, 231, and 242 be amended as follows:

1. The authority citation for 48 CFR Parts 225, 231, and 242 continues to read as follows:

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

PART 225—FOREIGN ACQUISITION

2. Section 225.7303–2 is amended by revising paragraph (c) to read as follows:

225.7303–2 Cost of doing business with a foreign government or an international organization.

* * * * *

(c) The cost limitation for major contractors on independent research and development and bid and proposal (IR&D/B&P) costs for projects which are of potential interest to DoD, in 231.205–18(c)(iii), does not apply to foreign military sale contracts, except as provided in 225.7303–5. The

allowability of IR&D/B&P costs on contracts for foreign military sales not wholly paid for from funds made available on a nonrepayable basis shall be limited to the contract's allocable share of the contractor's total IR&D/B&P expenditures. In pricing contracts for such foreign military sales—

(1) Use the best estimate of reasonable costs in forward pricing.

(2) Use actual expenditures, to the extent that they are reasonable, in determining final cost.

* * * * *

PART 231—CONTRACT COST PRINCIPLES AND PROCEDURES

3. Section 231.205–18 is revised to read as follows:

231.205–18 Independent research and development and bid and proposal costs.

(a) *Definition. Major contractor,* as used in this subsection, means a contractor with more than $11,000,000 in IR&D/B&P costs in the preceding fiscal year allocated to DoD prime contracts and subcontracts whose values exceed the simplified acquisition threshold, except for fixed-price contracts and subcontracts without cost incentives.

(c) *Allowability.* (i) Departments/agencies shall not supplement this regulation in any way that limits IR&D/B&P cost allowability.

(ii) See 225.7303–2(c) for allowability provisions affecting foreign military sale contracts.

(iii) For major contractors (see paragraph (a) of this subsection), the following limitation applies—

(A) The amount of IR&D/B&P costs allowable under DoD contracts shall not exceed the lesser of—

(*1*) Such contracts' allocable share of total incurred IR&D/B&P costs; or

(*2*) The amount of incurred IR&D/B&P costs for projects having potential interest to DoD.

(B) Allowable IR&D/B&P costs are limited to those for projects which are of potential interest to the DoD, including activities intended to accomplish any of the following—

(*1*) Enable superior performance of future U.S. weapon systems and components;

(*2*) Reduce acquisition costs and life-cycle costs of military systems;

(*3*) Strengthen the defense industrial and technology base of the United States;

(*4*) Enhance the industrial competitiveness of the United States;

(*5*) Promote the development of technologies identified as critical under 10 U.S.C. 2522;

(*6*) Increase the development and promotion of efficient and effective applications of dual-use technologies;

(*7*) Provide efficient and effective technologies for achieving such environmental benefits as: improved environmental data gathering, environmental cleanup and restoration, pollution reduction in manufacturing, environmental conservation, and environmentally safe management of facilities.

(iv) For major contractors, the contracting officer will—

(i) Determine whether IR&D/B&P projects are of potential interest to DoD; and

(ii) Provide the results of the determination to the contractor.

(v) The cognizant contract administration office shall furnish contractors with guidance on financial information needed to support IR&D/B&P costs and on technical information needed from major contractors to support the potential interest to DoD determination (see also 242.771–3(a)).

PART 242—CONTRACT ADMINISTRATION

4. Sections 242.771 through 242.771–3 are revised to read as follows:

242.771 Independent research and development/bid and proposal.

242.771–1 Scope of subpart.

This section implements 10 U.S.C. 2372, Independent research and development and bid and proposal costs: payments to contractors.

242.771–2 Policy.

Defense contractors are encouraged to engage in IR&D/B&P activities of potential interest to DoD, including activities cited in 231.205–18(c)(iii)(B).

242.771–3 Responsibilities.

(a) The cognizant administrative contracting officer (ACO) or corporate ACO shall—

(1) Determine cost allowability of IR&D/B&P costs as set forth in 231.205–18 and FAR 31.205–18.

(2) Determine whether IR&D/B&P projects performed by major contractors (see 231.205–18(a)) are of potential interest to DoD. Notify the contractor promptly of any IR&D/B&P activities which are not of potential interest to DoD.

(b) The Defense Contract Management Command of the Defense Logistics Agency or the Military Department responsible for performing contract administration functions is responsible for—

(1) Providing contractors with guidance on financial information needed to support IR&D/B&P costs.

(2) Providing Defense Contract Audit Agency (DCAA) with IR&D/B&P statistical information, as necessary, to assist DCAA in its annual reporting requirement (see paragraph (c) of this subsection).

(c) The Defense Contract Audit Agency is responsible for submitting an annual report to the Director of Defense Procurement (USD (A&T) DP) setting forth required statistical information relating to the DoD-wide IR&D/B&P program.

(d) The Director, Defense Research and Engineering (USD (A&T) DDR&E), is responsible for establishing a regular method for communication—

(1) From DoD to contractors, of timely and comprehensive information regarding planned or expected DoD future needs; and

(2) From contractors to DoD, of brief technical descriptions of contractor IR&D projects.

[FR Doc. 97–43 Filed 1–2–97; 8:45 am]

BILLING CODE 5000–04–M

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

49 CFR Part 538

[Docket No. 94–35; Notice 2]

RIN 2127–AF37

Minimum Driving Range for Dual Fueled Electric Passenger Automobiles

AGENCY: National Highway Traffic Safety Administration (NHTSA), Department of Transportation (DOT).

ACTION: Notice of Proposed Rulemaking (NPRM).

SUMMARY: In this document, NHTSA proposes to set the minimum driving range only for dual fueled electric passenger automobiles, otherwise known as hybrid electric vehicles (HEVs), at 17.7 miles when operating on electricity alone. The purpose of establishing the range is to meet a statutory requirement intended to encourage the production of HEVs. An HEV which meets the range requirement would qualify to have its fuel economy calculated according to a special procedure that would facilitate the efforts of its manufacturer to comply with the corporate average fuel economy standards. NHTSA is also proposing to

establish a procedure through which manufacturers of HEVs that do not meet the minimum driving range requirements may petition the agency for relief.

DATES: Comments must be received by March 4, 1997.

ADDRESSES: Comments on this document must refer to the docket and notice numbers set forth above and be submitted (preferably 10 copies) to the Docket Section, National Highway Traffic Safety Administration, Room 5313, 400 Seventh Street SW., Washington, DC 20590. (Docket hours are 9:30 a.m. to 4:00 p.m., Monday through Friday.)

FOR FURTHER INFORMATION CONTACT: Mr. P. L. Moore, Office of Planning and Consumer Programs, NPS–32, Room 5315, National Highway Traffic Safety Administration, 400 Seventh Street SW., Washington, DC 20590. Telephone: (202) 366–5222.

SUPPLEMENTARY INFORMATION:

Background

A. Alternative Motor Fuels Act of 1988

Section 6 of the Alternative Motor Fuels Act of 1988 (AMFA) (P.L. 100–494) amended the fuel economy provisions of the Motor Vehicle Information and Cost Savings Act (Cost Savings Act) by adding a new section 513, ''Manufacturing Incentives for Automobiles.'' Section 513 contained incentives for the manufacture of vehicles designed to operate on alcohol or natural gas, including dual fuel vehicles; i.e., vehicles capable of operating on one of those alternative fuels and either gasoline or diesel fuel.

Section 513 provided that dual fuel vehicles meeting specified criteria qualify for special treatment in the calculation of their fuel economy for purposes of the corporate average fuel economy (CAFE) standards. The fuel economy of a qualifying vehicle is calculated in a manner that results in a relatively high fuel economy value, thus encouraging its production as a way of facilitating a manufacturer's compliance with the CAFE standards. One of the qualifying criteria for passenger automobiles was to meet a minimum driving range, which was to be established by NHTSA.

NHTSA was required to establish two minimum driving ranges, one for ''dual energy'' (alcohol/gasoline or diesel fuel) passenger automobiles when operating on alcohol, and the other for ''natural gas dual energy'' (natural gas/gasoline or diesel fuel) passenger automobiles when operating on natural gas. In establishing the driving ranges, NHTSA was to consider the purposes of AMFA, consumer acceptability, economic practicability, technology, environmental impact, safety, drivability, performance, and any other factors deemed relevant.

The AMFA and its legislative history made it clear that the driving ranges were to be low enough to encourage the production of dual fuel passenger automobiles, yet not so low that motorists would be discouraged by a low driving range from actually fueling their vehicles with the alternative fuels. The agency accordingly promulgated driving range regulations at 49 CFR Part 538 (55 FR 17616).

B. Energy Policy Act of 1992

The Energy Policy Act of 1992 (Pub. L. 102–486) amended section 513 of the Cost Savings Act to expand the scope of the alternative fuels it promotes. The amended section provided incentives for the production of vehicles using, in addition to alcohol and natural gas, liquefied petroleum gas, hydrogen, coal derived liquid fuels, fuels (other than alcohol) derived from biological materials, electricity (including electricity from solar energy), and any fuel NHTSA determines, by rule, is substantially not petroleum and would yield substantial energy security benefits and substantial environmental benefits.

Section 513 continued to provide incentives for the production of dual fuel vehicles; i.e., vehicles that operate on one of a now expanded list of alternative fuels, including electricity, and on gasoline or diesel fuel. For example, the calculated fuel economy of a dual fueled vehicle is based on the harmonic average of the fuel economy when operated on gasoline or diesel fuel and the credited fuel economy when operated on the alternative fuel. A hybrid electric vehicle operating on gasoline may have a combined city/highway fuel economy average of 28.5 miles per gallon, and a combined city/highway energy consumption of 422 watt-hours/mile when operated on electricity. Using the petroleum equivalency factor of 38322 watt-hours per gallon (Wh/gal) proposed by the Department of Energy on February 4, 1994 (59 FR 5336) to derive a miles per gallon equivalent, the mpg of such an electric vehicle with no petroleum powered accessories is derived by dividing the petroleum equivalency by the electric energy consumed per mile:

38322/422 =90.81 miles/gallon

The harmonic average of 90.81 mpg and 28.5 mpg is:

$$\frac{1}{\frac{0.5}{28.5}+\frac{0.5}{90.8}} = 43.4 \text{ miles / gallon}$$

NHTSA notes that some statutory terminology was changed by the 1992 amendments. Among other things, the terms ''dual energy'' and ''natural gas dual energy'' were dropped, and the terms ''alternative fueled automobile,'' ''dedicated automobile,'' and ''dual fueled automobile'' were added.

Section 513 also continued to require dual fueled passenger automobiles to meet specified criteria, including meeting a minimum driving range, in order to qualify for the special treatment in the calculation of their fuel economy for purposes of the CAFE standards. The

1992 Energy Policy Act necessitates amending Part 538. The agency must establish a minimum driving range for the expanded scope of dual fueled vehicles. Minimum driving range standards for all dual energy vehicles except electric vehicles were established by a final rule issued on March 21, 1996 (61 FR 14507). Pursuant to the 1992 amendments, the March 21, 1996, final rule also eliminated the exemption from the minimum driving range requirements for all non-electric dual fueled vehicles. Establishment of a minimum driving range for HEVs requires reinstating the availability of an exemption for these vehicles.

On July 5, 1994, the Cost Savings Act was revised and codified ''without substantive change.'' The provisions formerly found in section 513 of the Cost Savings Act are now at 49 U.S.C. 32901, 32905, and 32906. In setting the minimum driving range for dual energy electric vehicles, NHTSA is required by 49 U.S.C. 32901(c)(3) to consider the purposes set forth in section 3 of the AMFA as amended by the Energy Policy Act:

(1) To encourage the development and widespread use of methanol, ethanol, natural gas, other gaseous fuels, and electricity as transportation fuels by consumers; and

(2) To promote the production of alternatively fueled motor vehicles.

Section 32901(c)(3) also requires that the agency consider consumer acceptability, economic practicibility, technology, environmental impact, safety, drivability, performance, and other relevant factors in setting a minimum driving range.

Proposal

In this document, NHTSA is proposing to amend Part 538 pursuant to the Energy Policy Act. As discussed below, the agency is proposing to set the minimum driving range for all hybrid electric dual fueled passenger automobiles while operating on electricity alone at 17.7 miles and to establish application procedures for manufacturers of HEVs seeking exemption from the minimum range requirement.

To encourage the development and production of alternative fuel vehicles, the AMFA provides that such vehicles meeting an appropriate minimum driving range will qualify for special treatment in the calculation of their fuel economy for the purpose of their manufacturers' compliance with CAFE standards.

The inclusion of electricity in the list of alternative fuels covered by the AMFA necessitates that a minimum driving range be established for HEVs for fuel economy purposes. The AMFA specifies a minimum driving range of 200 miles for dual fueled passenger cars (other than dual fueled electric) when operating on the alternative fuel, but allows the Secretary of Transportation to establish the minimum driving range for HEVs.

The AMFA and Energy Policy Act provisions, which are now codified at 49 U.S.C. sections 32901(c) and 32905, require the Secretary of Transportation to establish a minimum driving range for HEVs. This minimum range requirement applies to passenger automobiles only. It does not apply to dual fueled light trucks.

In seeking to carry out its goals, the Act attempts to balance two competing objectives:

(1) Encouraging the production of alternatively fueled vehicles by offering CAFE standard compliance incentives, and

(2) Encouraging the purchase of alternatively fueled vehicles by consumers by providing the incentives only to those vehicles whose range of operation is large enough to meet consumer needs.

The setting of a minimum driving range for HEVs must balance the needs of the consumer with the technical and economic considerations that are faced by the manufacturers. A low minimum driving range eligibility criterion might encourage the production of dual fueled cars, but lead to HEVs being designed with such a low alternative fuel driving range that consumers do not buy them or, if they buy them, infrequently operate them on the alternative fuel. Conversely, an excessively high minimum driving range eligibility criterion might discourage the production of dual fueled electric cars and unnecessarily compromise other vehicle attributes and aspects of performance. Manufacturers would be discouraged by an overly-stringent minimum range because a vehicle which does not meet the minimum driving range for its type is unlikely to be built since the manufacturer would not receive any of the benefits or incentives provided by the Act.

From the viewpoint of the consumer, the necessary driving range may be dictated by the convenience of a range that corresponds to a typical workweek travel distance, or a daily travel distance for a fleet car. Also, if the majority of consumers would use an HEV in an urban area with more recharging stations or in a fleet application with a central recharging station, a large driving range may be less critical.

To aid the agency in relating the data on driving range for HEVs to the unique characteristics of dual fueled passenger automobiles, NHTSA published an Advance Notice of Proposed Rulemaking (ANPRM) on September 22, 1994 (59 FR 48589). In the ANPRM, the agency posed a number of questions on the use of HEVs relating to the determination of a driving range that would serve the purposes of Alternative Motor Fuels Act and the Energy Policy Act.

A. Response to the ANPRM

The agency received four comments in response to the September 22, 1994, ANPRM. Comments were submitted by Volvo Cars of North America, Inc. (Volvo), National Automobile Dealers Association (NADA), Mitsubishi Motors America, Inc. (Mitsubishi), and American Automobile Manufacturers Association (AAMA). NADA did not provide responses to the individual questions; Volvo commented on most of the questions, and Mitsubishi and AAMA commented on all questions.

One of the questions contained in the ANPRM requested views on the minimum driving range for HEV passenger cars when operating on electricity. Volvo stated that a minimum driving range of approximately 60 to 80 miles would be appropriate. Mitsubishi declined to recommend an explicit minimum driving range, but did recommend that the agency consider the application of a driving cycle that is at a lower speed than the current EPA urban/highway driving cycle since the EPA urban/highway driving cycle's speeds (60+ mph) are too high for some HEVs. AAMA recommended that NHTSA set a zero minimum driving range for HEVs so that no HEV technologies (including those with little or no all-electric range) that still offer energy and/or emissions benefits will be excluded by regulatory design. AAMA believes that this approach to setting minimum driving range is consistent with the intent of the Energy Policy Act.

The ANPRM also solicited comments on what the appropriate method for determining minimum driving ranges should be, whether the EPA driving cycle should be used to determine the range and whether driving range measurements should be undertaken with the vehicle using electric power alone or a combination of electricity and other fuels. Volvo stated that dual fueled vehicles should incorporate the same driving range on the two fuels combined as a normal gasoline fueled vehicle, which is 350–400 miles. However, Volvo believes that it is possible for a hybrid vehicle to complete the EPA driving cycle solely on electric power. Mitsubishi believes

that the minimum driving range should be determined based on the hybrid vehicle's role and purpose; e.g., in a high pollution urban area, the range should be based on all electric operation and in suburban or rural areas the range should be based on operation with the other power source running as well. Mitsubishi also stated that whether the hybrid can operate solely on electricity depends on the design and purpose of the vehicle. AAMA stated that the range should be determined on the combination of both power sources and it believes that there may be vehicles that can operate solely on electricity while others may require the auxiliary power source as well. AAMA also noted that a hybrid with electric power and an alternative fueled engine is a dedicated alternative fueled automobile since it operates entirely on alternative fuels, albeit two types of alternative fuel.

The ANPRM also requested comments regarding the suitability of the Society of Automotive Engineers (SAE) J1711 Hybrid Electric Vehicle Test Procedure. This test procedure, which is still under development, might be used in the future for determining range. Among other requests, the NPRM sought information regarding the adaptability of the SAE procedure for use with the EPA driving cycle, and the appropriateness of other tests. Mitsubishi's opinion was that the SAE procedure should be adopted, but with lower speeds since the EPA cycle speeds are too high for hybrids. AAMA stated that the SAE procedure could be used once it is fully developed since it does contain procedures for computing an all-electric range. AAMA further added that it was unaware of other test procedures that would be applicable in determining the range for hybrid vehicles.

In addition to addressing the basic concerns of how to determine a driving range for HEVs and what the potential ranges for such vehicles may be in light of existing technology, the ANPRM also solicited information relating to consumer acceptability, economic practicability, technology, environmental impact, safety, drivability, and performance. Comments received in response to the ANPRM as well as the agency's own research indicate that consumer expectations and requirements for range, safety, drivability and performance place a great burden on existing HEV technologies, particularly when the economic practicibility of these vehicles is considered. In regard to consumer demands and expectations, Volvo thinks that hybrid vehicles will be used mainly in urban areas and recharging will take place at the consumer's residence or, for fleets, at central recharging facilities. Mitsubishi believes that the primary use will be in urban areas and for fleets with central recharging. AAMA expects that hybrids will be used in urban areas for commuting and fleet use. Recharging is expected to be at residences and centralized stations or parking garages.

In response to questions directed at specific consumer expectations of minimum driving range, Volvo commented that the consumer can accept a shorter driving range if the hybrid or dual fueled vehicle incorporates an auxiliary power unit as opposed to a vehicle solely powered by an electrical source. Volvo also stated that the minimum driving range for a vehicle operating on electricity should be defined so that the majority of people who commute, for example in the Los Angeles metropolitan area (or any other mandated metropolitan area), have the capability to get to work and then back home (and with some margin) using the vehicle's stored electrical energy supply. Mitsubishi offered the fact that 90% of daily round-trip commutes are less than 60 miles in urban areas. AAMA commented that the minimum driving range should be based on convenience to the customer. Volvo, Mitsubishi, and AAMA all indicated that until technology allows more rapid recharging and electric recharging facilities become widely available, that the range of HEVs operating on electricity alone will be constrained by the need to recharge vehicles at their base of operations.

Consumer requirements such as performance, utility and comfort also have an impact on range. Mitsubishi noted that about 1 kW of electrical power is expected to be needed to operate normal heating and cooling systems in Electric passenger cars. With a heat pump system, driving in the city may decrease the range by 15 to 20%. Using a heater adequate to meet FMVSS 103 requirements would consume more than 5 kW of electricity. Mitsubishi stated that such a heater would easily meet the defrosting requirements, but heating the interior could reduce the driving range in half. AAMA indicated that heaters and air conditioners reduce the range of the vehicle depending on the ambient temperature and type of system. While new technology is being developed, it cannot be considered at this time because of high cost and unknown reliability. While NADA did not comment on this question specifically, it submitted information about the GM Impact electric vehicle cold weather experience and noted that minimum HEV range calculations must also reflect climate variations. Results of prototype tests in colder ambient air temperatures indicated that these vehicles suffered drastically reduced driving range with the expected 55 mile range reduced by 40% when the temperature falls from 70 degrees Fahrenheit to 20 degrees and a 55% reduction when the temperature falls to 0 degrees.

In offering its comments on utility and space Mitsubishi indicated that if the minimum driving range is set too high, there may not be enough space for the batteries in a typical sedan-type vehicle. AAMA stated that there is always a trade-off between appearance and aerodynamics versus function when designing a vehicle and that with current technology, storage space is likely to be reduced if a large minimum driving range is required. Passenger and cargo space must be utilized to increase range to higher levels.

In examining the economic practicability of HEVs, the range of the vehicle appears to be directly related to its cost. AAMA stated, and the responses submitted by Volvo and Mitsubishi indicate, that even without significant driving range requirements, one of the HEVs most serious issues is battery cost. High driving range requirements can lead to excessive cost and weight of powertrains and energy storage devices. The increased weight due to the dual fuel capability of HEVs requires increased vehicle structural strength and additional chassis components which increase the overall weight and cost of the HEV and reduce energy efficiency.

Higher range requirements have other costs as well, particularly when existing technologies are considered. Greater range under electric power requires larger and heavier battery packs. Volvo indicated that the bigger the battery, the longer the range, since battery pack size is in direct proportion to the consumer's available driving range. Volvo also stated that the bigger the battery, the heavier the vehicle, thus providing a shorter driving range when a non-electric source of energy is used to propel the vehicle. Mitsubishi reasoned that if the battery pack is larger, it may take longer to discharge the battery, which would result in a longer HEV driving range. However, Mitsubishi believes that HEVs may actually have a shorter driving range since the reduction in fuel economy resulting from the increased weight may not offset the amount of energy gained by a larger battery pack.

AAMA indicated that batteries occupying the same space as a gasoline fuel tank would weigh about 1.7 times

as much while providing only a fraction of the operating range (approximately 3%). In an HEV, an oversized energy storage device reduces the space available for the gasoline or diesel fuel storage.

Higher range in the electric-only mode of operation would also invoke penalties affecting performance and safety. Mitsubishi believes that the balance of the vehicle, and consequently the vehicle's handling, will be affected if a large number of batteries are used to provide longer driving ranges. Mitsubishi indicated that an HEV with the range of a standard gasoline powered vehicle would weigh approximately 5000 lbs. Mitsubishi further added that while the majority of driving performance depends on the vehicle weight and the motor's power capacity, the most important parameter is weight balance to improve handling. In addition to performance and handling, Mitsubishi indicated that it did not have sufficient data regarding the safety risk related to longer driving ranges on electric power, but believed that if the battery capacity is smaller, the safety risk is lower, and the driving range is shorter. AAMA explained that an electric powertrain can be made to produce the same performance capability as a gasoline vehicle, but, like a gasoline vehicle, increased performance generally results in decreased range when holding all other variables constant. If longer range requires larger battery storage, then cost and packaging constraints will lead toward smaller engines, which, if the battery is near depletion, leads to performance and drivability degradation.

B. The Proposed Minimum Driving Range

The setting of a minimum driving range for HEVs must carefully balance what the potential purchaser expects from the vehicle and what technical and economic considerations the manufacturer will encounter in successfully bringing these vehicles to the marketplace. The agency's goal is to allow maximum flexibility to manufacturers of this emerging technology while encouraging the purchase of alternatively fueled vehicles by consumers, with the expectation that those vehicles produced will satisfy vehicle performance requirements and contain attributes desired by the purchaser.

In comparison to a normal gasoline fueled vehicle driving range of 350–400 miles, the typical electric-only vehicle has a driving range of 60–80 miles or less. Recent developments in electric vehicle technology appear to be extending driving ranges. New battery types, such as the fiber-nickel-cadmium battery previously used only in the aerospace industry, may change existing constraints on range. Vehicles based on these batteries are expected to have a range of 100 to 150 miles, can partially recharge in as little as five minutes, and have a battery life of more than 200,000 miles. These batteries, however, along with a host of other advanced-technology batteries are still in the developmental stage, and are not expected to be available on a commercial scale for many years. Meanwhile, lead-acid and possibly nickel-cadmium are the only commercially available and economical battery technologies suitable for electric vehicles in the near term. Therefore, for the immediate future, it is expected that the battery used in electric and hybrid vehicles will be the lead-acid battery. This battery configuration has considerable constraints, such as an extremely low charge density and a long recharge time. Based on NHTSA's review of comments forwarded in response to the ANPRM, a review of current literature, studies of current industry capabilities, an assessment of the available technology, and existing statutory requirements, the agency is proposing to set the minimum driving range for HEVs, when operating solely on electricity at 17.7 miles—the range required to complete one EPA urban/highway cycle under the current Federal Test Procedure (FTP).

In the agency's view, setting a minimum driving range at 17.7 miles ensures that HEVs will have sufficient driving range to meet the needs of consumers while also encouraging HEV development. A 17.7 mile minimum range is not so stringent as to foreclose the development of vehicles relying on new technologies or entry into the market without unduly large expenditures of capital resources. The proposed range is also sufficient to meet the needs of many vehicle users. According to the 1990 National Personal Transportation Survey (NPTS), a 17.7 mile range would be adequate for 85% of daily vehicle trips and 45% of daily vehicle miles traveled. In addition, setting the minimum driving range at 17.7 miles allows use of EPA test procedures, where one complete highway and urban cycle consists of 17.7 mi. The agency is, therefore, proposing that those vehicles that finish one complete circuit of the EPA highway and urban cycle in the electric-only mode without recharging shall be deemed to have met the minimum range requirement.

The agency notes that the proposed minimum driving range contemplates operation of the vehicle solely on electric power when some hybrid designs under consideration are full time hybrids. In these vehicles, electric and internal combustion engines are designed to complement each other and may not have sufficient power alone to adequately propel the vehicle. Similarly, other designs in which the vehicle may be operated on electric power alone may not have sufficient range to meet the proposed 17.7 mile minimum range. However, calculation of the fuel economy of a dual fueled automobile under Section 513 of the AMFA (now 49 U.S.C. 32905) requires that the vehicle be operated solely on the alternative fuel and, as set forth in 49 U.S.C. 32904(c), have its energy consumption measured through use of the EPA combined urban and highway cycle. This statutory requirement compels a minimum driving range specifying electric only operation for a distance equivalent to one EPA cycle.

In order to assist the agency in setting the minimum driving range and evaluating the environmental consequences of this proposal, NHTSA requests that vehicle manufacturers provide answers to the following questions: (1) If there were no CAFE incentives for producing dual fuel electric vehicles, how many of these vehicles would you manufacture in the next ten years? What type of battery would the vehicles have? What range do you expect the vehicle to have when operating on electric power, conventional fuels, or both? (2) With CAFE incentives available only for dual fuel electric vehicles that have a range of at least 17.7 miles, how many of these vehicles would you produce in each of the next ten years? What kind of battery would it employ? (3) Is there a minimum driving range different than 17.7 miles that would give you an incentive to build substantially more vehicles? How many vehicles would you manufacture in the next ten years in this case? What types of batteries would you use? (4) What is the highest driving range at which you would manufacture at least 80% of the number of vehicles projected in your answer to question 3, and what type of batteries would you use to achieve that range?

Adopting a range lower than 17.7 miles might provide additional flexibility to manufacturers seeking to develop new technologies. However, it is NHTSA's current view that the agency is precluded by the explicit language of 49 U.S.C. 32905 from setting

a minimum driving range that does not require operation on electricity alone. In addition, determining the fuel economy of a hybrid electric vehicle while operating on electricity alone requires that the vehicle complete at least one EPA driving cycle. In addition, allowing manufacturers to obtain CAFE credits by producing a vehicle that may not be capable of any meaningful operation while using electricity as a fuel, is contrary to the intent of the statute in that credits would be made available without any corresponding benefit. Those manufacturers who are unable, because of technological or other burdens, to produce a vehicle capable of meeting the 17.7 mile range requirement, may apply for exemption under the procedures proposed in this notice.

Regulatory Impacts

A. Executive Order 12866 and DOT Regulatory Policies and Procedures

This notice has not been reviewed under Executive Order 12866. NHTSA has considered the impact of this rulemaking action and has determined that the action is not ''significant'' under the Department of Transportation's regulatory policies and procedures. In this NPRM, the agency proposes to set the minimum driving range for electric dual fueled passenger automobiles when operating solely on electricity at 17.7 miles. The establishment of a minimum driving range implements statutory incentives to encourage the manufacture of alternative fuel vehicles and does not add any additional burdens. For these reasons, NHTSA believes that any impacts on manufacturers will be so minimal as not to warrant preparation of a full regulatory evaluation.

B. Regulatory Flexibility Act

The agency has also considered the effects of this rulemaking action under the Regulatory Flexibility Act. I certify that this proposed rule, if made final, will not have a significant economic impact on a substantial number of small entities. The rationale for this certification is that, to the extent that any passenger automobile manufacturers qualify as small entities, their number would not be substantial. Moreover, conversion of vehicles to dual fuel status with the minimum ranges that would be established by this regulation would be undertaken voluntarily. Therefore, no significant costs would be imposed on any manufacturers or other small entities.

C. Federalism

This action has been analyzed in accordance with the principles and criteria contained in Executive Order 12612, and it has been determined that the rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

D. Civil Justice Reform

This proposed rule would not have any retroactive effect and it does not preempt any State law. 49 U.S.C. 32909 sets forth a procedure for judicial review of automobile fuel economy regulations. That section does not require submission of a petition for reconsideration or other administrative proceedings before parties may file suit in court.

E. Paperwork Reduction Act of 1995

This proposed rule includes new ''collections of information'' as that term is defined by the Office of Management and Budget. For Part 538, OMB has previously approved a collection of information (OMB Control Number 2127–00554 ''Minimum Driving Range for Dual Energy and Natural Gas Dual Energy Passenger Vehicles—49 CFR 538'') for use through June 30, 1996. This approval has now lapsed as the petitioning process for non-electric alternative fuel vehicles was rescinded in the last revision of Part 538 (61 FR 14507). NHTSA will prepare a new request for collection of information approval for the petitioning process proposed in this notice and will include in the request an estimate of the new collection of information burden that would result if this proposed rule is made final. To assist the agency in estimating the new collection of information burden that would result if this proposed rule is made final, the agency requests that potential petitioners provide comments to the following questions: (1) Do you anticipate petitioning the agency for a reduction in the minimum driving range requirement for a particular vehicle? If so, identify yourself as a member of one of the following; household, business, for-profit entity, non-profit entity, and/or federal, state, local, or tribal government. (2) What are the estimated annual reporting and recordkeeping hours required to submit a petition for a model-specific reduction of the minimum driving range? Indicate whether this information could be collected and transmitted electronically either in whole or in part and what percentage of the information could be collected or transmitted electronically. (3) What is your estimate of the annual reporting and recordkeeping costs required to petition for a model-specific reduction of the minimum range requirement? (4) What is your estimate of the total annualized capital/startup costs required for submitting a petition for a model-specific reduction? (5) What is your estimate of your total annual costs for reporting and recordkeeping for petitioning for a model-specific reduction?

Pursuant to the Paperwork Reduction Act of 1995 and OMB's regulations at 5 CFR section 1320.5(b)(2), NHTSA informs the potential persons who are to respond to the collection of information that such persons are not required to respond to the collection of information unless it displays a currently valid OMB control number. As of the publication of this notice, there is no valid OMB control number applicable to the collection of information associated with the driving range reduction petition process proposed in this notice. As noted above, the agency intends to obtain a valid OMB control number prior to promulgation of a final rule.

Public Comments

NHTSA solicits public comments on the issues presented in this notice. It is requested, but not required, that 10 copies be submitted.

All comments must not exceed 15 pages in length (49 CFR 553.21). Necessary attachments may be appended to these submissions without regard to the 15 page limit. This limitation is intended to encourage commenters to detail their primary arguments in a concise fashion.

If a commenter wishes to submit certain information under a claim of confidentiality, three copies of the complete submission, including purportedly confidential business information, should be submitted to Chief Counsel, NHTSA, at the street address given above, and seven copies from which the purportedly confidential information has been deleted should be submitted to the Docket Section. A request for confidentiality should be accompanied by a cover letter setting forth the information specified in the agency's confidential business information regulation (49 CFR part 512).

All comments received before the close of business on the comment closing date indicated above for the NPRM 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. Comments received too late in regard to the final

rule will be considered as suggestions for further rulemaking action. Comments on this notice will be available for inspection in the docket. NHTSA will continue to file relevant information as it becomes available in the docket after the closing date, and it is recommended that interested persons continue to examine the docket for new material.

Those persons desiring to be notified upon receipt of their comments in the rules docket should enclose a self-addressed, stamped postcard in the envelope with their comments. Upon receiving the comments, the docket supervisor will return the postcard by mail.

List of Subjects in 49 CFR Part 538

Energy conservation, Gasoline, Imports, Motor vehicles.

In consideration of the foregoing, 49 CFR part 538 is proposed to be revised to read as follows:

PART 538—MANUFACTURING INCENTIVES FOR ALTERNATIVE FUEL VEHICLES

Sec.
538.5 Minimum driving range.
538.6 Measurement of driving range.
538.7 Petitions for reduction of minimum driving range.

Authority: 49 U.S.C. 32901, 32905, and 32906; delegation of authority at 49 CFR 1.50.

§ 538.5 Minimum driving range.

(a) The minimum driving range that a passenger automobile must have in order to be treated as a dual fueled automobile pursuant to 49 U.S.C. 32901(c) is 200 miles when operating on its nominal usable fuel tank capacity of the alternative fuel, except when the alternative fuel is electricity.

(b) The minimum driving range that a passenger automobile using electricity as an alternative fuel must have in order to be treated as a dual fueled automobile pursuant to 49 U.S.C. 32901(c) is 17.7 miles when operating on its nominal storage capacity of electricity.

§ 538.6 Measurement of driving range.

(a) The driving range of a passenger automobile model type not using electricity as an alternative fuel is determined by multiplying the combined EPA city/highway fuel economy rating when operating on the alternative fuel, by the nominal usable fuel tank capacity (in gallons), of the fuel tank containing the alternative fuel.

(b) The combined EPA city/highway fuel economy rating is the value determined by the procedures established by the Administrator of the EPA under 49 U.S.C. 32904 and set forth in 40 CFR part 600.

(c) The driving range of a passenger automobile model type using electricity as an alternative fuel is determined by operating the vehicle in the electric-only mode of operation through the EPA combined city/highway cycle.

(d) Passenger automobile types using electricity as an alternative fuel that have completed the EPA combined city/highway cycle once without recharging shall be deemed to have a range of 17.7 miles.

§ 538.7 Petitions for reduction of minimum driving range.

(a) A manufacturer of a model type of passenger automobile capable of operating on both electricity and either gasoline or diesel fuel may petition for a reduced minimum driving range for that model type in accordance with paragraphs (b) and (c) of this section.

(b) Each petition shall:

(1) Be addressed to: Administrator, National Highway Traffic Safety Administration, 400 Seventh Street, SW., Washington, DC 20590.

(2) Be submitted not later than the beginning of the first model year in which the petitioner seeks to have the model type treated as an electric dual fueled automobile.

(3) Be written in the English language.

(4) State the full name, address, and title of the official responsible for preparing the petition, and the name and address of the petitioner.

(5) Set forth in full data, views, and arguments of the petitioner, including the information and data specified in paragraph (c) of this section, and the calculations and analyses used to develop that information and data. No documents may be incorporated by reference in a petition unless the documents are submitted with the petition.

(6) Specify and segregate any part of the information and data submitted under this section that the petitioner wishes to have withheld from public disclosure in accordance with part 512 of this chapter.

(c) Each petitioner shall include the following information in his/her petition:

(1) Identification of the model type or types for which a lower driving range is sought under this section.

(2) For each model type identified in accordance with paragraph (c)(1) of this section:

(i) The driving range sought for that model type.

(ii) The number of years for which that driving range is sought.

(iii) A description of the model type, including car line designation, engine displacement and type, electric storage capacity, transmission type, and average fuel economy when operating on:

(A) Electricity, and

(B) Gasoline or diesel fuel.

(iv) An explanation of why the petitioner cannot modify the model type so as to meet the generally applicable minimum range, including the steps taken by the petitioner to improve the minimum range of the vehicle, as well as additional steps that are technologically feasible, but have not been taken. The costs to the petitioner of taking these additional steps shall be included.

(3) A discussion of why granting the petition would be consistent with the following factors:

(i) The purposes of 49 U.S.C. chapter 329, including encouraging the development and widespread use of electricity as a transportation fuel by consumers, and the production of passenger automobiles capable of being operated on both electricity and gasoline/diesel fuel;

(ii) Consumer acceptability;

(iii) Economic practicability;

(iv) Technology;

(v) Environmental impact;

(vi) Safety;

(vii) Drivability; and

(viii) Performance.

(d) If a petition is found not to contain the information required by this section, the petitioner is informed about the areas of insufficiency and advised that the petition will not receive further consideration until the required information is received.

(e) The Administrator may request the petitioner to provide information in addition to that required by this section.

(f) The Administrator publishes in the Federal Register a notice of receipt for each petition containing the information required by this section. Any interested person may submit written comments regarding the petition.

(g) In reaching a determination on a petition submitted under this section, the Administrator takes into account:

(1) The purposes of 49 U.S.C. chapter 329, including encouraging the development and widespread use of alternative fuels as transportation fuels by consumers, and the production of alternative fuel powered motor vehicles;

(2) Consumer acceptability;

(3) Economic practicability;

(4) Technology;

(5) Environmental impact;

(6) Safety;

(7) Drivability; and

(8) Performance.

(h) If the Administrator grants the petition, the petitioner is notified in writing, specifying the reduced

minimum driving range, and specifying the model years for which the reduced driving range applies. The Administrator also publishes a notice of the grant in the Federal Register and the reasons for the grant.

(i) If the Administrator denies the petition, the petitioner is notified in writing. The Administrator also publishes a notice of the denial of the petition in the Federal Register and the reasons for the denial.

Issued on: December 26, 1996.

L. Robert Shelton,

Associate Administrator for Safety Performance Standards.

[FR Doc. 97–85 Filed 1–2–97; 8:45 am]

BILLING CODE 4910–59–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 300

[Docket No. 961217359–6359–01; I.D. 121196B]

RIN 0648–AJ11

Pacific Halibut Fisheries; Catch Sharing Plan

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

ACTION: Proposed rule and proposed catch sharing plan.

SUMMARY: NMFS proposes to approve and implement revisions to the Catch Sharing Plan (Plan) for sport harvests of Pacific halibut off Oregon under authority of the Northern Pacific Halibut Act of 1982 (Halibut Act). NMFS also proposes sport fishery regulations to implement the Plan in 1997. The proposed rule is intended to carry out the objectives of the Plan for 1997.

DATES: Comments on the changes to the Plan must be received by January 19, 1997; comments on the proposed sport fishery regulations must be received by February 15, 1997.

ADDRESSES: Send comments or requests for the Plan to William Stelle, Jr., Director, Northwest Region, NMFS, 7600 Sand Point Way NE, Seattle, WA 98115.

FOR FURTHER INFORMATION CONTACT: Joe Scordino, 206–526–6140.

SUPPLEMENTARY INFORMATION: The Halibut Act of 1982 at 16 U.S.C. 773c provides that the Secretary of Commerce (Secretary) shall have general responsibility to carry out the Halibut Convention between the United States and Canada and that the Secretary shall adopt such regulations as may be necessary to carry out the purposes and objectives of the Convention and the Halibut Act. Section 773c(c) also authorizes the regional fishery management council having authority for the geographic area concerned to develop regulations governing the Pacific halibut catch in U.S. Convention waters that are in addition to, but not in conflict with, regulations of the International Pacific Halibut Commission (IPHC). Accordingly, catch sharing plans to allocate the total allowable catch (TAC) of Pacific halibut between treaty Indian and non-Indian harvesters, and among non-Indian commercial and sport fisheries in IPHC statistical Area 2A (off Washington, Oregon, and California) have been developed each year since 1988 by the Pacific Fishery Management Council (Council) in accordance with the Halibut Act. In 1995, NMFS implemented a Council-recommended long-term Plan (60 FR 14651, March 20, 1995) which was revised in 1996 (61 FR 11337, March 20, 1996). The Plan allocates 35 percent of the Area 2A TAC to Washington treaty Indian tribes in Subarea 2A–1 and 65 percent to non-Indian fisheries in Area 2A. The allocation to non-Indian fisheries is divided into three shares, with the Washington sport fishery (north of the Columbia River) receiving 36.6 percent, the Oregon/California sport fishery receiving 31.7 percent, and the commercial fishery receiving 31.7 percent. The commercial fishery is further divided into two sectors; a directed (traditional longline) commercial fishery that is allocated 85 percent of the 31.7 percent (26.945 percent of the non-Indian commercial harvest), and incidental (troll salmon) commercial fishery is allocated 15 percent of the 31.7 percent (4.755 percent of the non-Indian commercial harvest). The directed commercial fishery in Area 2A is confined to southern Washington (south of 46°53’18’’ N. lat.), Oregon and California. The Plan also divides the sport fisheries into seven geographic areas each with separate allocations, seasons, and bag limits.

Proposed Changes to the Plan

At its August 1996 public meeting, the Council adopted, for public comment, proposed changes to the Plan on: (1) Re-structuring the Oregon sport fisheries from quota managed seasons to fixed-length seasons that are determined and set preseason, and (2) deleting the rollover provisions for unused quota in the commercial incidental halibut catch (salmon troll) fishery. At its October 1996 public meeting, the Council made final recommendations for modifying the Plan to restructure the May and August seasons in the Oregon Central Coast subarea sport fishery (Cape Falcon to Florence north jetty) from a quota managed to a fixed-length season fishery. At the request of the Oregon Department of Fish and Wildlife (ODFW), the Oregon South Coast subarea sport fishery in May was not recommended for modification based on input from sport users in that area; however, the August season, which is combined with the Central Coast subarea, was recommended for modification to a fixed-length season. The commercial, incidental halibut catch (salmon troll) fishery was not recommended for change because of the Council’s desire to maintain its original intent in the Plan to roll over any remaining quota not incidentally harvested during the May/June chinook salmon troll fishery to the directed commercial (longline) fishery.

NMFS is proposing to implement the Council-recommended changes to the Plan.

Proposed Revised Section of the Plan for the Oregon Sport Fisheries

Oregon Central Coast Subarea

If the Area 2A TAC is 388,350 lb (176.2 mt) and greater, this Oregon Central Coast subarea extends from Cape Falcon to the Siuslaw River at the Florence north jetty (44°01’08’’ N. lat.) and the sport fishery is allocated 88.4 percent of the Oregon/California sport allocation, which is 18.21 percent of the Area 2A TAC. If the Area 2A TAC is less than 388,350 lb (176.2 mt), this subarea extends from Cape Falcon to the California border and the sport fishery is allocated 95.4 percent of the Oregon/California sport allocation. The structuring objectives for this subarea are to provide two fixed-length periods of fishing opportunity in May and in August in productive deeper water areas along the coast, principally for charter and larger private boat anglers, and provide a period of fishing opportunity in the summer for nearshore waters for small boat anglers. Fixed-length seasons will be established preseason for the May and August openings and will not be modified inseason. The average catch per day observed in the previous 3 years in May and August will be used to estimate the number of open days for each fixed season. ODFW will monitor landings and provide a post-season estimate of catch within 2 weeks of the end of the fixed season. If sufficient

catch remains for an additional day of fishing after the May season or the August season, openings will be provided in May and August respectively. Potential additional open dates for both the May and August seasons will be announced preseason. If a decision is made inseason to allow fishing on one or more of these additional dates, notice of the opening will be announced on the NMFS hotline (206) 526–6667 or (800) 662–9825. No halibut fishing will be allowed on the additional dates unless the opening date has been announced on the NMFS hotline. Any poundage remaining unharvested in the subquotas from earlier seasons will be added to the next season. The daily bag limit for all seasons is two halibut per person, one with a minimum 32–inch (81.3–cm) size limit and the second with a minimum 50–inch (127.0 cm) size limit. ODFW will sponsor a public workshop shortly after the IPHC annual meeting to develop recommendations to NMFS on the opening dates for each season each year. The three seasons for this subarea are as follows.

1. The first season is an all-depth fishery that begins in mid-May and is allocated 68 percent of the subarea quota. Fixed season dates will be established preseason based on projected catch per day and number of days to achievement of the subquota for this first season. No inseason adjustments will be made, except that additional opening days (established preseason) may be allowed if any quota for this season remains unharvested. The fishery will be open 2 days per week (Friday and Saturday) if the season is for 4 or fewer fishing days. The fishery will be open 3 days per week (Thursday through Saturday) if the season is for 5 or more fishing days.

2. The second season opens the day following closure of the first season, only in waters inside the 30–fathom (55–m) curve, and continues daily until 7 percent of the subarea quota is taken, or until early August, whichever is earlier.

3. The last season is a coastwide (Cape Falcon to Oregon/California border) all-depth fishery that begins in early August and is allocated 25 percent of the subarea quota. Fixed season dates will be established preseason based on projected catch per day and number of days to achievement of the combined Oregon subarea quotas south of Cape Falcon. No inseason adjustments will be made, except that additional opening days (established preseason) may be allowed if quota remains unharvested. The fishery will be open 2 days per week (Friday and Saturday).

Oregon South Coast Subarea

If the Area 2A TAC is 388,350 lb (176.2 mt) and above, this Oregon South Coast subarea extends from the Siuslaw River at the Florence north jetty (44°01'08'' N. lat.) to the California border (42°00'00'' N. lat.) and the sport fishery is allocated 7.0 percent of the Oregon/California sport allocation, which is 1.44 percent of the Area 2A TAC. If the Area 2A TAC is less than 388,350 lb (176.2 mt), this subarea will be included in the Oregon Central Coast subarea. The structuring objective for this subarea is to create a south coast management zone designed to accommodate the needs of both charterboat and private boat anglers in this area where weather and bar crossing conditions very often do not allow scheduled fishing trips. The first and second seasons will be managed for a quota, and a fixed-length season will be established preseason for the August coastwide season (Cape Falcon to Oregon/California border). The average catch per day observed in the previous 3 years fisheries in August would be used to estimate the number of days for the fixed season. Any poundage remaining in the subquotas from earlier seasons would be added to the next season. Additional open dates may be allowed after the August fixed-length season if sufficient quota remains for an additional day of fishing. If a decision is made inseason to allow fishing on one or more of these additional dates, notice of the opening will be announced on the NMFS hotline (206) 526–6667 or (800) 662–9825. No halibut fishing will be allowed on the additional dates unless the opening date has been announced on the NMFS hotline. Additional open dates will be announced preseason. The daily bag limit for all seasons is two halibut per person, one with a minimum 32–inch (81.3–cm) size limit and the second with a minimum 50–inch (127.0–cm) size limit. ODFW will sponsor a public workshop shortly after the IPHC annual meeting to develop recommendations to NMFS on the opening dates for each season each year. The three seasons for this subarea are as follows:

1. The first season is an all-depth fishery that begins in May and continues at least 3 days per week (dependent on TAC) until 80 percent of the subarea quota is taken.

2. The second season opens the day following closure of the first season, only in waters inside the 30–fathom (55 m) curve, and continues daily until the subarea quota is estimated to have been taken, or early August, whichever is earlier.

3. The last season is a coastwide (Cape Falcon to Oregon/California border) all-depth fishery that begins in early August. Fixed season dates will be established preseason based on projected catch per day and number of days to achievement of the combined Oregon subarea quotas south of Cape Falcon. No inseason adjustments will be made, except that additional opening days (established preseason) may be allowed if quota remains unharvested. The fishery will be open 2 days per week (Friday and Saturday).

Proposed Sport Fishery Regulations

This document also proposes sport fishery regulations necessary to implement the Plan in 1997. These proposed sport fishery regulations are based on the 1996 Area 2A TAC of 520,000 lb (235.9 mt). Many of the proposed sport fishing regulations are the same as the 1996 regulations, which were published on March 20, 1996 (61 FR 11337). It is unknown at this time what the 1997 TAC will be, but information available from IPHC indicates the TAC will likely be greater than 1996. If the 1997 TAC is greater than 1996, the proposed sport regulations will be revised in a final rule as described in the Plan. The final TAC will be determined by the IPHC at its annual meeting in January 1997. The proposed sport fishing regulations for 1997 by subarea based on the 1996 TAC of 520,000 lb (235.9 mt), are as follows:

Washington Inside Waters Subarea (Puget Sound and Straits)

The proposed sport regulations for this subarea are similar to 1996, except that the season is reduced by 2 weeks, because the catch rate in 1996 was greater than predicted preseason in 1996. The proposed fishing season would be open from May 23 through July 13, 5 days a week (Thursday through Monday). If the 1997 TAC is greater than 1996, the season length and/or days open per week will likely increase. The final determination of the season dates that will be open will be based on the allowable harvest level, estimated catch rates, and recommendations developed in a public workshop sponsored by Washington Department of Fish and Wildlife after the 1997 TAC is set by the IPHC.

Washington North Coast Subarea (north of the Queets River)

The proposed sport regulations for this subarea are the same as 1996 with a May 1 opening and continuing 5 days per week (Tuesday through Saturday) until the quota is taken. If the 1997 TAC is the same as 1996, the quota for this

subarea would likely be reached by the end of May. If the 1997 TAC is greater than 1996, the Plan stipulates that the second priority (after a 5-days-per-week season in May) is to reopen the fishery on July 1 and continue through at least July 4. The next priority in the Plan, if the TAC is sufficient, is to increase the May season to 7 days per week and continue into June.

Washington South Coast Subarea

The proposed sport regulations for this subarea are the same as 1996 with a May 1 opening and continuing 7 days per week until 1,000 lb (0.45 mt) remain in the quota, and then would reopen as a nearshore fishery until the remaining quota is taken, or September 30, whichever occurs first. The Plan does not stipulate any change in the structuring of this season if the 1997 TAC is greater than 1996.

Columbia River Subarea

The proposed sport regulations for this subarea are the same as 1996 with a May 1 opening and continuing 7-days per week until the quota is reached or September 30, whichever occurs first. The Plan does not stipulate any change in the structuring of this season if the 1997 TAC is greater than 1996.

Oregon Central Coast Subarea

The proposed changes to the Plan would change the structuring for the May and August seasons in this area to fixed-seasons. With an Area 2A TAC of 520,000 lb (235.9 mt), the May opening would be a 5-day fishery with a 3-day season from May 8 through May 10, and a 2-day season on May 16 and 17. If sufficient quota remains after this season for additional days fishing, the open dates would be May 31, then May 30, then May 29. The 30–fathom fishery would open on May 18 and continue until July 31 or attainment of quota for this season. The August coastwide unrestricted-depth fishery (Cape Falcon to Oregon/California border) would be a 2-day season on August 1 and 2. If sufficient quota remains after this season for additional days fishing, the open dates would be August 16, then August 15, then August 14. If the 1997 TAC is greater than 1996, the May season may be more than 5 days, and the fishery would be open 3 days per week as described in the above proposed changes to the Plan. The final determination of the season dates will be based on the allowable harvest level, estimated catch rates, and recommendations developed in a public workshop sponsored by ODFW after the 1997 TAC is set by the IPHC.

Oregon South Coast Subarea

The proposed sport regulations for the first and second seasons are the same as 1996 with the first season opening May 16 and continuing 3 days per week until 80 percent of the quota is taken, then switching to a nearshore water fishery until the subarea quota is taken or July 31, whichever is earlier. The third coastwide (Cape Falcon to OR/CA border) unrestricted depth season would be a 2-day season on August 1 and 2. If sufficient quota remains after this season for additional days fishing, the open dates would be August 16, then August 15, then August 14. The Plan, as proposed to be changed (described above), does not stipulate any change in the structuring of the seasons if the 1997 TAC is greater than 1996. The final determination of the season opening dates will be based on recommendations developed in a public workshop sponsored by ODFW after the 1997 TAC is set by the IPHC.

California Subarea

The proposed sport regulations for this subarea are the same as 1996 with a May 1 opening and continuing 7-days per week until September 30. The Plan does not stipulate any change in the structuring of this season if the 1997 TAC is greater than 1996.

NMFS requests public comments on the Council's recommended modifications to the Plan and the proposed sport fishing regulations. The Area 2A TAC will be set by the IPHC at its annual meeting on January 27–30, 1997. Comments on the proposed changes to the Plan are requested by January 19, 1997 so that final changes to the Plan can be approved before the IPHC meeting. Comments on the proposed sport regulations are requested by February 15, 1997, after the IPHC annual meeting, so that the public will have the opportunity to consider the final Area 2A TAC before submitting comments on the proposed sport fishing regulations. The States of Washington and Oregon will conduct public workshops shortly after the IPHC meeting to obtain input on the sport season dates. After the Area 2A TAC is known, and after NMFS reviews public comments and comments from the States, NMFS will issue final rules for the Area 2A Pacific halibut sport fishery concurrent with the IPHC regulations for the 1997 Pacific halibut fisheries.

Copies of the Plan are available from NMFS (see **ADDRESSES**).

Classification

The proposed revisions to the Plan and sport regulations are not significant and fall within the scope of the 1995 Environmental Assessment/Regulatory Impact Review prepared by the Council, which also applies to this action.

The Assistant General Counsel for Legislation and Regulation of the Department of Commerce certified to the Chief Counsel for Advocacy of the Small Business Administration that this proposed action, if adopted, would not have a significant economic impact on a substantial number of small entities as follows:

The proposed revisions to the Catch Sharing Plan would not change the allocation of the total allowable catch of Pacific halibut between treaty and non-Indian fisheries, and among non-Indian commercial and sport fisheries in International Pacific Commission Statistical Area 2A (off Washington, Oregon, and California). The proposed revisions, recommended by the Pacific Fishery Management Council, would affect only the non-Indian sports fishery and are intended to allow users to better utilize allocations in the sport fisheries off Oregon.

Many of the proposed sport fishing regulations are similar to those implemented in 1996 and are based on the Area 2A 1996 total allowable catch of 520,000 pounds (235.9 metric tons) of Pacific halibut. If the International Pacific Halibut Commission determines that the 1997 total allowable catch for Area 2A is greater than the 1996 amount, the fishing seasons and open fishing dates could be adjusted to provide for an increased sport fishery harvest. Any increase in the 1997 total allowable catch would have a positive economic impact on the sport fisheries.

Therefore, a regulatory flexibility analysis was not prepared.

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

Dated: December 27, 1996.

Nancy Foster,

Deputy Assistant Administrator for Fisheries, National Marine Fisheries Service.

[FR Doc. 97–6 Filed 1–2–96; 8:45 am]

BILLING CODE 3510–22–F

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50 CFR Part 622

[I.D. 120696E]

South Atlantic Fishery Management Council; Public Hearings; Correction

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

ACTION: Public hearings; correction.

SUMMARY: This document corrects the notice announcing hearings on Draft Amendment 8 to the Fishery Management Plan for the Snapper-Grouper Fishery of the South Atlantic

(FMP), published on December 20, 1996, at 61 FR 67294.

FOR FURTHER INFORMATION CONTACT: Susan Buchanan, 803–571–4366.

SUPPLEMENTARY INFORMATION: The document that is the subject of these corrections announced that the South Atlantic Fishery Management Council (Council) will convene 10 public hearings on Draft Amendment 8 to the FMP.

Need for Correction

As published, the summary paragraph is incomplete and the Council is adding some additional information regarding the availability of staff members to answer questions about the document before each public hearing.

Correction of Publication

Accordingly, the publication on December 20, 1996, of the public hearing document (I.D. 120696E), which was the subject of FR DOC 96–29500, is corrected as follows:

On page 67294, in the third column, the **SUMMARY** paragraph is corrected to read: ''The South Atlantic Fishery Management Council (Council) will convene 10 public hearings on Draft Amendment 8 to the Fishery Management Plan for the Snapper-Grouper Fishery of the South Atlantic Region (FMP) and its associated analyses of regulatory and environmental impacts, including a draft supplemental environmental impact statement (DSEIS). Due to the complexity of the public hearing document, Council staff members will be available at the respective hearing locations from 6 p.m. to 7 p.m. (one hour before the start of the public hearings) to answer questions the public may have about the document''.

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

Dated: December 27, 1996.

George H. Darcy,

Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 97–29 Filed 1–2–97; 8:45 am]

BILLING CODE 3510–22–F

Notices

Federal Register
Vol. 62, No. 2
Friday, January 3, 1997

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 COMMERCE

International Trade Administration

Determination Not to Revoke Antidumping Duty Orders and Findings Nor to Terminate Suspended Investigations

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

ACTION: Determination not to revoke antidumping duty orders and findings nor to terminate suspended investigations.

SUMMARY: The Department of Commerce is notifying the public of its determination not to revoke the antidumping duty orders and findings nor to terminate the suspended investigations listed below.

EFFECTIVE DATE: January 3, 1997.

FOR FURTHER INFORMATION CONTACT: Michael Panfeld or the analyst listed under Antidumping Proceeding at: Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street & Constitution Avenue, NW., Washington, DC 20230.

SUPPLEMENTARY INFORMATION: The Department of Commerce (the Department) may revoke an antidumping duty order or finding or terminate a suspended investigation, pursuant to 19 CFR 353.25(d)(4)(iii), if no interested party has requested an administrative review for four consecutive annual anniversary months and no domestic interested party objects to the revocation or requests an administrative review.

We had not received a request to conduct an administrative review for the most recent four consecutive annual anniversary months. Therefore, pursuant to § 353.25(d)(4)(i) of the Department's regulations, on November 4, 1996, we published in the Federal Register a notice of intent to revoke these antidumping duty orders and findings and to terminate the suspended investigations and served written notice of the intent to each domestic interested party on the Department's service list in each case. Within the specified time frame, we received objections from domestic interested parties to our intent to revoke these antidumping duty orders and findings and to terminate the suspended investigations. Therefore, because domestic interested parties objected to our intent to revoke or terminate, we no longer intend to revoke these antidumping duty orders and findings or to terminate the suspended investigations.

Antidumping Proceeding

A–357–405
Argentina
Barbed Wire & Barbless Fencing Wire
Objection Date: November 18, 1996, November 19, 1996
Objector: Insteel Industries, Inc., Keystone Steel & Wire Company
Contact: Tom Killiam at (202) 482–2704

A–357–007
Argentina
Carbon Steel Wire Rods
Objection Date: November 26, 1996, November 27, 1996
Objector: North Star Steel, Atlantic Steel Company
Contact: Tom Killiam at (202) 482–2704

A–559–502
Singapore
Light-Walled Rectangular Pipe & Tube
Objection Date: November 27, 1996
Objector: Hannibal Industries, Inc.
Contact: Tom Killiam at (202) 482–2704

A–570–811
The People's Republic of China
Tungsten Ore Concentrates
Objection Date: November 26, 1996
Objector: U.S. Tungsten Corporation
Contact: Andrea Chu at (202) 482–4733

A–588–090
Japan
Certain Small Electric Motors of 5 to 150 Horsepower
Objection Date: November 25, 1996
Objector: Reliance Electric Industrial Company
Contact: Jacqueline Winbush at (202) 482–1374

Dated: December 17, 1996.

Barbara R. Stafford,

Deputy Assistant Secretary for AD/CVD Enforcement.

[FR Doc. 97–74 Filed 1–2–97; 8:45 am]

BILLING CODE 3510–DS–P

[A–588–823]

Professional Electric Cutting Tools From Japan; Final Results of Antidumping Duty Administrative Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

ACTION: Notice of final results of antidumping duty administrative review.

SUMMARY: On September 4, 1996, the Department of Commerce (the Department) published the preliminary results of its administrative review of the antidumping duty order on professional electric cutting tools (PECTs) from Japan. This review covers the period of July 1, 1994 through June 30, 1995.

We gave interested parties an opportunity to comment on our preliminary results. Based on our analysis of the comments received, we have changed the results from those presented in the preliminary results of review.

EFFECTIVE DATE: January 3, 1997.

FOR FURTHER INFORMATION CONTACT: Rebecca Trainor or Maureen Flannery, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW, Washington, DC 20230; telephone: (202) 482–4733.

Applicable Statutes and Regulations

Unless otherwise stated, all citations to the statute are references to the provisions effective January 1, 1995, the effective date of the amendments made to the Tariff Act of 1930 (the Act) by the Uruguay Round Agreements Act (URAA). In addition, unless otherwise indicated, all citations to the Department's regulations are to the current regulations, as amended by the interim regulations published in the Federal Register on May 11, 1995 (60 FR 25130).

SUPPLEMENTARY INFORMATION:

Background

On September 4, 1996, we published in the Federal Register (61 FR 46624) the preliminary results of administrative review of the antidumping duty order on PECTs from Japan (58 FR 37461; July 12, 1993). We received case briefs from the respondent, Makita Corporation and

Makita U.S.A., Inc. (Makita) and the petitioner, Black and Decker (U.S.), Inc. (Black & Decker) on October 18, 1996. Petitioner and respondent submitted rebuttal briefs on October 24, 1996. We held a public hearing on October 29, 1996. We are conducting this administrative review in accordance with section 751 of the Act.

Scope of the Review

Imports covered by this review are shipments of PECTs from Japan. PECTs may be assembled or unassembled, and corded or cordless.

The term ''electric'' encompasses electromechanical devices, including tools with electronic variable speed features. The term ''assembled'' includes unfinished or incomplete articles, which have the essential characteristics of the finished or complete tool. The term ''unassembled'' means components which, when taken as a whole, can be converted into the finished or unfinished or incomplete tool through simple assembly operations (e.g., kits).

PECTs have blades or other cutting devices used for cutting wood, metal, and other materials. PECTs include chop saws, circular saws, jig saws, reciprocating saws, miter saws, portable bank saws, cut-off machines, shears, nibblers, planers, routers, joiners, jointers, metal cutting saws, and similar cutting tools.

The products subject to this order include all hand-held PECTs and certain bench-top, hand-operated PECTs. Hand-operated tools are designed so that only the functional or moving part is held and moved by hand while in use, the whole being designed to rest on a table top, bench, or other surface. Bench-top tools are small stationary tools that can be mounted or placed on a table or bench. The are generally distinguishable from other stationary tools by size and ease of movement.

The scope of the PECT order includes only the following bench-top, hand-operated tools: cut-off saws; PVC saws; chop saws; cut-off machines, currently classifiable under subheading 8461 of the Harmonized Tariff Schedule of the United States (HTSUS); all types of miter saws, including slide compound miter saws and compound miter saws, currently classifiable under subheading 8465 of the HTSUS; and portable band saws with detachable bases, also currently classifiable under subheading 8465 of the HTSUS.

This order does not include: professional sanding/grinding tools; professional electric drilling/fastening tools; lawn and garden tools; heat guns; paint and wallpaper strippers; and chain saws, currently classifiable under subheading 8508 of the HTSUS.

Parts or components of PECTs when they are imported as kits, or as accessories imported together with covered tools, are included within the scope of this order.

''Corded'' and ''cordless'' PECTs are included within the scope of this order. ''Corded'' PECTs, which are driven by electric current passed through a power cord, are, for purposes of this order, defined as power tools which have at least five of the following seven characteristics:

1. The predominate use of ball, needle, or roller bearings (i.e., a majority or greater number of the bearings in the tool are ball, needle, or roller bearings;
2. Helical, spiral bevel, or worm gearing;
3. Rubber (or some equivalent material which meets UL's specifications S or SJ) jacketed power supply cord with a length of 8 feet or more;
4. Power supply cord with a separate cord protector;
5. Externally accessible motor brushes;
6. The predominate use of heat treated transmission parts (i.e., a majority or greater number of the transmission parts in the tool are heat treated); and
7. The presence of more than one coil per slot armature.

If only six of the above seven characteristics are applicable to a particular ''corded'' tool, then that tool must have at least four of the six characteristics to be considered a ''corded'' PECT.

''Cordless'' PECTs, for the purposes of this order, consist of those cordless electric power tools having a voltage greater than 7.2 volts and a battery recharge time of one hour or less.

PECTs are currently classifiable under the following subheadings of the HTSUS: 8508.20.00.20, 8508.20.00.70, 8508.20.00.90, 8461.50.00.20, 8465.91.00.35, 85.80.00.55, 8508.80.00.65 and 8508.80.00.90. Although the HTSUS subheading is provided for convenience and customs purposes, the written description of the merchandise under review is dispositive.

This review covers one company and the period July 1, 1994 through June 30, 1995.

Analysis of the Comments Received

Comment 1: Makita argues that the Department's usage of the term ''professional'' to define the scope of the subject merchandise is inaccurate, and that power tools cannot be distinguished by the terms ''professional'' or ''non-professional.'' Makita claims that, in the less-than-fair-value (LTFV) investigation, the Department used an arbitrary and shifting set of physical characteristics, not recognized by producers, consumers or end-users in the tool industry, in its effort to create a generally-accepted definition of the subject merchandise.

Petitioner argues that Makita submitted its views on the scope of the order to the Department during the LTFV investigation, and that the Department rejected Makita's argument that there is no distinction between professional and consumer electric cutting tools. Petitioner asserts that Makita has not submitted any valid grounds on which the scope issue should be reopened. Furthermore, petitioner argues, the Department should not reconsider this matter until the Court of International Trade (CIT) has reached its decision on issues related to the LTFV investigation.

Department's Position: Makita's argument that we should reconsider the scope of the order is unpersuasive, as there is nothing on the record of this review to suggest that our scope is incorrect. During the LTFV investigation, we gave all parties an opportunity to present their views concerning the scope. Makita appealed our determination of the scope, among other issues concerning the LTFV investigation, to the CIT. The CIT has not yet issued its determination on these matters, and thus altering the scope at this time is unwarranted.

Comment 2: Makita argues that, in failing to use average-to-average price comparisons in the calculation of the dumping margin, the Department ignored the changes to the U.S. antidumping law pursuant to the World Trade Organization's Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade (''WTO Antidumping Agreement'') and the Department's own practice. Makita states that, prior to the WTO-mandated amendments to the antidumping law, the Department had the discretion to use averaging in both investigations and administrative reviews pursuant to 19 U.S.C. § 1677f–1(a)(1). With the amendments to the law, however, Makita argues that the Department is now required to use either average-to-average or transaction-to-transaction price comparisons in investigations, with a preference for the average-to-average approach.

Although the new law does not specifically provide for the use of average-to-average price comparisons during administrative reviews, Makita argues that the Department is required

to use this methodology in reviews for the following reasons: (1) the new law does not specifically except administrative reviews from the requirement of using average-to-average price comparisons; (2) administrative reviews and investigations are identical proceedings, different in name only; and (3) there is no justification or logical reason for the application of different standards to investigations and reviews. Makita asserts that the argument that average-to-average price comparisons may mask targeted dumping is not a justification for failing to use this methodology in reviews when it is used in investigations, because the likelihood of targeted dumping is equally present in both investigations and reviews.

Makita argues that, in general, the application of a different methodology in administrative reviews than was used in LTFV investigations will result in higher margins in reviews than were found in investigations, with the effect that exporters will not be able to rely on margins established in the investigation as a guide for future corrective conduct. Citing *Shikoku Chemicals Corp.* v. *U.S.*, 795 F.Supp. 417, 421 (CIT 1992) (*Shikoku*), Makita further states that it has a right to rely on the consistent and fair application of methodologies from one proceeding to the next. The fact that the Department did not use average-to-average price comparisons in the LTFV investigation in this case is, according to Makita, irrelevant for the reasons stated above.

In support of its contention that Congress intended for average-to-average price comparisons to be used in both investigations and administrative reviews, Makita states that Congress did not expressly or implicitly disapprove of the Department's longstanding practice under the earlier antidumping law of using the same price comparison methodology in both investigations and reviews. Thus, Congress intended for the Department to continue this practice. Makita cites *Harris* v. *Sullivan*, 968 F.2d 263, 265 (2nd Cir. 1992) (*Harris*). Makita asserts that the fact that the Statement of Administrative Action (SAA) may suggest otherwise is irrelevant, since the SAA is not law, nor is it appropriate to use it to interpret a statutory provision that is neither vague nor ambiguous, pursuant to *Marcel Watch Co.* v. *U.S.*, 11 F.3d 1054, 1058 (Fed. Cir. 1992). *See* SAA, House Doc. 103–316, Vol. 1, 103d Cong. 2nd Sess., September 27, 1994.

Furthermore, Makita argues, the SAA itself may be in violation of the WTO Antidumping Agreement, because using a different price comparison methodology in reviews than was used in investigations may by itself increase antidumping duties in a manner not contemplated by the WTO.

Petitioner states that the correctness of the Department's approach in the preliminary results is confirmed by the statute, the SAA, and the Department's proposed regulations, and that Makita's arguments are based on an incorrect reading of the law. Petitioner cites the SAA at 843, and *Antidumping Duties: Proposed Rule*, 61 FR 7308, 7348, section 351.414 (February 27, 1996) (*Proposed Regulations*).

Petitioner argues that Makita's reliance on *Shikoku* and *Harris* is misplaced. The Department has not changed a long-standing practice; rather, Congress has mandated a new approach, which requires different price comparison methodologies in investigations and reviews. As evidence that Congress intended to treat investigations separately from reviews, petitioner points out that 19 U.S.C. § 1677f–1(d) contains different provisions for investigations and reviews: section (d)(1) deals with investigations, and requires the Department to compare weighted average normal values (NVs) to weighted-average export prices, with the alternative of comparing transaction-by-transaction prices on both sides of the equation, while section (d)(2) deals with reviews, and requires the Department to compare weighted average NVs to individual export prices, as the Department did in this case.

Another justification for treating investigations and reviews differently, according to petitioner, is that respondents should be held to higher, stricter standards in reviews, since by the time of the administrative review, they are on notice that further dumping will be penalized. Petitioner argues that Makita's case confirms this proposition, since Makita has failed to correct its dumping practices since issuance of the LTFV determination, and should therefore be held to a higher standard during the administrative review.

Department's Position: We agree with petitioner. The Act, as amended by the URAA, distinguishes between price comparison methodologies in investigations and reviews. Section 777A(d)(1) states that in investigations, generally the Department will make price comparisons on an average-to-average or transaction-to-transaction-specific basis. *See also* SAA at 842–43; *Proposed Regulations* at 7348–49 and Proposed Rule 351.414.

However, the language of 777A(d)(2) reflects Congress's understanding that the Department would use a monthly average NV to a U.S. transaction-specific methodology during reviews, in keeping with the Department's past practice, and both the SAA and the Department's proposed regulations expressly state that the monthly average-to-transaction-specific comparison is the preferred methodology in reviews. *See* SAA at 843; *Proposed Regulations* at 7348–49. Hence, the Department is under no legal obligation to apply an average-to-average approach in a review merely because 777A(d)(1) permits such a comparison in investigations. However, in appropriate circumstances, such as in the case of highly perishable products, for example, average-to-average price comparisons may be used. *See Floral Trade Council of Davis* v. *United States*, 606 F. Supp. 695,703 (CIT 1991). Makita has not demonstrated that similar circumstances exist with respect to the sale of PECTs that would warrant a departure from our stated preference of making monthly average-to-transaction-specific price comparisons in reviews.

Moreover, contrary to Makita's assertion, an LTFV investigation and an administrative review are not ''identical proceedings,'' but are two distinct segments of a single antidumping proceeding. The Act expressly distinguishes between investigations and reviews. *See* § 733; 735; 751; 19 CFR 353.2(l). They differ in several respects, such as initiation requirements and outcome—an investigation may or may not end upon the issuance of an antidumping duty order, while only a review will result in the actual assessment of duties. Further, investigations and reviews are based on different sets of sales, and both are subject to separate judicial review.

The WTO Antidumping Agreement also distinguishes between investigations and reviews in antidumping matters. (*See also* Comment 3). Article 2.4.2 of the WTO Antidumping Agreement explicitly requires that an average-to-average price comparison be used in the ''investigation phase'' of an antidumping proceeding. The SAA elucidates the intent of the WTO Antidumping Agreement that the Department continue to treat investigations and reviews differently with respect to price comparisons. As the SAA states:

> The Agreement reflects the express intent of the negotiators that the preference for the use of an average-to-average or transaction-to-transaction comparison be limited to the ''investigation phase'' of an antidumping proceeding. Therefore, as permitted by Article 2.4.2, the preferred methodology in reviews will be to compare average to individual export prices.

SAA at 843.

Finally, Makita claims that it has a right to rely on the consistent and fair application of methodologies from one segment of a proceeding to the next. Makita argues that by not applying an average-to-average comparison in this review, the Department is not consistent with what it is required to do under the new law for investigations—make average-to-average price comparisons. Hence, following Makita's logic, the Department must now apply an average-to-average methodology in this review to be consistent with the new methodology used in investigations. Makita is incorrect in two respects. The law now requires the Department to apply an average-to-average price comparison in investigations only. Secondly, by comparing monthly average NVs to transaction-specific U.S. prices in this review, we are being consistent with our longstanding practice, which was not changed by the passage of the URAA, as discussed above. Moreover, during the investigation of this order, which occurred under the old law, we did compare average foreign market values (FMVs) to transaction-specific U.S. prices. Thus, we are being consistent from one segment of the proceeding to another.

Finally, Makita's reliance on *Shikoku* is misplaced. That case dealt with a situation in which the Department failed to follow a particular case-specific calculation methodology that it had repeatedly used in several reviews with respect to the sales of a particular respondent. Here, there has been no change in methodology, as discussed above.

Comment 3: Makita argues that, if the Department had used average-to-average price comparisons in the preliminary results, Makita's margin would have been *de minimis* pursuant to the 2 percent *de minimis* standard mandated by Article 5.8 of the WTO Antidumping Agreement (*see* 19 U.S.C. §§ 1673b(b)(3) and 1673(a)(4)). Since the WTO Antidumping Agreement makes no distinction between investigations and administrative reviews, Makita argues, the 2 percent *de minimis* standard should also apply to reviews, for the same reasons Makita discussed with respect to using average-to-average price comparisons in reviews.

Makita argues that no basis can be found in either the WTO Antidumping Agreement, or in U.S. law or policy, for using 0.5 percent as the *de minimis* standard for reviews, since there is no mention of this particular figure in any of the relevant documents. Makita asserts that using a stricter standard for reviews than for investigations is illogical if the underlying purpose is to punish exporters who are caught dumping, since it would make more sense to apply a stricter standard in the investigation phase. Finally, Makita claims that this practice could by itself result in increased dumping liability for exporters, and is a possible violation of the WTO by the United States.

Petitioner argues that Makita misreads the law, which requires that the new *de minimis* level of two percent be applied in investigations only. Thus, the Department must continue to use its regulatory standard of 0.5 percent during reviews, as stated in the SAA and the Department's proposed regulations (61 FR 7308, 7355).

Department's Position: We disagree with respondent that the 0.5 percent *de minimis* standard set forth in 19 CFR 353.6 should not continue to apply to reviews. Article 5.8 of the WTO Antidumping Agreement explicitly requires signatories to apply the two percent *de minimis* standard only in antidumping investigations. *See* Article 5.8. There is no such requirement regarding reviews. Moreover, Makita is incorrect in claiming that the WTO Antidumping Agreement makes no distinction between investigations and administrative reviews. *See eg.*, Article 5; Article 11.

In conformity with Article 5.8 of the WTO Antidumping Agreement, sections 733(b) and 735(a) of the Act were amended by the URAA to require that, in investigations, the Department treat the weighted average dumping margin of any producer or exporter which is below two percent *ad valorem* as *de minimis*. Hence, pursuant to this change, the Department is now required to apply a two percent *de minimis* standard during *investigations* initiated after January 1, 1995, the effective date of the URAA (*see* sections 733(b)(3) and 735(a)(4)). However, the Act does not mandate a change to the Department's regulatory practice of using a 0.5 percent *de minimis* standard during administrative reviews. As discussed above, the WTO Antidumping Agreement, the Act, the SAA and the Department's regulations recognize investigations and reviews to be two distinct segments of an antidumping proceeding.

The SAA also clarifies that ''[t]he requirements of Article 5.8 apply only to investigations, not to reviews of antidumping duty orders or suspended investigations.'' *See* SAA at 845. The SAA further states ''* * * in antidumping investigations, Commerce [shall] treat the weighted-average dumping margin of any producer or exporter which is below two percent ad valorem as *de minimis*.'' SAA at 844. Likewise, ''[t]he Administration intends that Commerce will continue its present practice in reviews of waiving the collection of estimated cash deposits if the deposit rate is below 0.5 percent ad valorem, the existing regulatory standard for *de minimis*.'' SAA at 845 (emphasis added). *See Proposed Regulations* at 7355, Proposed Rule 351.106; *see also High-Tenacity Rayon Filiment Yarn from Germany; Final Results of Antidumping Duty Administrative Review*, 61 FR 51421 (October 2, 1996).

Comment 4: Makita claims that the Department's preliminary margin calculation program misapplied the sales below cost test by deducting from the gross unit price certain costs which were included in the total cost against which the net price is compared. As a result, the number of sales below cost was overstated in the preliminary results. Petitioner did not comment on this issue.

Department's Position: We agree with Makita, and have made the requested corrections to the margin calculation program for the final results.

Comment 5: Makita claims that the Department's computer program incorrectly calculated constructed value (CV) and constructed export price (CEP) profit, based on only those home market sales that were used as matches for U.S. sales. Makita argues that, since the profit calculations must be made on the basis of all sales of the foreign like product, using this reduced home market database results in overstated profit rates for both CV and CEP profit.

Makita argues that the law does not intend for profit to be calculated using only the products in the home market which are the closest matches to models sold in the United States. Makita cites to the Department's explanation of its proposed regulations, with respect to section 351.405(b), which states that this would ''undermine the predictability of the statute'' by giving the Department ''the discretion to pick and choose the sale of the foreign product from which profit and SG&A would be taken'' (61 FR 7335).

With respect to CEP profit, Makita points out that the law is clear that the calculation is to be based on total expenses ''incurred with respect to the subject merchandise sold in the United States and the foreign like product sold in the exporting country.'' 19 U.S.C. § 1677a(f)(2)(C)(i).

Petitioner argues that the Department correctly calculated CEP profit based on data for the foreign like product. Petitioner claims that the term foreign like product is defined by the statute as

the sales used as a basis of comparison with sales to the United States (19 U.S.C. § 1677b(a)). Petitioner notes that 19 U.S.C. § 1677(16)(A)(B)(C) requires the Department to select as the foreign like product merchandise that is, in the first instance, identical to that sold in the United States. If identical merchandise does not exist, the Department may select similar merchandise as the foreign like product, the objective being to develop a pool of comparable products, the prices of which are used to calculate NV. Petitioner cites *Koyo Seiko Co., Ltd.* v. *United States,* 66 F.3d 1204, 1209 (C.A.Fed. 1995) (Koyo Seiko) in support of its contention that the pool of matched models is the foreign like product from which the home market portion of the CEP profit is derived.

Petitioner concludes that if the foreign like product is expanded beyond the pool of matched models to include all similar products, as respondent requests, the resulting profit figure would be unrepresentative of the products that were used to determine NV.

Department's Position: We agree that we incorrectly limited the home market data base to those models used as matches for U.S. sales for the purposes of calculating CV and CEP profit in the preliminary results. For the final results, we have used all sales of the foreign like product for the purposes of calculating CV and CEP profit.

Newly amended sections 772(f) and 773(e)(2)(A) now require that the Department calculate CV and CEP profit based on a respondent's actual profits made from home market sales of the foreign like product, provided the home market is found viable. While neither side disputes that actual profits will be used in this regard, petitioner believes that the Department should disregard its past practice of determining profit for CV based on sales in the home market on an aggregated basis, *i.e.,* based on sales of the same general class or kind as the merchandise under consideration. *See* 773(e)(1)(B) of the pre-URAA statute. Instead, petitioner argues that newly amended 771(16) now requires that the Department arrive at the actual home market profit using only those home market sales which can be matched most closely to the subject merchandise applying the descending hierarchy of 771(16).

For purposes of calculating CV and CEP profit, we interpret the term ''foreign like product'' to be inclusive of all merchandise sold in the home market which is in the same general class or kind of merchandise as that under consideration. We do not believe the change in terminology from ''such or similar merchandise to ''foreign like product'' was intended as a substantive change in this regard. Thus, ''foreign like product'' includes all of the merchandise covered by the descending hierarchy of section 771(16) (A), (B) & (C). This comports with our past practice. Moreover, were we to adopt petitioner's view, the Department would have the discretion to pick and choose the sale of the foreign like product from which profit would be taken, which would undermine the prodictability of the statute, as Makita correctly points out. *See Proposed Regulations* at 7335. In this case, since all models of PECTs comprise the same general class or kind of merchandise, regardless of whether they were matched to U.S. sales in the margin calculation, we determine the foreign like product to include all of Makita's reported home market models. *See Professional Electric Cutting Tools and Professional Electric Sanding/ Grinding Tools from Japan: Final Determinations of Sales at Less Than Fair Value,* 58 FR 30144 (May 26, 1993) (the Department determined that PECTs comprise one class or kind). *See also Large Newspaper Printing Presses and Components Thereof, Whether Assembled or Unassembled, from Japan; Final Determination of Sales at Less Than Fair Value Investigation,* 61 FR 38139 (July 23, 1996).

Petitioner confuses section 771(16)'s hierarchy of what encompasses the foreign like product with how the Department uses this hierarchy for purposes of model-matching to arrive at a comparison based on the most physically similar merchandise. Petitioner's reliance on *Koyo Seiko* is misplaced, as that case dealt with the issue of the model-matching hierarchy set out for such or similar merchandise under the old law. (''Congress has implicitly delegated authority to Commerce to determine and apply a model-match methodology necessary to yield 'such or similar' merchandise under the statute.'') However, here we are concerned with calculating actual profits under the newly amended law for CV and CEP, and whether home market profits and SG&A should be inclusive of all sales of the foreign like product in making this calculation.

We note that for calculating the actual selling, general and administrative expenses for the purposes of CV for these final results, we have also based said expenses on all of Makita's home market sales of PECTs, for the same reasons set out above.

Lastly, petitioner's concern that basing the CEP profit calculation on a larger group of models than is used to calculate NV will result in an unrepresentative profit figure is unfounded. As the SAA states, even if the Department determined total profit on the basis of a broader product line than the subject merchandise, no distortion in the profit allocable to U.S. sales is created, because the total expenses are also determined on the basis of the same expanded product line. *See SAA* at 825.

Comment 6: Petitioner claims that the Department's margin calculation program incorrectly subtracted home market indirect selling expenses from NV. Petitioner points out that indirect selling expenses are only properly deducted under certain limited circumstances, such as an offset for selling commissions in the United States and as an offset to CEP.

Makita argues that the deduction of indirect selling expenses from NV was not a mistake, since it satisfies the requirements for establishing a ''fair comparison'' as required by the WTO Antidumping Agreement and 19 U.S.C. § 1677b(a). Makita states that, according to the new law, the Department must reduce NV by the amounts included in the price that are ''attributable to any additional costs, charges, and expenses.'' 19 U.S.C. § 1677b(6)(B). Reducing NV by the amount of indirect selling expenses, Makita claims, would therefore be appropriate.

Makita argues that, since greater selling expenses for a specific service are incurred in the home market than are incurred for the same service for products destined for the U.S. market, deducting direct selling expenses from NV, while not also deducting indirect selling expenses, does not represent a ''fair comparison'' under the new law. Finally, Makita asserts that there is no reasonable basis for arriving at any relevant or meaningful distinction between ''direct'' and ''indirect'' selling expenses.

Department's Position: We agree with petitioner that our deduction of indirect selling expenses from NV was a clerical error. The amended statute permits the deduction of indirect selling expenses from NV as a CEP offset only when a level-of-trade (LOT) adjustment is warranted, but the data available do not provide an appropriate basis to determine a LOT adjustment. *See* § 773(a)(7)(B). In addition, the SAA clearly states that the CEP offset is to be used *in lieu of* a LOT adjustment. *See* SAA at 829. In the preliminary results, we made a LOT adjustment to NV in accordance with § 773(a)(7)(B). Therefore, we have not deducted indirect selling expenses from NV in our final margin calculation.

Makita's reliance on 773(a)(6)(B) in support of its position that the new law now requires that all expenses be deducted from NV is erroneous. This statutory provision explicitly provides for the deduction of all movement expenses from NV, but not for the deduction of all expenses in general, and indirect selling expenses in particular, as Makita suggests. Were we to do so, we would clearly be in violation of the Act. Moreover, we disagree with Makita's assertion that the language in 773(a) stating that a ''fair comparison'' shall be made between the export price or CEP and NV now requires the Department to make additional adjustments to NV not specifically set out in 773(a). Rather, 773(a) expressly states that, in order to achieve a ''fair comparison,'' NV will be determined as set out in 773(a), which we have followed in this review.

Comment 7: Petitioner argues that the Department should correct an error in the computer program involving the difference in merchandise (difmer) adjustment. Petitioner points out that, according to the Department's methodology, the difmer is found by subtracting the variable manufacturing costs in the U.S. market from the variable manufacturing costs in the home market. If the U.S. manufacturing costs exceed the home market manufacturing costs, the difference should be added to NV in accordance with the procedures described in the Import Administration Antidumping Manual (*see* Chapter 8 at 44, July 1993 Rev.) Petitioner points out that the Department's computer program incorrectly deducted from NV the positive amount by which U.S. costs exceed home market costs.

Makita states that, in most cases, the difmer should not be added to NV. However, in this case, no difmer adjustment should be made at all, pursuant to 19 U.S.C. § 1677b(a), which requires the Department to make fair comparisons. Makita claims that the main physical characteristics of the merchandise at issue should not result in any difmer adjustment because they are not amenable to precise measurement for purposes of arriving at price differences. Since all physical differences are minor variations or features mandated to meet U.S. and Japanese technical and safety standards, their inclusion was a necessary condition to Makita's sale of the subject merchandise in both the U.S. and Japan. Makita argues that price comparisons within antidumping proceedings should focus on the voluntary action of a respondent in raising or not raising its U.S. prices rather than on issues relating to the technical need for additional costly features of the product. Makita requests that the Department disregard differences in voltage, amperage, and wattage in its application of the difmer.

Department's Position: We agree with petitioner that we made a clerical error by adding difmer to NV instead of subtracting it. We have made the necessary correction to our margin calculations for the final results.

When we make price comparisons based on similar models, it is our longstanding practice to adjust NV for the differences in the variable costs associated with manufacturing those products. *See e.g., Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From Japan and Tapered Roller Bearings, Four Inches or Less in Outside Diameter and Components Thereof, From Japan; Final Results of Antidumping Duty Administrative Review and Revocation in Part of an Antidumping Finding,* 61 FR 57629 (November 7, 1996). We calculated difmer based on the variable cost information Makita provided in its questionnaire response. In choosing to sell its products to the United States, Makita made the decision to adapt the models sold to U.S. voltage and amperage requirements. Makita admits that there are legitimate cost differences between home market models and U.S. models. For our purposes, the reasons behind why there are cost differences are irrelevant. It is well-established law that establishing an intent to dump is not required under the Act. (*See USX* v. *United States,* 682 F.Supp. 6068 (CIT, 1988).

Final Results of Review

As a result of our review, we have determined that the following margins exist:

Manufacturer/ exporter	Time period	Margin (percent)
Makita Corporation	7/1/94–6/30/95	4.36

The Department shall determine, and the Customs service shall assess, antidumping duties on all appropriate entries. Individual differences between United States price and NV may vary from the percentage stated above. The Department will issue appraisement instructions directly to the Customs Service.

Furthermore, the following deposit requirements will be effective upon publication of this notice of final results of review for all shipments of PECTs from Japan entered, or withdrawn from warehouse, for consumption on or after the publication date, as provided by section 751(a)(1) of the Act: (1) The cash deposit rate for the reviewed company will be that established in these final results of this administrative review; (2) for previously reviewed or investigated companies not listed above, the cash deposit rate will continue to be the company-specific rate published for the most recent period; (3) if the exporter is not a firm covered in this or a previous review or the LTFV investigation, but the manufacturer is, the cash deposit rate will be the most recent rate established for the manufacturer of the merchandise; and (4) the cash deposit rate for all other manufacturers or exporters will be the ''all others'' rate of 54.52 percent, the all others rate established in the LTFV investigation.

These deposit requirements, when imposed, shall remain in effect until publication of the final results of the next administrative review.

This notice also serves as a reminder to importers of their responsibility under 19 CFR 353.26 to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this review period. Failure to comply with this requirement could result in the Secretary's presumption that reimbursement of antidumping duties occurred and the subsequent assessment of double antidumping duties.

This notice also serves as a reminder to parties subject to administrative protective order (APO) of their responsibility concerning the disposition of proprietary information disclosed under APO in accordance with 19 CFR 353.34(d). Timely written notification of return/destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and the terms of an APO is a sanctionable violation.

This administrative review and notice are in accordance with section 751(a)(1) of the Act (19 U.S.C. 1675(a)(1)) and section 353.22 of the Department's regulations.

Dated: December 24, 1996.

Jeffrey P. Bialos,

Acting Assistant Secretary for Import Administration.

[FR Doc. 97–73 Filed 1–2–97; 8:45 am]

BILLING CODE 3510–DS–P

[C–549–401]

Certain Apparel From Thailand; Determination to Amend Revocation, in Part, of Countervailing Duty Order

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

ACTION: Notice of determination to amend revocation, in part, of countervailing duty order.

SUMMARY: The Department of Commerce (the Department) has determined to amend the effective date of the revocation of the countervailing duty order on Certain Apparel from Thailand, with respect to the products classified under the item numbers of the Harmonized Tariff Schedule (HTS) listed in Appendix D to this notice, from January 1, 1995 to January 1, 1991. In addition, the Department has determined not to amend the effective date of revocation with respect to the products classified under the HTS item numbers listed in Appendix B to this notice. As a result of this determination not to amend the effective date of revocation, we will now complete the administrative review of the countervailing duty order, covering the period January 1, 1991 through December 31, 1991, with respect to the Appendix B items.

EFFECTIVE DATE: January 3, 1997.

FOR FURTHER INFORMATION CONTACT: Dana Mermelstein or Robert Copyak, Office of CVD/AD Enforcement VI, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, N.W., Washington, D.C. 20230; telephone: (202) 482–2786.

SUPPLEMENTARY INFORMATION:

Background

During the original certain textile products and certain apparel investigations from various countries, including Thailand, the Department reviewed issues concerning the standing of petitioners with respect to apparel and explained its determinations in *Final Negative Countervailing Duty Determination: Certain Textile Mill Products and Apparel from Malaysia* (50 FR 9852; March 12, 1985) (*Malaysia Final Determination*). No injury investigations were required for the countries involved, and the Department relied upon a list of 86 like products both for determining the standing of petitioners and for establishing the corresponding scope of the certain apparel order. *See* Letter from Wilmer, Cutler & Pickering, Dec. 3, 1984, Annex 3, on file in the Central Records Unit, Room B–099, Department of Commerce (CRU).

With respect to the investigation on certain apparel, the Department determined that the Amalgamated Clothing and Textile Workers Union (ACTWU) was an interested party with respect to 52 of the 86 apparel like products covered by the petition. The Department also determined that the standing requirement for the remaining apparel products covered by the petition was satisfied by the International Ladies' Garment Workers' Union (ILGWU). Together, these petitioners had filed the petition ''on behalf'' of the apparel industry.

On March 13, 1992, the Department announced its intent to revoke the countervailing duty order on certain apparel from Thailand pursuant to section 355.25(d)(4)(i) of the Department's regulations because no interested party had requested an administrative review for at least four consecutive review periods. *Notice of Intent to Revoke Countervailing Duty Orders,* 57 FR 8860 (March 13, 1992) (*Intent to Revoke Notice*). Pursuant to the Department's regulations, if no interested party objects to the Department's intended revocation or requests an administrative review of the countervailing duty order, the Department will revoke the order. 19 CFR § 355.25(d)(4)(iii)(1993).

On March 16, 1992, ACTWU objected to the intended revocation and requested an administrative review, covering the period January 1, 1991 through December 31, 1991. The review was initiated on April 13, 1992. *Initiation of Antidumping and Countervailing Duty Administrative Reviews,* 57 FR 12797 (April 13, 1992). On April 24, 1992, the Royal Thai Government (RTG) challenged the standing of ACTWU to object to the Department's intended revocation and to request an administrative review. The RTG argued that, to the extent that ACTWU lacked standing with respect to any of the many like products covered by the order, the Department should revoke the countervailing duty order with respect to those products and conduct the administrative review of only the merchandise which remained in the scope of the order. On June 19, 1996, the Department issued its preliminary findings with respect to the standing of ACTWU. *See Memorandum from Barbara E. Tillman to Paul L. Joffe, Acting Assistant Secretary for Import Administration,* June 19, 1996 (*Analysis Memorandum*). Comments on the Department's preliminary findings were filed by the RTG. The Department's final determinations with respect to this issue are fully discussed in the sections *Interested Party Status of ACTWU* and *Analysis of Comments,* below.

Revocation Under Section 753 of the Uruguay Round Agreements Act

This countervailing duty order was revoked effective January 1, 1995, pursuant to section 753 of the Tariff Act of 1930, as amended by the Uruguay Round Agreements Act (60 FR 40568). The Department is conducting an administrative review only to determine the appropriate assessment rate for entries made during the period January 1, 1991 through December 31, 1991.

Scope Conversion

The scope of the certain apparel order was originally defined in terms of the item numbers listed under the *Tariff Schedule of the United States Annotated* (TSUSA). *See Final Affirmative Countervailing Duty Determination and Countervailing Duty Order: Certain Apparel from Thailand* (50 FR 9819; March 12, 1985) (*Thailand Final Determination*). On January 1, 1989, the United States fully converted from TSUSA to the *Harmonized Tariff Schedule* (HTS). At that time, the Customs Service prepared a list which included all of the HTS numbers necessary to cover the items previously identified by the TSUSA. However, because the two tariff schedules use different classification systems which do not produce a one-to-one product correlation, this list also included some items not included in the like product list relied upon by the Department in the investigation. On July 26, 1993, the Department published *Certain Apparel; Notice of Proposed Scope Amendment* (58 FR 39789), which contained the proposed HTS scope and invited comments. The conversion became final on May 17, 1994, with the publication of *Certain Apparel from Thailand; Scope Amendment* (59 FR 25699) (*Scope Notice*), in which the comments submitted were addressed. The analysis undertaken as a result of the RTG's challenge of ACTWU's standing is based on the item numbers of the HTS listed in the *Scope Notice*; these HTS item numbers have now been separated into those for which we determine that ACTWU has standing (Appendix B) and those for which we determine ACTWU does not have standing (Appendix D).

Applicable Statute and Regulations

The Department has made this determination in accordance with sections 751 (a) and (c) of the Tariff Act of 1930, as amended (the Act). Unless otherwise indicated, all citations to the

statute and to Department's regulations are in reference to the provisions as they existed on December 31, 1994.

Interested Party Status of ACTWU

In April 1992, the RTG challenged the standing of ACTWU both to object to the Department's intended revocation and to request an administrative review of the countervailing duty order on certain apparel from Thailand. The RTG argued that, to the extent ACTWU lacked standing with respect to any of the many like products covered by the order, the Department should revoke the order with respect to those products and conduct the administrative review of only the merchandise which remained in the scope of the order. The RTG cited to the original investigation, noting that ACTWU was found to have standing for only 52 of the 86 like products investigated (standing for the remaining like products was satisfied by co-petitioners). Furthermore, the RTG noted that declining union membership had been documented in the course of the investigation. Thus, the RTG urged the Department to examine anew whether ACTWU had standing with respect to all of the like products covered by the order.

During the 1985 countervailing duty investigations of apparel and textile mill products, which involved many countries, including Thailand and Malaysia, the Department determined that ACTWU was an interested party with respect to 52 of the original 86 apparel like products covered by the petition. *Final Negative Countervailing Duty Determination; Certain Textile Mill Products and Apparel from Malaysia,* 50 FR 9852 (March 12, 1985) (*Malaysia Final Determination*). The Department determined that the standing requirement for the remaining apparel products covered by the petition was satisfied by the International Ladies' Garment Workers' Union (ILGWU). Together, these petitioners had filed the petition ''on behalf of'' the apparel industry and had standing with respect to the 86 apparel like products at issue. Id. at 9854; *Thailand Final Determination.*

The RTG contested ACTWU's standing as an interested party after the objection by ACTWU to the Department's intent to revoke the order. The Department determined, based on information collected in the course of this proceeding, that there was no basis to reexamine ACTWU's standing for the 52 like products for which it was found to have standing during the investigation. *See Memorandum from Barbara E. Tillman, Director, Office of Countervailing Compliance to Joseph A. Spetrini, Deputy Assistant Secretary for Import Administration, on the Interested Party Status of a Domestic Interested Party With Respect to the Countervailing Duty Order on Apparel from Thailand,* October 14, 1992 (*October 1992 Memorandum*), on file in the Central Records Unit, Room B–099, Department of Commerce (CRU).

The Department examined ACTWU's status as an interested party, within the meaning of section 771(9)(D) of the Act, with respect the 34 remaining like products covered by this order. *See Analysis Memorandum.* The Department asked ACTWU to indicate which of these products were produced by its members.[1] Regarding unions, section 771(9)(D) defines ''interested party'' as ''a certified union or recognized union or group of workers which is representative of an industry engaged in the manufacture, production or wholesale in the United States of a like product. . . .''

After examining the information provided by ACTWU, and considering the arguments submitted by the RTG over the course of this proceeding, the Department issued its preliminary findings on June 19, 1996. *See Analysis Memorandum.* Of the remaining 34 like products, the Department determined that ACTWU had standing as an interested party with respect to five. Combined with the 52 like products for which ACTWU was found to have standing during the investigations (*see Malaysia Final Determination*), the total number of like products for which ACTWU was found to have standing is 57. The Department invited comments on this determination. We address the RTG's arguments in the *Analysis of Comments* section below. No other party submitted comments.

Analysis of Comments

Comment 1: The RTG argues that the Department's determination that ACTWU has standing with respect to 57 like products is based upon a legal standard that is contrary to the plain language of the statute. The RTG cites section 355.2(i)(4) of the Department's regulations, which specifies that to be an interested party, a union must be ''representative of the industry or of sellers (other than retailers) in the United States of the like product produced in the United States.'' The RTG also cites section 771(4)(D) of the Act, which defines ''industry'' as ''the domestic producers as a whole of a like product, or those producers whose collective output of the like product constitutes a major proportion of the total domestic production of that product * * *.'' The RTG concludes that in order to be representative of those producers whose collective output represents a major proportion of total domestic production of the like product, a union must demonstrate that it represents workers in each facility included in such a determination.

The RTG argues that it is inappropriate for the Department to presume that a union is representative of an industry producing the like product when it represents only one or a small number of the workers in that industry. Had Congress intended such a result, the RTG argues, it would not have required that a union be ''representative of an industry'' (which clearly encompasses more than just one worker or more than just one enterprise); rather, Congress would simply have required the union to be representative of a ''producer'' of the ''like product.''

In conclusion, the RTG notes that ACTWU, like all unions, is engaged in efforts to increase its membership by enrolling workers at factories that are not yet unionized; if ACTWU has not succeeded in enrolling workers at companies whose collective output represents a major proportion of total domestic production of a particular like product, then, the RTG argues, the union cannot simply be deemed representative of the industry producing that product. The RTG urges the Department to arrive at an interpretation of the statute that gives full meaning to the term ''industry'' in the specifications of the standing requirements for unions.

Department's Position: We disagree with the RTG's assertion that we applied the incorrect legal standard to determine whether ACTWU is an interested party, and we continue to find that ACTWU has standing to object to revocation and request an administrative review for each of the like products for which the union ultimately claimed interested party status, in accordance with section 355.25(d)(4)(iii) of the Department's regulations.

The RTG correctly notes that to qualify as an interested party pursuant to section 771(9)(D) of the Act, a union must be ''representative of an industry engaged in the manufacture, production, or wholesale in the United States of a like product.'' However, the RTG incorrectly links this requirement

[1] An 87th like product, flatbags, handbags and luggage, was subject to investigation and was classified as within the scope of the apparel order when certain textile mill products and certain apparel were separated into two countervailing duty orders. There is no information in the record which indicates that ACTWU had standing with respect to this product.

directly to the definition of the term ''industry'' under section 771(4)(A). The RTG concludes that, to meet this requirement, a union must at least demonstrate that it represents workers in each facility producing the like product. We disagree. Such a narrow interpretation of the phrase ''representative of an industry'' would unduly limit the rights of a union to qualify as an interested party, object to revocation, and otherwise participate in a proceeding.

Section 771(9) of the Act defines several categories of domestic interested parties. In each case, the key to qualifying is for the party to manufacture, produce or wholesale the like product in the United States. For instance, under section 771(9)(C), to qualify as a ''manufacturer or producer'' of the like product, the Court of International Trade has held that a party must actually manufacture the product in the United States. *See Brother Indus. (USA)* v. *United States,* 801 F. Supp. 751, 757 (CIT 1992).

However, the language of the legislative history describing the standing requirements ''is broad and unqualified.'' *Id.* (*citing* S. Rep. No. 249, 96th Cong., 1st Sess. 90 (1979)). Where Congress intended to further limit a party's ability to qualify as an interested party, Congress made that intention explicit. In particular, sections 771(9)(E) and (F) explicitly limit the rights of a trade or business association in just this manner. The legislative history explains:

> The provision also provides that a trade or business association may be considered an interested party only when a majority of its members are importers of merchandise under investigation, or manufacture, produce, or wholesale a like product, as the case may be. This limitation is believed to fairly delimit those groups with sufficient interest to always be considered interested parties. An association representative of importers generally, or business generally, would not be considered an interested party under this limitation, although a sub-group of such an association may qualify.

S. Rep. No. 249, 95th Cong., 1st Sess. 90 (1979). By contrast, with regard to section 771(9)(D), the legislative history states that the provision ''clarifies that a union may file a petition and participate in proceedings under Title VII as added by the bill. The union or group of workers must represent workers in the relevant U.S. industry.'' *Id.* Congress gave no indication that by requiring a union to be ''representative of an industry,'' it intended to limit the rights of unions which ''represent workers in the relevant U.S. industry'' to participate in proceedings as interested parties. The legislative history makes clear that Congress intended unions which represent workers in the relevant U.S. industry to be ''representative'' of the industry. For these reasons, we find that the phrase ''representative of an industry'' requires no more than that a union ''represent workers in the relevant U.S. industry.''

This is the same determination reached by the Department in the original apparel and textile mill product investigations. *See Malaysia Final Determination* at 9854. Contrary to the claim of the RTG, we have not determined that a union representing just one worker at just one facility producing the like product necessarily qualifies as an interested party. We have determined that when a union certifies, as ACTWU has done, that it represents workers in the relevant U.S. industry, we will not investigate the matter further, absent actual evidence calling the union's certification into question. This determination is further explained in the *Department's Position* on comment 2, below.

Having found that ACTWU qualifies as an interested party, the next issue is whether the union may object to revocation and request an administrative review for those like products for which it has claimed standing. Section 355.25(d)(4)(iii) of the Department's regulations provides simply that if no interested party objects to revocation or requests a review, the Department will conclude that the order (or suspended investigation) is no longer of interest to domestic interested parties, as provided for by section 355.25(d)(1)(i). Conversely, if a domestic interested party does object, and no other party expresses its support for revocation, the Department will not revoke the order. In this situation, the Department effectively presumes that the order, whether in whole or in part, is of interest to domestic interested parties and that revocation is not appropriate.

The Department indicated in the commentary to the regulations that when ''parties which account for a significant proportion of domestic production'' either affirmatively oppose or support revocation, we will make a case-by-case determination of whether revocation is appropriate. 53 FR 52,306, 52,333 (1988). Accordingly, the Department has revoked an order over the objection of one or more domestic interested parties, and we have refused to revoke despite receiving support for revocation from part of the domestic industry. *See Oregon Steel Mills, Inc.* v. *United States,* 862 F.2d 1541 (Fed. Cir. 1988) (affirming revocation); *Certain Round-Shaped Agricultural Tillage Tools From Brazil; Preliminary Results of Changed Circumstances CVD Review and Intent Not To Revoke Order,* 55 FR 41,265 (1990) (declining to revoke). In this case, however, no domestic interested party has expressed support for the order. ACTWU's objection to revocation is the only indication we have received regarding the domestic industry's position. As described above, ACTWU has certified that it represents workers producing each of the remaining 57 like products, which qualifies the union as an interested party. Given that no domestic interested party has supported revocation, it is reasonable to presume that the remainder of the industry favors or at least acquiesces in ACTWU's position.

This is similar to the presumption adhered to by the Department for determining whether a petition for initiating an antidumping or countervailing duty investigation is filed ''on behalf of an industry,'' in accordance with section 702(b)(1) of the Act. In that situation, the Department presumes that the petitioner filed on behalf of the domestic industry, unless a majority of the domestic industry affirmatively opposes the petition. The Court of Appeals for the Federal Circuit has upheld this interpretation of the statute as being reasonable. *Minebea Co., Ltd.* v. *United States,* 984 F.2d 1178, 1180 (Fed. Cir. 1993); *Suramerica de Aleaciones Laminadas, C.A.* v. *United States,* 966 F.2d 660 (Fed. Cir. 1992).

Comment 2: The RTG next argues that, even assuming the Department has applied the correct legal standard, the Department must still investigate whether ACTWU meets this standard, both with respect to the 52 like products for which ACTWU was found to have standing in the original investigation and with respect to the five products for which ACTWU first made standing claims in this proceeding. The RTG claims that it is incorrect for the Department to refuse to reconsider its original standing determination; moreover, the Department cannot refuse to further investigate ACTWU's additional claims of standing, absent affirmative evidence that ACTWU's interested party status has changed.

Regarding the 52 like products for which ACTWU originally claimed standing, the RTG contests the Department's refusal during this proceeding to reconsider its determination in the original countervailing duty investigation. The RTG argues that it was documented in the context of the original 1984–1985 investigations that union membership in

the apparel industry had been gradually declining. The RTG asserts that it is likely that this trend has continued and that ACTWU's membership has changed over time. The RTG also asserts that companies in import sensitive industries have been moving production facilities from the unionized Northeast to non-unionized areas in the South, to Mexico, and elsewhere overseas. On this basis, the RTG concludes that there exists public information showing declining and changing union membership in the apparel industry.

According to the RTG, these facts should have caused the Department to revisit its 1985 determination. In addition, the RTG claims that the information provided by ACTWU in 1984, indicating standing for 52 of the like products, is inconsistent with ACTWU's ultimate claim in 1994 of standing for five additional like products. In claiming standing for five additional like products, ACTWU called attention to obvious changes in membership over time. Such changing membership indicates that ACTWU may no longer represent one or more of the like product industries it represented in 1984.

Furthermore, the RTG argues, the Department's determination that ACTWU is an interested party with respect to the original 52 like products was based on ACTWU's certification during the investigation that it was an ''interested party.'' According to the RTG, this is a legal conclusion on the part of ACTWU, and is therefore not the appropriate basis for the Department's determination. Rather, the Department should seek a factual representation from which to draw its own legal conclusion.

As a matter of policy, the RTG argues that it is inappropriate for the Department to place the burden of production in this instance on respondents. ACTWU's membership information is not public; it would be impossible for the RTG to determine whether ACTWU continues to represent workers in each of the like product industries at issue; and, it is contrary to the normal presumption of the conduct of a countervailing duty investigation to require a party to come forward with another party's confidential information.

Thus, the RTG urges the Department to solicit and examine information regarding ACTWU's membership, as it relates to these like products. Specifically, for each like product, the RTG urges the Department to obtain the following information: the names of the companies in which ACTWU represents workers, the number of union-represented and non-union workers in each such facility, the names of companies which produce the like product whose workers are not represented by the union, and an estimate of the number of workers in such facilities.

Department's Position: We disagree with the RTG. As described in the *Analysis Memorandum,* absent affirmative evidence showing that a party's status has changed, we do not reconsider our original standing determination with respect to those like products for which a domestic interested party, objecting to revocation or requesting a review, had interested party status during the original investigation. Moreover, ACTWU has certified that it continues to represent workers producing each of the 52 like products for which it was originally determined to have standing, and neither the RTG nor any other party has presented affirmative evidence challenging ACTWU's certification.

It is true that several years have passed since the Department reached its original standing determination. However, the Department is not required to investigate standing issues to the same extent as it must allegations of dumping or subsidization. *See Brother Indus., Ltd.* v. *United States,* Slip Op. 92–231 at 4–5 (CIT Dec. 30, 1992). For the purpose of requesting a review or objecting to revocation, it would not be appropriate either to revisit our original standing determination or to question a union's certification that it represents workers producing a particular like product, absent some evidence that the union's representation of those workers has, in fact, changed.

Much the same holds true for the remaining like products for which ACTWU claimed standing. The union certified that it represents workers in each of these industries, and the RTG has presented no evidence to the contrary. Absent such evidence, we consider ACTWU's certification sufficient. It is worth noting that the Department did not accept ACTWU's initial standing claim at face value. ACTWU originally claimed that its members produced eighteen additional products. ACTWU correctly qualified this claim, however, by noting that the products its members produced were identical to the products covered by the scope of the order except for vegetable fiber content. The Department rejected this claim on the ground that the like product list describing the scope of the order distinguishes among apparel products on this very basis—according to fiber content. *See* Letter from Barbara Tillman to Mark Love, dated May 11, 1994, on file in CRU. Thereafter, ACTWU withdrew this claim, and submitted another claim with respect to five different like products, which ACTWU certified as being identical to those covered by the scope of the order. We examined the claim and the certification, and deemed the certification sufficient to support the claim, absent evidence to the contrary. No such evidence was provided.

This standard does not place an undue burden on respondents to produce evidence to challenge a union's standing to object to revocation or request a review. The Department found at the time of the original investigation that ACTWU represented workers producing 52 like products, and ACTWU has certified that it continues to produce these and the other five like products for which it has claimed standing. It is not too much to require that a party challenging this assertion do more than point to the passage of time and shifts in demographics as support. Like the standard for filing a petition, the standing requirements for objecting to revocation are to be construed liberally. *See Brother Indus.,* Slip Op. 92–231 at 4 (*citing* S. Rep. 249 at 63); *Brother Indus.,* 801 F.Supp. At 757. We determine that ACTWU has met these requirements.

Comment 3: The RTG argues that the Department should revoke the order with respect to those products at the HTS ten-digit level that do not fall within the 57 like products for which ACTWU has claimed standing. The RTG notes that examination of standing at the ten-digit level is consistent with the standing analysis used by the Department in the suspended investigation of certain textile mill products from Thailand. The RTG is concerned that at the eight-digit level, the HTS item numbers cover several products, some of which are represented among the list of 86 like products originally covered by this countervailing duty order and some of which are not. Thus, the Department should revoke the order for these products at the ten-digit level.

Department's Position: Beginning with the conversion from the TSUSA to the HTS tariff schedule, the Department has conducted its standing analysis in this proceeding at the ten-digit HTS level. *See Scope Notice,* 59 FR at 25610. This is the same approach we took in the suspended investigations involving textile mill products from Thailand and various other countries. *See, e.g., Certain Mill Products From Thailand; Notice of Termination in Part,* 60 FR 20258 (April 25, 1995); *Certain Textile*

Mill Products From Colombia and Thailand; Notice of Proposed Conversion, 59 FR 16101 (April 15, 1994). If only the eight-digit HTS item number is listed for a particular product category, either the category does not break down into additional ten-digit HTS levels, or all of the products included in that category (at the eight-digit or greater level) are covered by the scope of the order.

Where the qualifications of coverage corresponded to the breakdown of products at the ten-digit level, we have now included the appropriate HTS numbers at the ten-digit level to identify both HTS items for which the order remains in effect for the 1991 review period and the HTS items for which the effective date of revocation will be amended (as indicated in Appendix B and Appendix D). Further, in drawing up the HTS list, we included annotations for the first time in the *Scope Notice* to clarify the limits of coverage under particular item numbers which identified merchandise outside of the scope of the order as well as merchandise within the scope. In the course of this proceeding, the Department has added a number of annotations, and other annotations have been clarified as a result of the RTG's arguments in *Comment 4* below.

Comment 4: The RTG urges the Department to reexamine some of the products for which it found ACTWU to have standing and to revise the footnotes which annotate certain of the HTS item numbers for which it found ACTWU to have standing. Basically, the RTG takes issue with some of the Department's categorizations of the numerous HTS item numbers according to the list of 86 like products which has been the basis for standing determinations throughout the history of this case. Specifically, the Department categorized HTS number 6111.3050 (babies' garments and cloth accessories, sunsuits, blanket sleepers (synthetic, knit)) under the like products for nightwear (like product 58), other apparel (60), or playsuits (45). According to the RTG, there is no indication that these like product categories were ever intended to include baby apparel, and that only those like product categories which carry the designation ''WGI,'' for women's, girls', and infants' apparel, should be used for determining ACTWU's standing with regard to baby apparel. Since ACTWU made no standing claims with respect to many WGI like products made from synthetic fabric, it is reasonable to conclude that ACTWU lacked standing with respect to babies' garments and clothing accessories. Thus, the Department should revoke the order with respect to HTS 6111.3050.

In addition, the Department found ACTWU to have standing for HTS 6112.1200, men's and boys' synthetic track suits, based on ACTWU's standing for the like products for other coats (42), knit shirts (46), and trousers (54) of man-made fiber. According to the RTG, there is no indication that track suits or other warm-up style suits were ever intended to fall within these particular like products, and therefore, the order with respect to this HTS item number should also be revoked.

The RTG argues that the Department also incorrectly classified the products included under HTS 6209.2050, babies' sunsuits, washsuits, clothing sets and diapers (non-knit, cotton), under the like products for playsuits (8) and other apparel (21) of cotton, and found ACTWU to have standing with respect to all products within this HTS subheading. The RTG takes issue with the Department's determination that diapers constitute ''other apparel,'' and notes that there is no indication that ACTWU represents workers making diapers. Thus, the order should be revoked with respect to HTS 6209.2050.

With respect to ''trousers, breeches, and shorts,'' the RTG's argues that the like product categories for ''trousers'' necessarily exclude breeches and shorts, and therefore although ACTWU was found to have standing with respect to ''trousers,'' it cannot be said to have standing with respect to breeches and shorts. Because the HTS numbers which identify trousers also include breeches and shorts, and there is no indication, according to the RTG, that ACTWU's standing for trousers extends to breeches and shorts, the RTG argues for an annotation which notes the limits of coverage under any HTS item numbers which cover ''trousers breeches, and shorts'' together. Alternatively, the RTG argues for revocation of the HTS numbers at the ten-digit level.

The RTG also noted a number of additional HTS item numbers for which they recommend the Department modify the annotations to clarify the limits of the coverage under those item numbers.

Department's Position: With respect to HTS item numbers 6111.3050, 6112.1200, and 6209.2050, the RTG's concern that the Department has misclassified these HTS items in terms of the listing of like products which are subject to the order is misplaced. As a general matter, in classifying these items using the like product list, the Department consulted with the United States Customs Service and received confirmation that the classifications were reasonable. *See Memorandum for The File on Certain Apparel from Thailand—Like Products and HTS Numbers,* dated February 20, 1996, on file in the CRU.

We reject the RTG's argument that ACTWU's standing with respect to babies' apparel on the whole is questionable based on the fact that ACTWU lacks standing with respect to several items of babies' apparel included among the like products. The Department determined ACTWU's standing for these HTS item numbers after first classifying them according to like products. Because ACTWU was determined to have standing for all of the like products under which these HTS items were classified, their standing for this HTS item number needs no qualification.

We also reject the RTG's conclusion that track suits were never intended to be included among the 87 like products covered by the countervailing duty order. This conclusion is unsupported by record evidence. This issue, like so many of the issues raised by the RTG, actually concerns the Department's conversion of the tariff schedule from the TSUSA to the HTS listing. As noted above, ACTWU represents workers producing the like products ''other coats,'' ''knit shirts,'' and ''trousers'' of man-made fiber. In conducting the original investigation, the Department determined that those like products corresponded to a certain TSUSA item number or numbers. Thereafter, in making the conversion from TSUSA to HTS, the Department concluded that those TSUSA item number or numbers corresponded in part to the HTS item number 6112.1200.10, for men's and boys' synthetic track suits. At the same time, we determined that of the like products corresponding to the coverage of the order, the closest match to track suits are the like products mentioned above. Thus, we based our standing determination for track suits on the fact that ACTWU has standing for the individual like products which comprise track suits.

This is a reasonable determination. While synthetic track suits do constitute a single item for HTS purposes, a track suit actually consists of two separate components, a relatively light-weight synthetic coat and trousers. Indeed, the HTS listing for track suits is broken down into coats, shirts, and trousers; in the case of coats, the HTS then cross-references the separate HTS listings for those items. This confirms that it is reasonable to classify track suits under the like products for their components.

Similarly, many of the other standing determinations questioned by the RTG concern HTS item numbers which cover

''ensembles,'' which we have classified under the like products for their components. In reviewing our determinations, we agree with the RTG that certain of these classifications should be clarified. In many cases, ACTWU was found to have standing for some of the components and not for others. ACTWU's standing with respect to the HTS item is limited by the like products for the ensemble components for which it was found to have standing. Thus, we have clarified the annotations as appropriate, or resorted to the use of the ten-digit HTS item number, as explained in *Comment 3* above and as indicated in Appendix B.

We disagree, however, that the like product category ''trousers'' excludes breeches and shorts. We determine that breeches and shorts are types of trousers. Therefore ACTWU's standing with respect to ''trousers'' extends to all types of trousers, including breeches and shorts. Thus, we will neither be adding the annotation desired by the RTG nor revoking at the ten-digit level the HTS numbers for breeches and shorts.

Determination to Amend Revocation, in Part

For the reasons stated above, the Department has determined that the ACTWU does not have standing as an interested party with respect to 30 of the like products covered by this countervailing duty order, as listed in Appendix C this notice. The HTS item numbers corresponding to the like products listed in Appendix C are listed in Appendix D. The Department is now amending the effective date of the revocation of the order with respect to these HTS item numbers to make it effective January 1, 1991. Accordingly, for the merchandise identified in Appendix D, the Department will instruct the U.S. Customs Service to liquidate without regard to countervailing duties all unliquidated entries made on or after January 1, 1991.

The Department determines that ACTWU does have standing as an interested party, in accordance with 19 U.S.C. 1677(9)(D) and 19 C.F.R. § 355.2(i)(4), with respect to 57 like products. These like products are listed in Appendix A. The HTS item numbers which correspond to these like products are listed in Appendix B, with appropriate annotations as discussed above. Thus, the Department will conduct the administrative review of entries of the merchandise listed in Appendix B, made during the period January 1, 1991 through December 31, 1991, and will issue appropriate instructions to Customs with respect to these entries upon completion of the review.

This countervailing duty order was subject to section 753 of the Uruguay Round Agreements Act. *See Countervailing Duty Order; Opportunity to Request a Section 753 Injury Investigation*, 60 FR 27,963 (May 26, 1995). Because no domestic interested parties exercised their right under section 753(a) of the Act to request an injury investigation, the International Trade Commission made a negative injury determination with respect to this order, pursuant to section 753(b)(4) of the Act. As a result, the Department revoked the order, effective January 1, 1995, pursuant to section 753(b)(3)(B) of the Act, and ordered Customs to terminate suspension of liquidation and to refund all cash deposits made after January 1, 1995. *Revocation of Countervailing Duty Orders*, 60 FR 40568 (August 9, 1995). Accordingly, for the merchandise listed in Appendix B for which the Department is not amending the effective date of revocation, the Department intends to order Customs to liquidate shipments exported on or after January 1, 1991 and entered on or before December 31, 1991, in accordance with the final results of the administrative review. We will not issue further instructions with respect to suspension of liquidation or cash deposits of estimated countervailing duties.

This determination and notice are in accordance with sections 751 (a) and (c) of the Act (19 U.S.C. 1675(a)(1) and 1675(c)).

Dated: December 9, 1996.

Jeffrey P. Bialos,

Acting Assistant Secretary for Import Administration.

Appendix A—C–549–401 Countervailing Duty Order on Certain Apparel From Thailand Like Products for Which ACTWU Has Standing

Like product code No.	Like product description
Cotton:	
1	Handkerchiefs.
2	Gloves.
3	Hosiery.
4	Suit-type coats, M&B.
5	Other Coats, M&B.
8	Playsuits.
9	Knit Shirts, M&B.
10	Knit Shirts & Blouses, WGI.
11	Shirts, Not Knit, M&B.
14	Sweaters.
15	Trousers, M&B.
19	Nightwear.
20	Underwear.
21	Other Apparel.
Wool:	
22	Gloves.
23	Hosiery.
24	Suit-type Coats, M&B.
25	Other Coats, M&B.
26	Coats, WGI.
28	Knit Shirts & Blouses.
29	Shirts & Blouses, Not Knit.
30	Skirts.
31	Suits, M&B.
33	Sweaters, M&B.
35	Trousers, M&B.
36	Trousers, WGI.
37	Other Wool Apparel.
Man-Made Fiber:	
38	Handkerchiefs.
39	Gloves.
40	Hosiery.
41	Suit-type Coats, M&B.
42	Other Coats, M&B.
45	Playsuits.
46	Knit Shirts, M&B.
48	Shirts, Not Knit, M&B.
51	Suits, M&B.
52	Suits, WGI.
53	Sweaters.
54	Trousers, M&B.
58	Nightwear.
59	Underwear.
60	Other Apparel.
Other Fabric:	
61	Handkerchiefs.
62	Gloves.
63	Hosiery.
64	Suit-type Coats, M&B.
65	Other Coats, M&B.
68	Playsuits.
69	Knit Shirts M&B.
71	Shirts, Not Knit, M&B
74	Suits, M&B.
76	Sweaters, M&B.
78	Trousers, M&B.
82	Nightwear.
83	Down-filled Coats, M&B.
85	Underwear.
86	Other Apparel.

Appendix B—C–549–401 Countervailing Duty Order on Certain Apparel From Thailand Harmonized Tariff Schedule Numbers

HTS No.	Annotation
6101.2000	Coverage excludes garments having embroidery or permanently affixed applique work on the outer surface.
6101.3020	

HTS No.	Annotation
6102.1000	
6103.1920	Coverage limited to garments that would be covered if separately entered.
6103.2200	Coverage limited to garments that would be covered if separately entered.
6103.2300	Coverage limited to garments that would be covered if separately entered.
6103.2910	Coverage limited to garments that would be covered if separately entered.
6103.4210	Coverage excludes garments having embroidery or permanently affixed applique work on the outer surface.
6103.4315	Coverage excludes garments having embroidery or permanently affixed applique work on the outer surface.
6103.4910	Coverage excludes garments having embroidery or permanently affixed applique work on the outer surface.
6104.1320	
6104.1915	
6104.2100.10	
6104.2100.30	
6104.2100.40	
6104.2100.60	
6104.2100.80	
6104.2200.10	
6104.2200.60	
6104.2200.80	
6104.2200.90	
6104.2300.22	
6104.2910.60	
6104.5100	Coverage excludes garments having embroidery or permanently affixed applique work on the outer surface.
6104.5310	Coverage limited to wool skirts.
6104.5910	Coverage limited to wool skirts; coverage excludes girls' skirts or divided skirts *NOT* having embroidery or permanently affixed applique work on the outer surface.
6104.6920	Coverage limited to wool trousers.
6105.1000	
6105.2020	
6106.1000	
6109.1000	
6109.9010.07	
6109.9010.09	
6109.9010.13	
6109.9010.25	
6109.9010.47	
6109.9010.49	Coverage excludes garments having embroidery or permanently affixed applique work on the outer surface.
6110.2020	Coverage excludes men's or boys' garments having embroidery or permanently affixed applique work on the outer surface.
6110.3030.05	
6110.3030.10	
6110.3030.15	
6110.3030.20	
6110.3030.25	
6110.3030.40	
6110.3030.50	
6111.3040	Coverage limited to sweaters; coverage excludes garments having embroidery or permanently affixed applique work on the outer surface.
6111.3050	
6111.9040	Coverage limited to sweaters.
6111.9050	
6112.1200.10	
6112.1200.30	
6112.1200.50	
6112.1910.10	Coverage limited to men's and boys' garments that would be covered if separately entered.
6112.1910.30	Coverage excludes men's or boys' garments that would be covered if separately entered.
6112.1910.50	Coverage excludes men's or boys' garments that would be covered if separately entered.
6112.2010.10	Coverage excludes men's or boys' garments that would be covered if separately entered.
6112.2010.30	Coverage limited to men's and boys' garments that would be covered if separately entered.
6112.2010.50	Coverage excludes men's or boys' garments that would be covered if separately entered.
6112.2010.60	Coverage excludes men's or boys' garments that would be covered if separately entered.
6112.2010.80	Coverage limited to men's and boys' garments that would be covered if separately entered.
6114.2000	
6114.3010.10	
6114.3030	
6201.1220	
6201.1340	
6201.9220	
6203.1910	Coverage limited to garments that would be covered if separately entered.
6203.2230	Coverage limited to garments that would be covered if separately entered.

HTS No.	Annotation
6203.2300	Coverage limited to garments that would be covered if separately entered.
6203.2920	Coverage limited to garments that would be covered if separately entered.
6203.4240	
6203.4340	
6203.4920	
6204.2300	Coverage limited to woolen garments that would be covered if separately entered.
6204.2920.10	
6204.2920.30	
6204.2920.40	
6204.2920.50	Coverage limited to garments that would be covered if separately entered.
6205.2020	
6208.2200	
6208.9200.30	
6208.9200.40	
6209.2050	

Appendix C—C–549–401 Countervailing Duty Order on Certain Apparel From Thailand Like Products for Which ACTWU Does Not Have Standing

Like product code No.	Like product description
Cotton:	
6	Coats, WGI.
7	Dresses.
12	Blouses, Not Knit, WGI.
13	Skirts.
16	Trousers, WGI.
17	Brassieres, etc.
18	Dressing Gowns.
Wool:	
27	Dresses.
32	Suits, WGI.
34	Sweaters, WGI
Man-Made Fiber:	
43	Coats, WGI.
44	Dresses.
47	Knit Shirts & Blouses, WGI.
49	Blouses, Not Knit, WGI.
50	Skirts.
55	Trousers, WGI.
56	Brassieres, etc.
57	Dressing Gowns.
Other Fabric:	
66	Coats, WGI.
67	Dresses.
70	Knit Shirts & Blouses, WGI.
72	Blouses, Not Knit, WGI.
73	Skirts.
75	Suits, WGI.
77	Sweaters, WGI.
79	Trousers, WGI.
80	Brassieres, etc.
81	Dressing Gowns.
84	Down-filled Coats, WGI.
Other Like:	
87	Flatgoods, handbags, and luggage.

Appendix D—C–549–401 Countervailing Duty Order on Certain Apparel From Thailand Harmonized Tariff Schedule Numbers

(For which revocation will be amended from January 1, 1995 to January 1, 1991)

4202.1240	6104.2910.70	6112.2010.90
4202.1260	6104.3100	6113.0000.30
4202.1280	6104.3310	6114.3010.20
4202.2245	6104.3320	6202.1220
4202.2260	6104.3910	6202.1340
4202.2270	6104.4200	6202.9220
4202.2280	6104.4320	6202.9345
4202.3240	6104.4420	6202.9350
4202.3295	6104.5200	6204.1200
4202.9215	6104.5320	6204.2230
4202.9220	6104.6220	6204.2920.15
4202.9230	6104.6320	6204.2920.20
4202.9260	6106.2020	6204.2920.25
4202.9290	6109.9010.50	6204.3220
6102.3010	6109.9010.60	6204.3350
6102.3020	6109.9010.65	6204.3930
6104.1200	6109.9010.70	6204.4230
6104.2100.70	6109.9010.75	6204.4340
6104.2200.30	6109.9010.90	6204.4440
6104.2200.40	6110.3030.30	6204.5220
6104.2200.50	6110.3030.35	6204.5330
6104.2300.10	6110.3030.45	6204.5930
6104.2300.14	6110.3030.55	6204.6240
6104.2300.16	6111.3010	6204.6335
6104.2300.20	6111.3020	6204.6925
6104.2300.24	6111.3030	6206.3030
6104.2300.26	6111.9010	6206.4030
6104.2300.30	6111.9020	6208.9200.10
6104.2300.32	6111.9030	6208.9200.20
6104.2300.34	6112.1200.20	6209.2010
6104.2300.36	6112.1200.40	6209.2020
6104.2300.40	6112.1200.60	6209.2030
6104.2300.42	6112.1910.20	6210.3010
6104.2910.10	6112.1910.40	6210.501020
6104.2910.20	6112.1910.60	6212.1050*
6104.2910.30	6112.2010.20	6212.1090*
6104.2910.40	6112.2010.40	
6104.2910.50	6112.2010.70	

*In the amended HTS list, published May 17, 1994, 6212.1050 and 6212.1090 were not listed. These two numbers replaced 6212.1010 and 6212.1020 in early 1995.

[FR Doc. 97–72 Filed 1–2–97; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF DEFENSE

Department of the Air Force

Proposed Collection; Comment Request

AGENCY: Headquarters Air Force Services Agency, DOD.

ACTION: Notice.

In compliance with Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, the Headquarters Air Force Services Agency (HQ AFSVA) announces a proposed format change to the existing Air Force Form 3211, Customer Comments card and seeks public comment of the provisions thereof. 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 the burden of the proposed information collection; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the information collection on respondents, including through the use of automated collection techniques or other forms of information technology.

DATES: Consideration will be given to all comments received by March 4, 1997.

ADDRESSES: Written comments and recommendations on the proposed information collection should be sent to HQ AFSVA, Lodging and Laundry Branch (HQ AFSVA/SVOHL, 10100 Reunion Place, Ste 401, San Antonio TX 78216–4138, ATTN: Lt Col Deb Kuennen or SMSgt Denise Knebel).

FOR FURTHER INFORMATION CONTACT: To request more information on this proposed information collection or to obtain a copy of the proposal and associated collection instruments, please write to the above address, or call HQ AFSVA/SVOHL, at (210) 652–8875.

Title, Associated Form, and OMB Number: Customer Comments, AF Form 3211, OMB Number 0701–XXX.

Needs and Uses: Each lodging guest is provided an AF Form 3211. The AF Form 3211 gives each guest the opportunity to comment on facilities

and services received. Completion and turn in of the form is optional. The information collection requirement is necessary for Wing leadership to assess the effectiveness of their Lodging program. AF Forms 3211 can be used as background documentation/supporting material for all types of management decisions.

Affected Public: AFI 34–246, Air Force Lodging Program, specifies who is an authorized guest in Air Force lodging. Some examples of the public include construction contractors and special guests of the Installation Commander.

Annual Burden Hours: 16.67.

Number of Respondents: 200.

Responses Per Respondent: 1.

Average Burden Per Response: 5 minutes.

Frequency: On occasion.

SUPPLEMENTARY INFORMATION:

Summary of Information Collection

Each guest of Air Force lodging and its contract lodging operations are provided access to AF Forms 3211. AF Forms 3211 give each guest the opportunity to comment on facilities and services received and completion and turn in of the form is optional. The information collection requirement is necessary for Wing leadership to assess the effectiveness of their Lodging program. Form 3211s are also useful as background documentation/supporting material for all types of management decisions. They are also reviewed by higher headquarters during lodging assistance and Innkeeper Award competitions.

Patsy J. Conner,

Air Force Federal Register Liaison Officer.

[FR Doc. 97–90 Filed 1–2–97; 8:45 am]

BILLING CODE 3910–01–P

DEPARTMENT OF EDUCATION

National Assessment Governing Board; Meeting

AGENCY: National Assessment Governing Board; Education.

ACTION: Notice of closed meeting.

SUMMARY: This notice sets forth the schedule and proposed agenda of a forthcoming meeting of the Achievement Levels Committee of the National Assessment Governing Board. This notice also describes the functions of the Board. Notice of this meeting is required under Section 10(a)(2) of the Federal Advisory Committee Act.

DATES: February 10, 1997.

TIME: 7:00 a.m.–2:30 p.m.

LOCATION: The Brown Palace Hotel, 321 Seventeenth Street, Denver, Colorado.

FOR FURTHER INFORMATION CONTACT: Mary Ann Wilmer, Operations Officer, National Assessment Governing Board, Suite 825, 800 North Capitol Street, N.W., Washington, D.C., 20002–4233, Telephone: (202) 357–6938.

SUPPLEMENTARY INFORMATION: The National Assessment Governing Board is established under section 412 of the National Education Statistics Act of 1994 (Title IV of the Improving America's Schools Act of 1994), (Pub. L. 103–382).

The Board is established to formulate policy guidelines for the National Assessment of Educational Progress. The Board is responsible for selecting subject areas to be assessed, developing assessment objectives, identifying appropriate achievement goals for each grade and subject tested, and establishing standards and procedures for interstate and national comparisons.

On February 10, 1997, between the hours of 7:30 a.m. and 2:30 p.m. there will be a closed meeting of the Achievement Levels Committee. The Committee will be reviewing the final data and national consensus information on the proposed 1996 science achievement levels to prepare its final recommendations to present to the Executive Committee.

This meeting must be conducted in closed session because premature disclosure of the information presented for review might significantly frustrate implementation of a proposed agency action. Such matters are protected by exemption 9(B) of Section 552b(c) of Title 5 U.S.C.

A summary of the activities of the meeting and related matters, which are informative to the public, consistent with the policy of 5 U.S.C., 552b, will be available to the public within fourteen days after the meeting.

Records are kept of all Board proceedings and are available for public inspection at the U.S. Department of Education, National Assessment Governing Board, Suite 825, 800 North Capitol Street, N.W. Washington, D.C., from 8:30 a.m. to 5:00 p.m.

Dated: December 30, 1996.

Roy Truby,

Executive Director, National Assessment Governing Board.

[FR Doc. 97–54 Filed 1–2–97; 8:45 am]

BILLING CODE 4000–01–M

National Assessment Governing Board; Meeting

AGENCY: National Assessment Governing Board; Education.

ACTION: Notice of partially closed teleconference meeting.

SUMMARY: This notice sets forth the schedule and proposed agenda of a forthcoming partially closed teleconference meeting of the Executive Committee of the National Assessment Governing Board. This notice also describes the functions of the Board. Notice of this meeting is required under Section 10(a)(2) of the Federal Advisory Committee Act. This document is intended to notify the general public of their opportunity to attend.

Date: February 13, 1997.

Time: 1:00–2:00 p.m., (closed); 2:00–3:00 p.m., (open).

Location: National Assessment Governing Board, Suite 825, 800 North Capitol Street, N.W., Washington, D.C.

FOR FURTHER INFORMATION CONTACT: Mary Ann Wilmer, Operations Officer, National Assessment Governing Board, Suite 825, 800 North Capitol Street, N.W., Washington, D.C., 20002–4233, Telephone: (202) 357–6938.

SUPPLEMENTARY INFORMATION: The National Assessment Governing Board is established under section 412 of the National Education Statistics Act of 1994 (Title IV of the Improving America's Schools Act of 1994), (Pub. L. 103–382).

The Board is established to formulate policy guidelines for the National Assessment of Educational Progress. The Board is responsible for selecting subject areas to be assessed, developing assessment objectives, identifying appropriate achievement goals for each grade and subject tested, and establishing standards and procedures for interstate and national comparisons.

On February 13, 1997, the Executive Committee will meet via teleconference in partially closed session. The Committee will meet in closed session from 1:00–2:00 p.m. to review and discuss the recommendation from the Achievement Levels Committee regarding the proposed achievement levels for the 1996 science assessment. This portion of the meeting must be conducted in closed session because premature disclosure of the information presented for review might significantly frustrate implementation of a proposed agency action. Such matters are protected by exemption 9(B) of Section 552b(c) of Title 5 U.S.C.

A summary of the activities of the meeting and related matters, which are informative to the public, consistent with the policy of 5 U.S.C. 552b, will be available to the public within fourteen days after the meeting.

Beginning at 2:00 p.m. until adjournment, 3:00 p.m., the Committee

will meet in open session to review and approve the agenda for the Governing Board meeting scheduled for March 6–8, 1997.

Records are kept of all Board proceedings and are available for public inspection at the U.S. Department of Education, National Assessment Governing Board, Suite 825, 800 North Capitol Street, N.W., Washington, D.C., from 8:30 a.m. to 5:00 p.m.

Dated: December 30, 1996.

Roy Truby,

Executive Director, National Assessment Governing Board.

[FR Doc. 97–55 Filed 1–2–97; 8:45 am]

BILLING CODE 4000–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER97–512–000]

A'Lones Group, Inc.; Notice of Issuance of Order

December 27, 1996.

A'Lones Group, Inc. [A'Lones Group) submitted for filing a rate schedule under which A'Lones Group will engage in wholesale electric power and energy transactions as a marketer. A'Lones Group also requested waiver of various Commission regulations. In particular, A'Lones Group requested that the Commission grant blanket approval under 18 CFR Part 34 of all future issuances of securities and assumptions of liability by A'Lones Group.

On December 18, 1996, pursuant to delegated authority, the Director, Division of Applications, Office of Electric Power Regulation, granted requests for blanket approval under Part 34, subject to the following:

Within thirty days of the date of the order, any person desiring to be heard or to protest the blanket approval of issuances of securities or assumptions of liability by A'Lones Group 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 and 385.214).

Absent a request for hearing within this period, A'Lones Group is authorized to issue securities and assume obligations or liabilities as a guarantor, endorser, surety, or otherwise in respect of any security of another person; provided that such issuance or assumption is for some lawful object within the corporate purposes of the applicant, and compatible with the public interest, and is reasonably necessary or appropriate for such purposes.

The Commission reserves the right to require a further showing that neither public nor private interests will be adversely affected by continued approval of A'Lones Group's issuances of securities or assumptions of liability.

Notice is hereby given that the deadline for filing motions to intervene or protests, as set forth above, is January 17, 1997. Copies of the full text of the order are available from the Commission's Public Reference Branch, 888 First Street, N.E. Washington, D.C. 20426.

Lois D. Cashell,

Secretary.

[FR Doc. 97–10 Filed 1–2–97; 8:45 am]

BILLING CODE 6717–01–M

[Docket No. ER97–464–000]

AMVEST Coal Sales, Inc.; Notice of Issuance of Order

December 27, 1996.

AMVEST Coal Sales, Inc. (AMVEST) submitted for filing a rate schedule under which AMVEST will engage in wholesale electric power and energy transactions as a marketer. AMVEST also requested waiver of various Commission regulations. In particular, AMVEST requested that the Commission grant blanket approval under 18 CFR Part 34 of all future issuances of securities and assumptions of liability by AMVEST.

On December 16, 1996, pursuant to delegated authority, the Director, Division of Applications, Office of Electric Power Regulation, granted requests for blanket approval under Part 34, subject to the following:

Within thirty days of the date of the order, any person desiring to be heard or to protest the blanket approval of issuances of securities or assumptions of liability by AMVEST 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 and 385.214).

Absent a request for hearing within this period, AMVEST is authorized to issue securities and assume obligations or liabilities as a guarantor, endorser, surety, or otherwise in respect of any security of another person; provided that such issuance or assumption is for some lawful object within the corporate purposes of the applicant, and compatible with the public interest, and is reasonably necessary or appropriate for such purposes.

The Commission reserves the right to require a further showing that neither public nor private interests will be adversely affected by continued approval of AMVEST's issuances of securities or assumptions of liability.

Notice is hereby given that the deadline for filing motions to intervene or protests, as set forth above, is January 15, 1997. Copies of the full text of the order are available from the Commission's Public Reference Branch, 888 First Street, N.E. Washington, D.C. 20426.

Lois D. Cashell,

Secretary.

[FR Doc. 97–9 Filed 1–2–97; 8:45 am]

BILLING CODE 6717–01–M

[Docket No. ER97–122–000]

United Power Technologies, Inc., Notice of Issuance of Order

December 27, 1996.

United Power Technologies, Inc. (United Power) submitted for filing a rate schedule under which United Power will engage in wholesale electric power and energy transactions as a marketer. United Power also requested waiver of various Commission regulations. In particular, United Power requested that the Commission grant blanket approval under 18 CFR Part 34 of all future issuances of securities and assumptions of liability by United Power.

On December 16, 1996, pursuant to delegated authority, the Director, Division of Applications, Office of Electric Power Regulation, granted requests for blanket approval under Part 34, subject to the following:

Within thirty days of the date of the order, any person desiring to be heard or to protest the blanket approval of issuances of securities or assumptions of liability by United Power 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 and 385.214).

Absent a request for hearing within this period, United Power is authorized to issue securities and assume obligations or liabilities as a guarantor, endorser, surety, or otherwise in respect of any security of another person; provided that such issuance or assumption is for some lawful object within the corporate purposes of the

applicant, and compatible with the public interest, and is reasonably necessary or appropriate for such purposes.

The Commission reserves the right to require a further showing that neither public nor private interests will be adversely affected by continued approval of United Power's issuances of securities or assumptions of liability.

Notice is hereby given that the deadline for filing motions to intervene or protests, as set forth above, is January 15, 1997. Copies of the full test of the order are available from the Commission's Public Reference Branch, 888 First Street, N.E. Washington, D.C. 20426.

Lois D. Cashell,

Secretary.

[FR Doc. 97–8 Filed 1–2–97; 8:45 am]

BILLING CODE 6717–01–M

[Docket No. ER97–325–000, et al.]

The Detroit Edison Company, et al.; Electric Rate and Corporate Regulation Filings

December 26, 1996.

Take notice that the following filings have been made with the Commission:

1. The Detroit Edison Company

[Docket No. ER97–325–000]

Take notice that on December 18, 1996, The Detroit Edison Company (Detroit Edison), tendered for filing a revised Wholesale Power Sales Tariff (WPS–1), together with a blacklined copy of the revised tariff, showing the revisions made in this filing. Detroit Edison requests an effective date of November 2,1996, for WPS–1.

Copies of this filing have been served on the Michigan Public Service Commission and on all parties to this proceeding.

Comment date: January 6, 1997, in accordance with Standard Paragraph E at the end of this notice.

2. Portland General Electric Company

[Docket No. ER97–651–000]

Take notice that on December 13, 1996, Portland General Electric Company (PGE) and Southern California Edison Company (Edison), filed an amendment to the Notices of Cancellation of PGE and Edison's Long-Term Power Sale and Exchange Agreement (PGE Rate Schedule FERC No. 57, and Edison Rate Schedule FERC No. 213) and requested expedited action and a waiver of the 60-day prior notice requirement (205 of the FPA and 18 CFR 35.15) to allow the termination to become effective on December 31, 1996.

PGE and Edison's notice of cancellation was subject to the California Public Utilities Commission (California PUC) approving, by December 31, 1996, a ''Termination Agreement Between Portland General Electric and Southern California Edison,'' dated March 28, 1996 (Termination Agreement). On December 9, 1996, the California PUC issued an Interim Opinion approving the Termination Agreement.

Comment date: January 8, 1997, in accordance with Standard Paragraph E at the end of this notice.

3. Duke Power Company

[Docket No. ER97–805–000]

Take notice that on December 16, 1996, Duke Power Company (Duke), tendered for filing a Market Rate Service Agreement between Duke and Associated Electric Cooperative, Inc. Duke requests that the Agreement be made effective as of November 19, 1996.

Comment date: January 8, 1997, in accordance with Standard Paragraph E at the end of this notice.

4. Commonwealth Edison Company

[Docket No. ER97–806–000]

Take notice that on December 16, 1996, Commonwealth Edison Company (ComEd) submitted three Service Agreements, variously dated, establishing American Electric Power Service Corp., (AEP), Northern Indiana Public Service Company (NIPSCO), and Interstate Power Company (ISP), as non-firm customers under the terms of ComEd's Open Access Transmission Tariff (OATT). Also submitted is a Service Agreement, establishing Wisconsin Electric Power Company (WEPCO), as a firm transmission customer under the terms of ComEd's OATT.

ComEd requests an effective date of November 16, 1996 for the service agreements with AEP, NIPSCO, ISP, and November 30, 1996 for the service agreement with WEPCO, and accordingly seeks waiver of the Commission's requirements. Copies of this filing were served upon AEP, NIPSCO, ISP, WEPCO and the Illinois Commerce Commission.

Comment date: January 8, 1997, in accordance with Standard Paragraph E at the end of this notice.

5. Louisville Gas and Electric Company

[Docket No. ER97–807–000]

Take notice that on December 16, 1996, Louisville Gas and Electric Company, tendered for filing copies of a service agreement between Louisville Gas and Electric Company and American Electric Power Service Corporation under Rate GSS.

Comment date: January 8, 1997, in accordance with Standard Paragraph E at the end of this notice.

6. Louisville Gas and Electric Company

[Docket No. ER97–808–000]

Take notice that on December 16, 1996, Louisville Gas and Electric Company, tendered for filing copies of a service agreement between Louisville Gas and Electric Company and Wabash Valley Power Association, Inc. under Rate GSS.

Comment date: January 8, 1997, in accordance with Standard Paragraph E at the end of this notice.

7. Union Electric Company

[Docket No. ER97–809–000]

Take notice that on December 16, 1996, Union Electric Company (UE), tendered for filing a Service Agreement for Non-Firm Point-to-Point Transmission Service dated December 6, 1996 between Illinois Power Company (IP) and UE. UE asserts that the purpose of the Agreement is to permit UE to provide transmission service to IP pursuant to UE's Open Access Transmission Tariff filed in Docket No. OA96-50.

Comment date: January 8, 1997, in accordance with Standard Paragraph E at the end of this notice.

8. Union Electric Company

[Docket No. ER97–810–000]

Take notice that on December 16, 1996, Union Electric Company (UE), tendered for filing a Service Agreement for Non-Firm Point-to-Point Transmission Service dated December 6, 1996 between MidAmerican Energy company (MEC) and UE. UE asserts that the purpose of the Agreement is to permit UE to provide transmission service to MEC pursuant to UE's Open Access Transmission Tariff filed in Docket No. OA96–50.

Comment date: January 8, 1997, in accordance with Standard Paragraph E at the end of this notice.

9. Commonwealth Edison Company

[Docket No. ER97–811–000]

Take notice that on December 16, 1996, Commonwealth Edison Company (ComEd), submitted for filing Service Agreements, establishing Interstate Power Company (ISP), American Electric Power Service Corporation (AEP), and the Village of Winnetka (Winnetka), as customers under the terms of ComEd's Power Sales and Reassignment of Transmission Rights Tariff PSRT–1 (PSRT–1 tariff). ComEd

also filed new Service Agreements with Vitol Gas & Electric LLC (Vitol), Sonat Power Marketing L.P. (Sonat), to reflect a customer name change. The Commission has previously designated the PSRT–1 Tariff as FERC Electric Tariff, First Revised Volume No. 2.

ComEd requests an effective date of January 1, 1997, and accordingly seeks waiver of the Commission's requirements. Copies of this filing were served upon ISP, Vitol, Sonat, AEP, Winnetka, and the Illinois Commerce Commission.

Comment date: January 8, 1997, in accordance with Standard Paragraph E at the end of this notice.

10. Wisconsin Public Service Corporation

[Docket No. ER97–812–000]

Take notice that on December 16, 1996, Wisconsin Public Service Corporation (WPSC), tendered for filing an executed Transmission Service Agreement between WPSC and AIG Trading Corporation. The Agreement provides for transmission service under the Open Access Transmission Service Tariff, FERC Original Volume No. 11.

Comment date: January 8, 1997, in accordance with Standard Paragraph E at the end of this notice.

11. Interstate Power Company

[Docket No. ER97–813–000]

Take notice that on December 16, 1996, Interstate Power Company (IPW), tendered for filing a Transmission Service Agreement between IPW and Wisconsin Electric Power Company. Under the Transmission Service Agreement, IPW will provide non-firm point-to-point transmission service to Wisconsin Electric.

Comment date: January 8, 1997, in accordance with Standard Paragraph E at the end of this notice.

12. Niagara Mohawk Power Corporation

[Docket No. ES97–19–000]

Take notice that on December 16, 1996, Niagara Mohawk Power Corporation (Niagara Mohawk) filed an application, under § 204 of the Federal Power Act, seeking authorization to issue, on or before December 31, 1998, short-term notes and obligations in an aggregate principal amount outstanding at any time not exceeding an amount equal to 10 percent of the aggregate of total consolidated surplus and secured indebtedness of Niagara Mohawk and its wholly-owned subsidiaries and the capital of the Niagara Mohawk plus $50 million. Such short-term secured notes and other obligations will have a final maturity date not more than one year after the date of issuance.

Comment date: January 15, 1997, in accordance with Standard Paragraph E at the end of this notice.

Standard Paragraph

E. 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 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 18 CFR 385.214). All such motions or protests should be filed on or before the comment date. 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.

Lois D. Cashell,

Secretary.

[FR Doc. 97–11 Filed 1–2–97; 8:45 am]

BILLING CODE 6717–01–P

[Project No. 11530–000, Iowa]

Mitchell County Conservation Board; Notice of Availability of Final Environmental Assessment

December 27, 1996.

In accordance with the National Environmental Policy Act of 1969 and the Federal Energy Regulatory Commission's (Commission) regulations, 18 CFR Part 380 (Order No. 486, 52 FR 47897), the Office of Hydropower Licensing has reviewed the application for initial license for the Mitchell Mill Dam Hydroelectric Project, located on the Cedar River, in Mitchell County, Iowa, and has prepared a Final Environmental Assessment (FEA) for the project.

Copies of the FEA are available for review in the Public Reference Branch, Room 2–A, of the Commission's offices at 888 First Street, N.E., Washington, D.C. 20426.

For further information, please contact Nancy Beals at (202) 219–2178.

Lois D. Cashell,

Secretary.

[FR Doc. 97–15 Filed 1–2–97; 8:45 am]

BILLING CODE 6717–01–M

[Project No. 2550–002]

N.E.W. Hydro, Inc.; Notice of Availability of Environmental Assessment

December 27, 1996.

In accordance with the National Environmental Policy Act of 1969 and the Federal Energy Regulatory Commission's (Commission's) Regulations, 18 CFR 380 (Order No. 486, 52 FR 47897), the Office of Hydropower Licensing has reviewed the application for a new license for the Weyauwega Hydroelectric Project, located on the Waupaca River, in the City of Weyauwega, Waupaca County, Wisconsin; and has prepared an Environmental Assessment (EA) for the project. In the EA, the Commission's staff has analyzed the potential environmental impacts of the existing project and has concluded that approval of the project, with appropriate environmental protection measures, would not constitute a major federal action significantly affecting the quality of the human environment.

Copies of the EA are available for review in the Public Reference Branch, Room 2–A, of the Commission's offices at 888 First Street NE., Washington, DC 20426. For further information, please contact Edward R. Meyer at (202) 208–7998.

Lois D. Cashell,

Secretary.

[FR Doc. 97–13 Filed 1–2–97; 8:45 am]

BILLING CODE 6717–01–M

[Project No. 11132–000]

Ridgewood Maine Hydro Partners, L.P.; Notice of Availability of Final Environmental Assessment

December 27, 1996.

In accordance with the National Environmental Policy Act of 1969 and the Federal Energy Regulatory Commission's (Commission's) regulations, 18 CFR Part 380 (Order No. 486, 52 F.R. 47897), the Office of Hydropower Licensing has reviewed the application for an original license for the existing unlicensed Eustis Hydroelectric Project, located in Franklin County, Maine, and has prepared a Final Environmental Assessment (FEA) for the project. In the FEA, the Commission's staff has analyzed the potential environmental impacts of the existing project and has concluded that approval of the project, with appropriate environmental protection measures, would not constitute a major federal action

significantly affecting the quality of the human environment.

Copies of the FEA are available for review in the Public Reference Branch, Room 2–A, of the Commission's offices at 888 First Street, N.E., Washington, D.C. 20426.

Lois D. Cashell,

Secretary.

[FR Doc. 97–14 Filed 1–2–97; 8:45 am]

BILLING CODE 6717–01–M

[Project No. 2131–008]

Wisconsin Electric Power Company; Notice of Availability of Environmental Assessment

December 27, 1996.

An environmental assessment (EA) is available for public review. The EA analyzes the environmental impacts of an application by Wisconsin Electric Power Company (licensee) to grant an easement to the Wisconsin Department of Natural Resources (WDNR) for about 1,366 acres of land in the Kingsford Hydroelectric Project boundary. The WDNR wants to include these lands in its new Spread Eagle Barrens State Natural Area (State Natural Area). The State Natural Area is being created by the WDNR to preserve, restore, and manage rare pine barrens/bracken grasslands in the vicinity of the Kingsford Hydroelectric Project. Approving the application to grant the easement would not constitute a major federal action significantly affecting the quality of the human environment. The Kingsford Hydroelectric Project is located on the Menominee River in Florence County, Wisconsin and Dickinson County, Michigan.

The EA was written by staff in the Office of Hydropower Licensing, Federal Energy Regulatory Commission. Copies of the EA can be obtained by calling the Commission's Public Reference Room at (202) 208–1371.

Lois D. Cashell,

Secretary.

[FR Doc. 97–12 Filed 1–2–97; 8:45 am]

BILLING CODE 6717–01–M

ENVIRONMENTAL PROTECTION AGENCY

[ER–FRL–5476–3]

Environmental Impact Statements; Notice of Availability

Responsible Agency: Office of Federal Activities, General Information (202) 564–7167 OR (202) 564–7153.

Weekly receipt of Environmental Impact Statements Filed December 23, 1996 Through December 27, 1996 Pursuant to 40 CFR 1506.9.

EIS No. 960596, Draft EIS, NPS, AS, National Park of American Samoa, Implementation, General Management Plan, Islands of Tutulla, Ta'u and Ofu, Territory of American Samoa, Due: February 18, 1997, Contact: Alan Schmierer (415) 744–3971.

EIS No. 960597, Draft EIS, BLM, CA, U.S. Army's Land Acquisition Project for National Training Center, Fort Irwin, San Bernardino County, CA, Due: April 04, 1997, Contact: Mike DeKeyrel (619) 255–8730.

EIS No. 960598, Final EIS, BLM, NV, Ruby Hill Gold Mining Operations Project, Implementation, Battle Mountain District, Plan of Operations and COE Section 404 Permit, Eureka County, NV, Due: February 03, 1997, Contact: Christopher Stubbs (702) 635–4000.

EIS No. 960599, Draft Supplement, COE, NJ, Green Brook Sub-Basin Flood Control Plan, Updated Information concerning a Revised Recommended Plan and Mitigation Plan, Implementation, Middlesex, Union and Somerset Counties, NJ, Due: February 18, 1997, Contact: William Richardson (212) 264–1275.

EIS No. 960600, Final EIS, AFS, AK, South Lindenberg Timber Sale(s), Timber Harvesting, Tongass National Forest, Stikine Area, Kupreanof Island, AK, Due: February 03, 1997, Contact: Jim Thompson (907) 772–3871.

EIS No. 960601, Draft EIS, DOI, UT, Upalco Unit/Uinta Basin Replacement Project, Water Supply Management, Approvals and Permits Issuance, Duchesne and Uintah Counties, UT, Due: March 04, 1997, Contact: Terry Holzworth (801) 226–7100. The US Department of the Interior and the Central Utah Water Conservancy District are Joint Lead Agencies on the above project.

EIS No. 960602, Draft EIS, FRC, ND, SD, MN, MT, IA, IL, Northern Border Project, Natural Gas Transportation, Pipeline and Facilities Expansion and Construction, Permits and Right-of-Way Grant Issuance, ND, SD, MN, MT, IA and IL, Due: February 18, 1997, Contact: Laura Turner (202) 208–0916.

Dated: December 30, 1996.

B. Katherine Biggs,

Director, NEPA Compliance Division, Office of Federal Activities.

[FR Doc. 97–65 Filed 1–2–97; 8:45 am]

BILLING CODE 6560–50–U

Environmental Protection Agency

[OPPTS–00204; FRL–5579–6]

Notice of Availability of Pollution Prevention Grants and Announcement of Financial Assistance Programs Eligible for Review

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of Availability of Pollution Prevention Grants.

SUMMARY: EPA is announcing the availability of approximately $5 million in fiscal year 1997 grant/cooperative agreement funds under the Pollution Prevention Incentives for States (PPIS) grant program. The grant dollars are targeted at State and Tribal programs that address the reduction or elimination of pollution across all environmental media: air, land, and water. Grants/cooperative agreements will be awarded under the authority of the Pollution Prevention Act of 1990.

FOR FURTHER INFORMATION CONTACT: Your EPA Regional Pollution Prevention Coordinator. Contact names for each Regional Office are listed under Unit VI. of this preamble.

SUPPLEMENTARY INFORMATION:

I. Background

Approximately $30 million has been awarded to more than 100 State, Tribal, and regional organizations under EPA's multimedia pollution prevention grant program, since its inception in 1989.

In November 1990, the Pollution Prevention Act of 1990 (the Act) (Pub. L. 101-508) was enacted, establishing as national policy that pollution should be prevented or reduced at the source whenever feasible. Section 6603 of the Act defines source reduction as any practice that:

(1) Reduces the amount of any hazardous substance, pollutant, or contaminant entering any waste stream or otherwise released into the environment (including fugitive emissions) prior to recycling, treatment, or disposal.

(2) Reduces the hazards to public health and the environment associated with the release of such substances, pollutants, or contaminants.

EPA further defines pollution prevention as the use of other practices that reduce or eliminate the creation of pollutants through increased efficiency in the use of raw materials, energy, water, or other resources, or protection of natural resources, or protection of natural resources by conservation.

Section 6605 of the Act authorizes EPA to make matching grants to States

to promote the use of source reduction techniques by businesses. In evaluating grant applications, the Act directs EPA to consider whether the proposed State program will:

(1) Make technical assistance available to businesses seeking information about source reduction opportunities, including funding for experts to provide onsite technical advice and to assist in the development of source reduction plans.

(2) Target assistance to businesses for which lack of information is an impediment to source reduction.

(3) Provide training in source reduction techniques.

In addition to this grant making authority, the Act authorized EPA to establish a national source reduction clearinghouse and expanded EPA's authorities to collect data to better track source reduction activities. The Act also requires EPA to report periodically to Congress on EPA progress in implementing the Act.

In June 1996, EPA published the *Pollution Prevention Incentives for States Assessment Study*. The study documents the full range of activities funded by the PPIS grant program during its first 5 years. It represents an accounting of how grantees used EPA funds to stimulate and enhance pollution prevention awareness and initiatives throughout the country. For a copy of the report, including the Executive Summary, contact the Pollution Prevention Information Clearinghouse at 202-260-1023.

II. Availability of FY 97 Funds

With this publication, EPA is announcing the availability of approximately $5 million in grant/cooperative agreement funds for FY 1997. The Agency has delegated grant making authority to the EPA Regional offices. Regional offices are responsible for the solicitation of interest, the screening of proposals, and the actual selection of awards. PPIS grant guidance will be provided to all applicants along with any supplementary information the Regions may wish to provide.

All applicants must address the national program criteria listed under Unit V.2. of this document. In addition, applicants may be required to meet any supplemental Regional criteria. Interested applicants should contact their Regional Pollution Prevention Coordinator for more information.

III. Catalogue of Federal Domestic Assistance

The number assigned to the PPIS program in the Catalogue of Federal Domestic Assistance is 66.708 (formerly 66.900).

IV. Matching Requirements

Organizations receiving pollution prevention grant funds are required to match Federal funds by at least 50 percent. For example, the Federal government will provide half of the total allowable cost of the project, and the State will provide the other half. A grant request for $100,000 would support a total allowable project cost of $200,000, with the State also providing $100,000. State contributions may include dollars, in-kind goods and services, and/or third party contributions.

V. Eligibility

1. *Applicants*. In accordance with the Act, eligible applicants for purposes of funding under this grant program include the 50 States, the District of Columbia, the U.S. Virgin Islands, the Commonwealth of Puerto Rico, any territory or possession of the United States, any agency or instrumentality of a State including State universities, and all Federally recognized Native American tribes. For convenience, the term ''State'' in this notice refers to all eligible applicants. Local governments, private universities, private nonprofit entities, private businesses, and individuals are not eligible. The organizations excluded from applying directly are encouraged to work with eligible applicants in developing proposals that include them as participants in the projects. EPA strongly encourages this type of cooperative arrangement.

2. *Activities and criteria*.--(i) *General*. The purpose of the PPIS grant program is to support the establishment and expansion of State, Regional, Tribal, or local multimedia pollution prevention programs. EPA specifically seeks to build State pollution prevention capabilities or to test, at the State level, innovative pollution prevention approaches and methodologies. Funds awarded under the PPIS grant program must be used to support pollution prevention programs that address the transfer of potentially harmful pollutants across all environmental media: air, water, and land. Programs should reflect comprehensive and coordinated pollution prevention planning and implementation efforts State- or Region-wide. State programs might focus on, for example:

a. Developing multimedia pollution prevention activities, including but not limited to: providing direct technical assistance to businesses; collecting and analyzing data to target outreach and technical assistance opportunities; conducting outreach activities; developing measures to determine progress in pollution prevention; and identifying regulatory and nonregulatory barriers and incentives to pollution prevention and developing plans to implement solutions, where possible.

b. Institutionalizing multimedia pollution prevention as an environmental management priority, establishing prevention goals, developing strategies to meet those goals, and integrating the pollution prevention ethic within both governmental and nongovernmental institutions of the State or region.

c. Initiating demonstration projects that test and support innovative pollution prevention approaches and methodologies including measuring progress.

(ii) *1997 National Criteria*. There is a growing emergence of business assistance organizations established within States to address the vast array of environmental concerns. Consequently, as a means to provide substantive support of pollution prevention, EPA is eager to ensure that the PPIS grants will add to the success and sustainability of State environmental assistance providers and will encourage a cooperative network of coordinated environmental assistance providers. EPA also believes it is important for these assistance organizations to complement the goals and strategies of the State Environmental Performance Agreement (EnPA), Performance Partnership Agreements (PPAs), and Performance Partnership Grants (PPGs) under the National Environmental Performance Partnership System (NEPPS).

EPA through the PPIS grant funds is striving to support the development of a coordinated network of State environmental service providers that seek to leverage the expertise of the various environmental assistance organizations and show an ability to work jointly in an effort to promote pollution prevention in conjunction with the overall environmental performance goals identified by the States through the EnPAs. The application must demonstrate how activities will advance State environmental goals. Applicants must describe how pollution prevention activities will complement (where present) State EnPAs, PPAs, and PPGs developed under NEPPS. EPA encourages all applicants to develop initiatives in priority industry sectors and geographic areas identified by the states.

For applicants from States that are currently not participating in the development of EnPAs, in order to be eligible for PPIS grant funds, the applicant must still clearly identify a partnership with one or more business or environmental assistance provider in the State.

In addition, in 1995 and 1996 the National Institute for Standards and Technology (NIST) funded 27 State environmental planning networks. The purpose of the planning effort is to coordinate activities among NIST Manufacturing Extension Partnerships, pollution prevention programs, compliance centers, and other environmental service delivery organizations in the State. PPIS applications from States that have received funding from NIST for environmental services planning must address how the grant will relate to the NIST-funded environmental planning efforts.

PPIS applications from States that have not been awarded a NIST environmental services planning grant are not required to address this criterion.

Based on the above, EPA has developed the following criteria that must be addressed by all eligible applicants. Proposals that do not address these criteria will not be considered eligible for funding. In the narrative of the grant application, the following three requirements must be addressed:

(1) Identify who the partnering organization(s) is/are and demonstrate or document the relationship. This can be done, for example, through a letter of agreement, a joint statement, or principles of agreement signed by both parties.

(2) Describe how the activities in the grant will support the State's EnPA under NEPPS, where present.

(3) Address how the grant will relate to the NIST-funded environmental coordination planning efforts. (This criterion only applies to those States that have a NIST-funded grant.)

Applicants should consult the PPIS program guidance for more detailed information on the 1997 goals and criteria. Proposals accepted for review under this program must qualify as pollution prevention as defined by EPA.

3. *Program management.* Awards for FY 1997 funds will be managed through the EPA Regional Offices.

4. *Contacts.* Interested applicants are requested to contact the appropriate EPA Regional Pollution Prevention Coordinator listed under Unit VI. of this document to obtain specific instructions and guidance for submitting proposals.

VI. Regional Pollution Prevention Contacts

Abby Swaine, US EPA Region 1 (SPN), JFK Federal Bldg, Room 2203 Boston, MA 02203, (617) 565-4523 (CT, MA, ME, NH, RI, VT)

Janet Sapadin, US EPA Region 2 (2-OPM-PPI), 290 Broadway, 25th Floor New York, NY 10007, (212) 637-3584 (NJ, NY, PR, VI)

Cathy Libertz, US EPA Region 3 (3ES43), 841 Chestnut Bldg. Philadelphia PA 19107, (215) 566-2737 (DC, DE, MD, PA, VA, WV)

Connie Roberts, US EPA Region 4, Atlanta Federal Center 100 Alabama St. SW Atlanta, GA 30365, (404) 562-9084 (AL, FL, GA, KY, MS, NC, SC, TN)

Phil Kaplan, US EPA Region 5 (DRP-8J), 77 West Jackson Blvd., Chicago, IL 60604-3590, (312) 353-4669 (IL, IN, MI, MN, OH, WI)

Linda Thompson, US EPA Region 6 (6EN-XP), 1445 Ross Ave., 12th Floor, Suite 1200 Dallas, TX 75202, (214) 665-6568 (AR, LA, NM, OK, TX)

Steve Wurtz, US EPA Region 7, 726 Minnesota Ave. Kansas City, KS 66101, (913) 551-7315 (IA, KS, MO, NE)

Linda Walters, US EPA Region 8 (8P2-P2), 999 18th St., Suite 500 Denver, CO 80202-2466 (303) 312-6385 (CO, MT, ND, SD, UT, WY)

Eileen Sheehan, US EPA Region 9 (H-1-B), 75 Hawthorne Ave. San Francisoco, CA 94105, (415) 744-2190 (AS, AZ, CA, CNMI, GU, HI, NV, RP)

Carolyn Gangmark, US EPA Region 10, 1200 Sixth Ave. Seattle, WA 98101, (206) 553-4072 (AK, ID, OR, WA)

Dated: December 20, 1996.

William H. Sanders,

Director, Office of Pollution Prevention and Toxics.

[FR Doc. 97–58 Filed 1–2–97; 8:45 am]

BILLING CODE 6560–50–F

FEDERAL MARITIME COMMISSION

Ocean Freight Forwarder License; Revocations

The Federal Maritime Commission hereby gives notice that the following fright forwarder licenses have been revoked pursuant to section 19 of the Shipping Act of 1984 (46 U.S.C. app. 1718) and the regulations of the Commission pertaining to the licensing of ocean freight forwarders, effective on the corresponding revocation dates shown below:

License Number: 3400.

Name: European & General Shipping, Inc.

Address: 8300 N.W. 53rd Street, Suite 308, Miami, FL 33166.

Date Revoked: December 2, 1996.

Reason: Failed to maintain a valid surety bond.

License Number: 309.

Name: Frederick Richards, Inc.

Address: 321 East Bay Street, Charleston, SC 29402.

Date Revoked: November 27, 1996.

Reason: Surrendered license voluntarily.

Bryant L. VanBrakle,

Director, Bureau of Tariffs, Certification and Licensing.

[FR Doc. 97–53 Filed 1–2–97; 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 January 16, 1997.

A. Federal Reserve Bank of San Francisco (Kenneth R. Binning, Director, Bank Holding Company) 101 Market Street, San Francisco, California 94105:

1. Robert M. and Jeannine N. Daugherty, Park City, Utah, and W. James Tozer, Jr., New York, New York, to each acquire a total of 1.87 percent; Pei-Yuan Chia, Bedford, New York, David and Constance Clapp, New York, New York, Solitude Partners, L.P., Solitude, Utah, Thomas S. Johnson, New York, New York, 333 Corporation, New York, New York, Robert and Gayle Larsen, Park City, Utah, Joseph Mahoney, Park City, Utah, John B. Prince, Salt Lake City, Utah, John M. Robertson, Salt Lake City, Utah, Michelle E. Proctor, Salt Lake City, Utah, Garth Blake Robinson, Centerville,

Utah, William N. Shiebler, Boston, Massachusetts, Richard B. Tucker, Denver, Colorado, Robert E. Wood II, Chicago, Illinois, to each acquire a total of 3.27 percent; Peter and Barbara Georgescu, New York, New York, Benefex Corporation, Watermill, New York, Steven Lazarus, Glencoe, Illinois, and James and Frances Wood, Mt. Kisco, New York, to each acquire a total of 1.63 percent, of the voting shares of Draper Bancorp, Draper, Utah, and thereby indirectly acquire Draper Bank and Trust, Draper, Utah.

Board of Governors of the Federal Reserve System, December 27, 1996.

Jennifer J. Johnson,

Deputy Secretary of the Board.

[FR Doc. 97–24 Filed 1-2-97; 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 January 27, 1997.

A. Federal Reserve Bank of Chicago (James A. Bluemle, Vice President) 230 South LaSalle Street, Chicago, Illinois 60690:

1. County Bancorp, Inc., Manitowoc, Wisconsin; to become a bank holding company by acquiring 100 percent of the voting shares of Investors Community Bank, Manitowoc, Wisconsin (in organization).

Board of Governors of the Federal Reserve System, December 27, 1996.

Jennifer J. Johnson,

Deputy Secretary of the Board.

[FR Doc. 96–23 Filed 1-2-97; 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 January 28, 1997.

A. Federal Reserve Bank of Atlanta (Zane R. Kelley, Vice President) 104 Marietta Street, N.W., Atlanta, Georgia 30303:

1. Southern Security Financial Corporation, Hollywood, Florida; to become a bank holding company by acquiring 100 percent of the voting shares of Southern Security Bank Corporation, Hollywood, Florida, and thereby indirectly acquire Southern Security Bank, Hollywood, Florida.

Board of Governors of the Federal Reserve System, December 30, 1996.

Jennifer J. Johnson,

Deputy Secretary of the Board.

[FR Doc. 97–75 Filed 1-2-97; 8:45 am]

BILLING CODE 6210-01-F

Sunshine Act Meeting

AGENCY HOLDING THE MEETING: Board of Governors of the Federal Reserve System.

TIME AND DATE: 10:00 a.m., Wednesday, January 8, 1997.

PLACE: Marriner S. Eccles Federal Reserve Board Building, C Street entrance between 20th and 21st Streets, N.W., Washington, D.C. 20551.

STATUS: Open.

MATTERS TO BE CONSIDERED:

1. Publication for comment of proposed amendments to the prudential limitations (firewalls) imposed on the operations of section 20 subsidiaries of bank holding companies.

2. Any items carried forward from a previously announced meeting.

Note: This meeting will be recorded for the benefit of those unable to attend. Cassettes will be available for listening in the Board's Freedom of Information Office, and copies may be ordered for $5 per cassette by calling (202) 452–3684 or by writing to: Freedom of Information Office, Board of Governors of the Federal Reserve System, Washington, D.C. 20551.

CONTACT PERSON FOR MORE INFORMATION: Mr. Joseph R. Coyne, Assistant to the Board; (202) 452–3204.

Dated: December 31, 1996.

Jennifer J. Johnson,

Deputy Secretary of the Board.

[FR Doc. 96–33400 Filed 12–31–96; 2:34 pm]

BILLING CODE 6210-01-P

Sunshine Act Meeting

AGENCY HOLDING THE MEETING: Board of Governors of the Federal Reserve System.

TIME AND DATE: Approximately 10:45 a.m., Wednesday, January 8, 1997, following a recess at the conclusion of the open meeting.

PLACE: Marriner S. Eccles Federal Reserve Board Building, C Street entrance between 20th and 21st Streets, N.W., Washington, D.C. 20551.

STATUS: Closed.

MATTERS TO BE CONSIDERED:

1. Personnel actions (appointments, promotions, assignments, reassignments, and salary actions) involving individual Federal Reserve System employees.
2. Any items carried forward from a previously announced meeting.

CONTACT PERSON FOR MORE INFORMATION: Mr. Joseph R. Coyne, Assistant to the Board; (202) 452–3204. You may call (202) 452–3207, beginning at approximately 5 p.m. two business days before this meeting, for a recorded announcement of bank and bank holding company applications scheduled for the meeting.

Dated: December 31, 1996.

Jennifer J. Johnson,

Deputy Secretary of the Board.

[FR Doc. 96–33401 Filed 12–31–96; 2:34 pm]

BILLING CODE 6210–01–P

FEDERAL RETIREMENT THRIFT INVESTMENT BOARD

Sunshine Act Meeting

TIME AND DATE: 10:00 a.m. (EST) January 13, 1997.

PLACE: 4th Floor, Conference Room 4506, 1250 H Street, N.W., Washington, D.C.

STATUS: Open.

MATTERS TO BE CONSIDERED:

1. Approval of the minutes of the December 16, 1996, Board member meeting.
2. Thrift Savings Plan activity report by the Executive Director.

CONTACT PERSON FOR MORE INFORMATION: Thomas J. Trabucco, Director, Office of External Affairs, (202) 942–1640.

Dated: December 31, 1996.

Roger W. Mehle,

Executive Director, Federal Retirement Thrift Investment Board.

[FR Doc. 96–33404 Filed 12–31–96; 2:34 pm]

BILLING CODE 6760–01–M

FEDERAL TRADE COMMISSION

[File No. 971–0002]

Baxter International Inc.; Analysis to Aid Public Comment

AGENCY: Federal Trade Commission.

ACTION: Proposed consent agreement.

SUMMARY: In settlement of alleged violations of federal law prohibiting unfair or deceptive acts or practices and unfair methods of competition, this consent agreement, accepted subject to final Commission approval, would require, among other things, Baxter International (''Baxter''), an Illinois-based corporation, to divest its Autoplex product to a Commission-approved buyer, and to license Immuno International AG's (''Immuno'') product in development to a Commission-approved licensee within four months of the date Baxter signs the consent. This would resolve antitrust concerns raised by the proposed $463 million acquisition of Immuno by Baxter, which both manufacture a wide variety of biologic products derived from human blood plasma.

DATES: Comments must be received on or before March 4, 1997.

ADDRESSES: Comments should be directed to: FTC/Office of the Secretary, Room 159, 6th St. and Pa. Ave., N.W., Washington, D.C. 20580.

FOR FURTHER INFORMATION CONTACT: William Baer or George Cary, FTC/H–374, Washington, D.C. 20580. (202) 326–2932 or 326–3741.

SUPPLEMENTARY INFORMATION: Pursuant to Section 6(f) of the Federal Trade Commission Act, 38 Stat. 721, 15 U.S.C. 46 and Section 2.34 of the Commission's Rules of Practice (16 CFR 2.34), notice is hereby given that the above-captioned consent agreement containing a consent order to cease and desist, having been filed with and accepted, subject to final approval, by the Commission, has been placed on the public record for a period of sixty (60) days. The following Analysis to Aid Public Comment describes the terms of the consent agreement, and the allegations in the complaint. An electronic copy of the full text of the consent agreement package can be obtained from the FTC Home page, on the World Wide Web, at ''http://www.ftc.gov/os/actions/htm.'' A paper copy can be obtained from the FTC Public Reference Room, Room H–130, Sixth Street and Pennsylvania Avenue, N.W., Washington, D.C. 20580, either in person or by calling (202) 326–3627. Public comment is invited. Such comments or views will be considered by the Commission and will be available for inspection and copying at its principal office in accordance with Section 4.9(b)(6)(ii) of the Commission's Rules of Practice (16 CFR 4.9(b)(6)(ii)).

Analysis of Proposed Consent Order to Aid Public Comment

The Federal Trade Commission (''Commission'') has accepted, subject to final approval, an agreement containing a proposed Consent Order (''Order'') from Baxter International Inc. (''Baxter''), which remedies the anticompetitive effects of Baxter's acquisition of Immuno International AG (''Immuno''). The proposed order requires Baxter to divest assets and undertake certain actions to restore competition in the market for treatments of Factor VIII inhibitors in hemophiliacs, and to license assets and undertake certain actions to restore competition in the market for fibrin sealant. In addition, Baxter has signed an Interim Agreement providing that the terms of the Consent Agreement will become effective immediately.

The proposed Consent Agreement has been placed on the public record for sixty (60) days for reception of comments by interested persons. Comments received during this period will become part of the public record. After sixty (60) days, the Commission will review the agreement and the comments received and will decide whether it should withdraw from the agreement or make final the agreement's proposed Order.

Pursuant to a Stock Purchase Agreement signed August 28, 1996, Baxter agreed to purchase a majority of the outstanding shares of Immuno, in a transaction valued at approximately $715 million. The proposed Complaint alleges that the acquisition violates Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. § 45, in the market for the research,

development, manufacture and sale of products for the treatment of Factor VIII inhibitors in the United States; and in the market for the research, development, manufacture and sale of fibrin sealant in the United States.

The proposed Order would remedy the alleged violations. In the market for the research, development, manufacture and sale of treatments for Factor VIII inhibitors in the United States, the proposed Order requires Baxter to divest its Autoplex product to a Commission approved buyer within four months. Baxter's Autoplex and Immuno's FEIBA are the only FDA-approved activated prothrombin complex concentrates for the treatment of patients with hemophilia A who have developed an immune system response to their therapy, known as ''inhibitors''. Autoplex and FEIBA act to overcome these patients' inhibitors so that they can be treated effectively. The acquisition would eliminate the substantial competition between Autoplex and FEIBA. The proposed Consent Agreement would remedy the loss of competition by requiring Baxter to divest Autoplex to a Commission-approved buyer within four months of the date Baxter signed the Consent Agreement.

In Europe and Japan, fibrin sealants are used to control bleeding and promote wound healing in a wide variety of surgical procedures, and to treat burn and trauma victims. Baxter and Immuno are two of only a few companies developing fibrin sealant for sale in the United States, and are likely to be two of the first companies to receive FDA approval to do so. The United States market for an FDA-approved fibrin sealants could be as large as $400 million per year. The acquisition would eliminate the significant on-going competition between Baxter and Immuno in the research and development, as well as future competition in the manufacture and sale, of fibrin sealant in the United States. The proposed Order remedies this loss of competition by requiring Baxter to license Immuno's product in development to a Commission-approved licensee within four months of the date Baxter signed the Consent Agreement.

The Order also requires Baxter to provide to the Commission a report of compliance with the divestiture and licensing provisions of the Order within sixty (60) days following the date the Order becomes final, and every ninety (90) days thereafter until Baxter has completed the divestiture and licensing. The Order also requires Baxter to notify the Commission at least thirty (30) days prior to any change in the structure of Baxter resulting in the emergence of a successor.

The purpose of this analysis is to facilitate public comment on the proposed Order, and it is not intended to constitute an official interpretation of the agreement and proposed Order or to modify in any way their terms.

Benjamin I. Berman,

Acting Secretary.

[FR Doc. 97–4 Filed 1–2–97; 8:45 am]

BILLING CODE 6750–01–P

[File No. 961–0055]

Ciba-Geigy Limited, et al.; Analysis to Aid Public Comment

AGENCY: Federal Trade Commission.

ACTION: Proposed Consent Agreement.

SUMMARY: In settlement of alleged violations of federal law prohibiting unfair or deceptive acts or practices and unfair methods of competition, this consent agreement, accepted subject to final Commission approval, would permit, among other things, the $63 billion merger of Ciba-Geigy Limited and Sandoz Ltd., two leading commercial developers of gene therapy products, so long as the companies carry out the divestiture, licensing and certain other requirements. If the divestiture is not completed on time, the consent agreement would permit the Commission to appoint a trustee to complete the transaction.

DATES: Comments must be received on or before March 4, 1997.

ADDRESSES: Comments should be directed to: FTC/Office of the Secretary, Room 159, 6th St. and Pa. Ave., N.W., Washington, D.C. 20580.

FOR FURTHER INFORMATION CONTACT: William Baer or George Cary, FTC/H–374, Washington, D.C. 20580. (202) 326–2932 or 326–3741.

SUPPLEMENTARY INFORMATION: Pursuant to Section 6(f) of the Federal Trade Commission Act, 38 Stat. 721, 15 U.S.C. 46 and Section 2.34 of the Commission's Rules of Practice (16 CFR 2.34), notice is hereby given that the above-captioned consent agreement containing a consent order to cease and desist, having been filed with and accepted, subject to final approval, by the Commission, has been placed on the public record for a period of sixty (60) days. The following Analysis to Aid Public Comment describes the terms of the consent agreement, and the allegations in the complaint. An electronic copy of the full text of the consent agreement package can be obtained from the FTC Home page, on the World Wide Web, at ''http://www.ftc.gov/os/actions/htm.'' A paper copy can be obtained from the FTC Public Reference Room, Room H–130, Sixth Street and Pennsylvania Avenue, N.W., Washington, D.C. 20580, either in person or by calling (202) 326–3627. Public comment is invited. Such comments or views will be considered by the Commission and will be available for inspection and copying at its principal office in accordance with Section 4.9(b)(6)(ii) of the Commission's Rules of Practice (16 CFR 4.9(b)(6)(ii)).

Analysis of Proposed Consent Order To Aid Public Comment

The Federal Trade Commission (''Commission'') has accepted, subject to final approval, an agreement containing a proposed Consent Order (''Order'') to resolve anticompetitive concerns raised by the proposed merger of Ciba-Geigy Limited (''Ciba'') and Sandoz Ltd. (''Sandoz'') into a new entity, Novartis AG (''Novartis''). The agreement is between the Commission and Ciba, Sandoz, and Chiron Corporation (''Chiron''). Ciba, which owned 46.5% of Chiron's voting stock as of September 30, 1996, participates in the field of gene therapy through Chiron. Under the proposed Order, the companies have agreed to license certain Sandoz and Chiron gene therapy technologies, to divest Sandoz' corn herbicide business, and to divest Sandoz' United States and Canadian flea control business. In addition, the parties have entered into an Agreement to Hold Separate Sandoz's agricultural chemicals business, including herbicides and other pesticides, and Sandoz's flea control business until the required divestitures have been accomplished.

The proposed Order has been placed on the public record for sixty (60) days for reception of comments by interested persons. Comments received during this period will become part of the public record. After sixty (60) days, the Commission will review the agreement and the comments received and will decide whether it should withdraw from the government or make final the agreement's proposed Order.

On March 6, 1996, Ciba and Sandoz signed a merger agreement providing that both companies will merge to form Novartis AG (''Novartis''). The total value of the stock involved in the transaction is in excess of $63 billion. The merged entity, Novartis, will control worldwide assets valued at approximately $80 billion.

The proposed complaint alleges that the merger violates Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. § 45, by lessening competition or tending to create a

monopoly in markets involving three general areas: (1) gene therapy research and development; (2) corn herbicides; and (3) flea control products. According to the complaint, the merger will increase the level of concentration and increase barriers to entry in each of the relevant markets and eliminate Ciba and Sandoz as substantial, independent competitors both for currently marketed products as well as products that are under development.

According to the proposed complaint, entry into the relevant markets would not be timely, likely, or sufficient in its magnitude, character, and scope to deter or counteract anticompetitive effects of the merger. Regulations by the Food and Drug Administration (''FDA'') covering gene therapy products and systemic flea control products, and by the Environmental Protection Agency (''EPA'') covering corn herbicides and externally applied flea control products, create long lead times for the introduction of new products. Additionally, patents and other intellectual property create large and potentially insurmountable barriers to entry.

Gene Therapy Research and Development

The proposed complaint alleges that therapy technology and the research and development of gene therapies constitute relevant markets in which to analyze the effects of the proposed merger. The proposed complaint also alleges that there are four specific gene therapy closet to market use retroviral vectors, the delivery vehicle for genes, to place an HSV-tk gene into the cancerous cells and are anticipated to have sales exceeding $600 million by 2002. HSV-tk gene therapy is also expected to be used to treat graft versus host disease, an acute, chronic and sometimes fatal complication occurring in a significant percentage of all bone marrow transplantations. Gene therapy treatments for hemophilia A are likely to be used prophylactically for many sufferers; in cases of trauma, gene therapy products would likely be used in combination with recombinant and purified Factor VIII proteins. Cancer patients could benefit significantly from gene therapy for chemoresistance by providing protection to patients' blood systems and allowing higher, more effective doses of cancer chemotherapy to be administered. If chemoresistance gene therapy research is successful, sales are projected to exceed $1 billion by 2004.

The complaint alleges that each of the gene therapy markets is highly concentrated and that Ciba/Chiron and Sandoz are two of only a few entities capable of commercially developing a broad range of gene therapy products. Ciba/Chiron and Sandoz control crucial inputs into the development of gene therapy products and the merger creates an unmatchable portfolio of intellectual property assets that are necessary to commercialize gene therapy products. In addition, they both posses the technological, manufacturing, clinical, and regulatory expertise and manufacturing capability to commercially develop gene therapy products. A substantial number of other companies are able to conduct gene therapy research. Without licenses to crucial intellectual property held by Ciba/Chiron and Sandoz, however, these other researchers would not be likely to continue development. The critical intellectual property rights for gene therapy held by Ciba/Chiron and Sandoz include a broad patent covering all ex vivo approaches product markets. These are the markets for the research, development, manufacture and sale of: (1) herpes simplex virus-thymidine kinase (''HSV-tk'') gene therapy for the treatment of cancer; (2) HSV-tk gene therapy for the treatment of graft versus host disease; (3) gene therapy for the treatment of hemophilia A; and (4) chemoresistance gene therapy. Sandoz and Ciba/Chiron are two of only a very small number of entities capable of commercially developing gene therapy products. They posses the intellectual property, the technological, manufacturing, clinical, and regulatory expertise, and the manufacturing assets to commercially develop gene therapy products.

Gene therapy involves treating diseases or medical conditions by modifying genes and then inserting the modified genes into a patient's cells. Patients' genes may be altered using one of two broad approaches: ex vivo, outside the body, for subsequent administration into the patient; or in vivo, inside the body, by gene therapy products that are given directly to the patients. Gene therapy research today targets fatal or disabling diseases such as cancer for which there are no current effective treatments and for which no drugs are in advanced development.

While no gene therapy product has yet been approved by the FDA for commercial sale, gene therapy treatments now in clinical trials offer patients the prospect of significant medical improvements or cures for diseases, particularly in oncology, transplantation and central nervous system diseases. Gene therapy may be useful in treating a wide array of diseases and conditions. Sales of all gene therapy products are projected to reach up to $45 billion by 2010.

The first regulatory approvals for commercial sales of gene therapy products, expected by the year 2000, will most likely be in the area of cancer treatment of brain tumors. Gene therapy offers brain cancer patients their first hope of a real cure. The brain cancer gene therapy products used in gene therapy and the use of cytokines, a protein necessary for many ex vivo gene therapy applications that is used to increase the number of cells taken from a patient. The parties also have vital intellectual property rights in retroviral vectors, the only delivery vehicle for gene therapy that has been proven safe and relatively effective.

The complaint alleges that only two companies, Ciba/Chiron and Sandoz, are capable of commercially developing HSV-tk gene therapy products with retroviral vectors and are either in clinical development or near clinical development to treat cancer and to treat graft versus host disease. Similarly, these two companies are the most advanced of all companies capable of commercially developing viral vectors using the Factor VIII gene for the treatment of hemophilia A and using the MDR–1 gene and the MRP gene for the treatment of chemoresistance. In each instance, Ciba/Chiron and Sandoz are either in clinical development or near clinical development for the treatment of these diseases, are the leading commercial developers of these gene therapy technologies and control critical proprietary intellectual property portfolios, including patents, patent applications, and know-how. For example, with respect to the HSV-tk gene therapy products, both Ciba/Chiron and Sandoz control intellectual property portfolios sufficient to make it likely that they could market HSV-tk gene therapy products in competition with one another. The merger would eliminate that competition, and because of the parties' patent portfolios, it is extremely unlikely that any other firm would be able to enter to replace that lost competition.

The complaint alleges that entry into the gene therapy markets requires lengthy FDA approved clinical trials, data collection and analysis, and expenditures of significant resources over may years. No company may reach advanced stages of development in the relevant gene therapy markets without: (1) clinical gene therapy expertise; (2) scientific research that requires years to complete; (3) patent rights to all the necessary proprietary inputs into the gene therapy product sufficient to provide the company with reasonable

assurances of freedom to operate; and (4) clinical grade product manufacturing expertise, regulatory approvals and capacity to complete clinical development. The necessary proprietary inputs may include genes, vectors and vector manufacturing technology, and cytokines.

Ciba/Chiron and Sandoz each possess virtually all of the gene therapy intellectual property needed to ensure their ability to independently perform gene therapy development. Through the merger, the companies' alternative competing gene therapy technologies will be combined, reducing innovation competition. That combination changes the competitive incentives of the merged entity. It will likely lead to a reduction in development of gene therapy products, as the parties combine their research and development pipelines and eliminate or slow down their parallel development projects.

In addition, Novartis, the merged firm, will have a disincentive to license intellectual property rights to or collaborate with other companies as compared to the pre-merger incentives of the independent competitors, Ciba/Chiron and Sandoz. Although Ciba/Chiron and Sandoz had substantial individual intellectual property portfolios pre-merger, they had the incentive and did act as rival centers from which others could obtain needed intellectual property rights. Ciba/Chiron and Sandoz would grant limited intellectual property rights to other developers and researchers in return for receiving marketing or other valuable rights back from them. Consequently, as the complaint alleges, the merger may heighten barriers to entry by resulting in one entity holding so extensive a portfolio of patents and patent applications, of uncertain breadth and validity, as to diminish its incentives to license, thus impeding the ability of other gene therapy researchers and developers to continue developing their products.

To remedy the alleged competitive harm, the proposed Order provides for a set of patent licenses to allow other companies to replace the competition otherwise lost due to the merger. The Commission believes that licensing, rather than divestiture of assets, is sufficient because access to certain key intellectual property rights held by the merged firm is a crucial component of successful commercialization of many potential gene therapy products. Competitors already have (to varying degrees) the hard assets, *e.g.,* production facilities, researchers and scientists, needed to compete. Rivals and other scientists confirm that licensing would enable them to develop gene therapy products and replace the competition lost due to the merger. Further, an asset divestiture might create substantial disruption in the parties' research and development efforts. In this case, therefore, a licensing remedy appears to be the preferred approach to restoring the competition lost by the merger.

The proposed Order includes the following remedy provisions. First, in the research, development, manufacture, and sale of gene therapy, the proposed Order would require Sandoz and Chiron to provide to all gene therapy researchers and developers non-exclusive licenses or sublicenses to certain proprietary and patented technologies essential for the competitive development and commercialization of gene therapy products. In the United States, Chiron owns the rights to commercialize cytokine Interleukin 2 (''IL–2''), and Sandoz has exclusive rights to the Anderson *ex vivo* patent, and claims arising there-under, and owns the rights to cytokines Interleukin 3 (''IL–3'') and Interleukin 6 (''IL–6''). Within thirty (30 days of the date the Order becomes final, the companies are required to grant to other gene therapy researchers non-exclusive licenses to each of these essential gene therapy technologies. In addition, each licensee must be given access to drug master files, the data filed with the FDA establishing the safety and purity of these cytokines. These licensing arrangements will remedy the reduction in competition in research and development of gene therapy caused by the merger.

As detailed in the Order, the IL–2, IL–3 and IL–6 cytokines and the Anderson *ex vivo* patent licenses include a right to a royalty payment at low rates (based upon net sales with no minimum amount). In the past, the Commission has had concerns with royalty payments in connection with licenses that are meant to restore competition eliminated by a merger. This is because continuing entanglements between the divesting company and the acquirer might provide opportunities for information exchange between competitors and interfere with their economic incentives to compete vigorously. These risks are relatively slight under the terms of the proposed Order, particularly because of the low royalties and potential number of non-exclusive licenses to the industry required under the proposed Order. In addition, to minimize further the financial relationships and the exchange of competitively sensitive information among Novartis, Chiron and potential competitor-licensees, an independent auditor will be appointed to collect and aggregate the royalty payments. Sandoz, Ciba, Chiron, and Novartis will be prohibited from gaining access to this confidential sales information. Each license will also include a binding arbitration clause to resolve disputes regarding the royalties or any other terms, a provision that further insulates Sandoz, Ciba, Chiron, and Novartis from interactions with the potential licensees.

Second, the proposed Order provides for further remedies regarding the anticompetitive harm alleged with respect to the HSV-tk product markets. Both Sandoz and Ciba/Chiron are developing HSV-tk gene therapies for cancer and graft versus host disease. After the merger, Ciba/Chiron and Sandoz would control dominating intellectual property portfolios for HSV-tk gene therapy. The proposed Order restores the pe-merger incentives for research, development, manufacture and sale of HSV-tk gene therapy products for cancer and graft versus host disease by requiring licensing of the Sandoz' and Chiron's worldwide HSV-tk patent rights, including rights relating to vectors. By September 1, 1997, Sandoz and Chiron each are required to grant a non-exclusive license to Rhône-Poulenc Rorer (''RPR''), with whom Ciba, Sandoz and Chiron have entered into a letter of intent for this purpose. If the agreement between RPR and Ciba, Sandoz, and Chiron were to fall through, Ciba, Sandoz and Chiron would be required to license these assets to another licensee who has received Commission approval by September 1, 1997. Under the terms of the proposed Order, the license granted to RPR, or an alternative licensee, must include the right to sublicense in fields that are not developed by RPR or the licensee, as well as a technology transfer from Sandoz of necessary HSV-tk know-how, including know-how relating to vectors, within one year of execution of the license.

Third, to ensure the continued research, development, manufacture and sale of Factor VIII gene therapy products for the treatment of hemophilia A, the proposed Order requires that by September 1, 1997, Sandoz shall either: (1) convert its exclusive license for the use in gene therapy of the partial Factor VIII gene to a non-exclusive license; or (2) grant to RPR a sublicense to those gene therapy Factor VIII rights. At the option of the sublicensee, Sandoz may be required to provide technical information and know-how relating to Factor VIII gene therapy products.

Finally, to ensure the continued research, development, manufacture and sale of chemoresistance gene

therapy products in the United States, the proposed Order requires that neither Ciba, Chiron, Sandoz nor Novartis shall acquire exclusive rights in intellectual property and technology related to the MDR–1 and/or MRP genes. With exclusive rights to the genes necessary for this treatment area, both parties would have potentially dominating intellectual property rights for the use of the MDR–1 or MRP chemoresistance genes in gene therapy. The merger combines the parties' two competing chemoresistance gene therapy programs and potentially concentrates the important intellectual property rights for these genes. Thus, the proposed restriction on exclusive licensing of the MDR–1 and MRP genes will ensure access to the chemoresistance genes to at least one other competing company.

The proposed Order also provides for the appointment of a trustee if Novartis and/or Chiron fail to grant any of these licenses within the appropriate time period. In that event, the trustee is authorized to divest either Sandoz' or Chiron's HSV-tk businesses in their entirety.

Corn Herbicides

According to the Commission's proposed complaint, the merger of Ciba and Sandoz into Novartis, absent relief, would have adverse effects on various markets for corn herbicide. United States sales of corn herbicides—chemical products designed to kill or control weeds that interfere with corn production—totaled $1.4 billion in 1995. According to the proposed complaint, the markets for corn herbicide are distinguished by the types of weeds—broadleaf or grass—against which the herbicide is chemically effective as well as by the stage of growth of the corn crop or weed—pre-emergent or post-emergent—at which the herbicide is safe for us on the corn crop and chemically effective against the weeds to be controlled.

The Commission's proposed complaint alleges that Ciba's metolachlor herbicides, sold under the brands Dual® and Bicep®, are the leading corn herbicides for pre-emergent control of grasses. The complaint alleges that Sandoz' recently introduced dimenthenamid grass herbicides, sold under the brands Frontier® and Guardsman®, are gaining share against Ciba's metolachlor grass herbicides.

The complaint also alleges that Sandoz' dicamba herbicides, sold under the brands Banvel®, Marksman®, and Clarity®, are the leading corn herbicides for post-emergent control of broadleaf weeds. According to the complaint Ciba's recently introduced sulfonyl urea broadleaf herbicide, sold under the bran Exceed®, is rapidly gaining share against Sandoz' dicamba broadleaf herbicides, and Ciba and Sandoz recognize that current users of Sandoz' dicamba herbicides are the principal target for expected market share gain by Ciba's Exceed® herbicide. Ciba is also the dominant supplier of atrazine, a broadleaf weed control product that is widely used as a component in premixed herbicide formulations sold by Ciba, Sandoz and their competitors.

According to the complaint, each of the corn herbicide markets is highly concentrated, as measured by the Herfindahl-Hirschman Index (''HHI'') and other measures of concentration. Ciba accounts for over 35 percent of corn herbicide sales in the United States and over 40 percent of treated acres, while Sandoz has approximately a 10 percent share by either measure. Further, the complaint alleges that the proposed merger would increase concentration, as measured by the HHI, by approximately 700 points for dollar sales, and by approximately 1000 points for treated acres, to approximately 3000 for sales and approximately 3300 for treated acres.

In the market for pre-emergent treatment of corn acres for grasses, the complaint alleges that Ciba products accounted for over 40 percent and that Sandoz accounted for approximately 3 percent in 1995. The proposed merger would increase concentration in that market, as measured by the HHI, by aprpoximately 300 points to approximately 3400. In addition, in the market for post-emergent treatment of corn acres for broadleaf weeds, the complaint alleges that Sandoz products accounted for over 30 percent and that Ciba's Exceed® brand accounted for approximately 5 percent in 1995. Combining Exceed® and other Ciba products with Sandoz' products, the proposed merger would increase concentration in that market, as measured by the HHI, by approximately 1900 points to over 4000.

The complaint alleges that entry into the corn herbicide markets requires over a decade for chemical synthesis; laboratory and greenhouse testing; formulation; process development; pilot production; pilot trials; field trials; testing for acute, subchronic and chronic toxicity, possible carcinogenic and mutagenic effects and effects on prenatal deformation; environmental toxicology testing; measurement of plant, animal, soil, water and air residues and testing of degradation of plant, animal, soil, and water environment; data collection; product registration and EPA review; construction of production facilities; and use optimization. Further, according to the complaint, once a product is introduced to the market, several years are often required to gain customer acceptance through demonstrated safety, performance and reliability, over a variety of weather conditions.

Additionally, the complaint alleges that, despite the expiration of United States patents on dicamba and metolachlor, post-patent strategies pursued by Ciba and Sandoz, including product reformulation, distribution agreements, purchase and supply contracts with manufacturers, and joint product development agreements, have limited entry of generic competition to Ciba's leading pre-emergent grass herbicides and Sandoz' leading post-emergent broadleaf herbicides.

Further, according to the complaint, supply agreements, joint product development agreements, and joint marketing agreements among producers of corn herbicide increase coordinated interaction and the recognition of mutual interdependence among competitors in each of the relevant markets for corn herbicide.

The complaint further alleges that the proposed merger of Ciba and Sandoz would eliminate Ciba and Sandoz as substantial, independent competitors; eliminate actual, direct, and substantial competition between Ciba and Sandoz, including the reduction in, delay of or redirection of research and development projects; eliminate the potential for increased actual, direct and substantial price competition and cause consumers to pay higher prices for corn herbicides; increase barriers to entry; increase the level of concentration in the corn herbicide markets; increase the merged firm's ability unilaterally to exercise market power in the market for corn herbicide for post-emergent control of broadleaf weeds by combining the two closest substitutes in the market; and increase the likelihood and degree of coordinated interaction between or among competitors in the market for corn herbicide for pre-emergent control of grasses.

The Order accepted for public comment contains provisions that would require Sandoz to divest its corn herbicide business, including Sandoz' dicamba and dimethenamid plants in Beaumont, Texas, and United States and Canadian assets to BASF Aktiengesellschaft (''BASF''), no later than ten days after the Order becomes final, pursuant to an agreement between Sandoz and BASF for approximately $780 million. If, through no fault of Sandoz, BASF fails to acquire the

business, the Order requires Sandoz to divest its corn herbicide business, within sixty days after the Order becomes final, to an alternative acquirer approved by the Commission and in a manner that receives the approval of the Commission, and to divest such additional ancillary assets and businesses and effect such arrangements as are necessary to assure the marketability, independence, viability and competiveness of the divested business. The Order further provides for appointment of a trustee to divest Sandoz' agricultural chemicals business, including herbicides and other pesticides, in the event Sandoz is unable to complete the required corn herbicide divestiture within the specified period.

Flea Control Products

According to the proposed complaint, the proposed merger will have anticompetitive effects in the market for the research, development, manufacture and sale of flea control products in the United States. Flea control products are chemical products designed to treat and prevent flea infestation in cats and dogs. They are sold in various forms, including pills, collars, shampoos, sprays, and foggers and are sold through various channels of distribution: veterinarians, pet specialty stores, lawn and garden centers, mass merchandisers, and grocery stores. The complaint alleges that there are no economic substitutes for flea control products for the treatment and prevention of flea infestation in cats and dogs.

The complaint further alleges that the flea control products market is a very highly concentrated market that had sales in the U.S. of approximately $400 million in 1995. Ciba is the leading developer, manufacturer and seller of flea control products, and Ciba's market share is approximately 50 percent. Ciba's Program® brand flea control products have a dominant share of the flea control products market. Sandoz ranks second in flea control products sales from sales of its flea control products, under the Vetkem® and Zodiac® brands, and from sales of the active ingredient, methoprene, used by other companies in flea control products. The complaint also alleges that, prior to the merger, Sandoz and Ciba were both developing additional flea control products, which likely would be in direct and substantial competition with each others' products.

The proposed complaint alleges that entry into the flea control products market requires over a decade for chemical synthesis, lengthy clinical trials, data collection and analysis, and expenditures of significant resources over many years as well as qualified manufacturing facilities in Order to achieve the required EPA or FDA approvals for commercial sale of these products. Once a product is introduced to the market, extensive sunk costs must be incurred for advertising and promotion to gain significant customer and pet owner acceptance. Despite the expiration of United States patents on methoprene, the base active ingredient used in Sandoz' second generation flea control products, the EPA registrations and proprietary technology involved in the production of methoprene have prevented entry of generic competition to Sandoz' flea control products.

The complaint further alleges that the proposed merger of Ciba and Sandoz would increase the merged firm's ability unilaterally to exercise market power in the flea control products market by combining the two closest substitutes in the market. According to the complaint, the proposed merger would increase the likelihood of coordinated interaction between or among competitors in the flea control products market and eliminate the potential for actual, direct and substantial price competition between them. Consumers would then pay higher prices for flea control products and would not receive the benefits of innovation competition among producers of flea control products.

The proposed Order seeks to remedy the anticompetitive effects of the proposed merger by requiring Sandoz to divest its flea control business for the United States and Canada. Under the Order, the Sandoz flea control business and the Sandoz Dallas facility, which is largely devoted to production of flea control products for the United States and Canada, must be sold to Central Garden and Pet Supply (''Central Garden'') within thirty days after the Order becomes final pursuant to an agreement between Central Garden and Sandoz that will be modified to conform to the terms of the consent Order. Alternatively, Novartis is required by the Order to divest the assets to an alternative acquirer that has received Commission approval, within ninety days after the Order is final. The Order further provides for appointment of a trustee to divest these assets in the vent Sandoz is unable to complete the required divestiture within the specified period. Ciba, Sandoz, and Novartis have entered into an agreement to hold these assets separate from the rest of Ciba, Sandoz, and Novartis pending completion of the divestiture.

The proposed Order also includes a technology transfer agreement to enable the acquirer to produce its own methoprene, the principal active ingredient in the products to be sold pursuant to the Order, as well as a temporary supply agreement to provide methoprene to the acquirer until its own manufacturing capability has achieved necessary government approvals. Some products currently produced at the Dallas facility that are manufactured for sale outside the United States and Canada may continue to be manufactured for Sandoz on behalf of the acquirer for two years.

To ensure the viability of the flea products acquirer, Novartis is prohibited from re-entering the U.S. market with a methoprene-based flea control product for six years. In addition, Novartis is required under the proposed Order to notify the Commission if it plans to acquire flea control assets in the U.S. during the next ten years.

The purpose of this analysis is to facilitate public comment on the proposed Order, and it is not intended to constitute an official interpretation of the agreement and proposed Order or to modify in any way its terms.

Benjamin I. Berman,

Acting Secretary.

Separate Statement of Commissioner Mary L. Azcuenaga in Ciba Geigy Limited, File No. 961–0055

The Commission today accepts a proposed consent order for public comment to settle allegations that the planned merger of Ciba Geigy Ltd. and Sandoz Ltd. would violate Section 7 of the Clayton Act in certain agricultural chemical, pet flea control and gene therapy markets.

There appears to be reason to believe that the proposed merger would be unlawful in the corn herbicide and flea control markets identified in the complaint and that divestiture in each market is the appropriate remedy. Because BASF makes and sells a specialized corn herbicide, the proposed divestiture of Sandoz's corn herbicide business to BASF would not entirely restore pre-merger conditions, but BASF's product is sufficiently differentiated from the divested assets that the minor overlap does not appear to be significant.

It is premature, in my view, to select Central Garden and Pet Supply to acquire Sandoz's flea control business, because the Commission has virtually no information about Central beyond that contained in the proposed order and the Analysis To Aid Public Comment. While the early identification of a candidate to acquire assets to be

divested under an order is to be preferred in order to restore competition quickly, the Commission does not yet have the information to evaluate the competitive implications of a proposed divestiture to Central Garden and Pet Supply.

The alleged gene therapy markets involve products now in clinical trials and others that appear to be more distant in time and perhaps more speculative. The proposed complaint also alleges a technology market, comprising the technology that firms use to develop gene therapies. The theory is that the post-merger combination of Sandoz and Ciba Geigy will control such a critical mass of proprietary information that its incentives to cross license will be diminished, either deterring entry or raising the price of it. I would be interested in public comment on these allegations.

Assuming a violation, it is not entirely clear that the proposed licensing relief is preferable or adequate. A divestiture is the preferred remedy in a Section 7 case. The proposed order, among other things, requires a license of the ex vivo patent, also called the Anderson patent, which was licensed to Sandoz by the National Institutes of Health. The merger does not add to the scope of the patent monopoly, and I see no basis in the proposed complaint for this aspect of the relief. Nor is there any apparent reason why a divestiture in these markets could not be accomplished. I look forward to reviewing the comments on this issue as well.

[FR Doc. 97–5 Filed 1–2–97; 8:45 am]

BILLING CODE 6750–01–P

GENERAL ACCOUNTING OFFICE

Federal Accounting Standards Advisory Board

AGENCY: General Accounting Office.

ACTION: Notice of meeting.

SUMMARY: Pursuant to section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463), as amended, notice is hereby given that the Federal Accounting Standards Advisory Board will meet on Friday, January 17, 1997, from 9:00 A.M. to 4:00 P.M. in room 7C13 of the General Accounting Office building, 441 G St., N.W., Washington, D.C.

The purpose of the meeting is to discuss (1) comments received on the Cost of Capital document, (2) social insurance, (3) Interpretation follow-up, and (4) future agenda items. Also, three new members will be introduced, who will be replacing three retiring members.

Any interested person may attend the meeting is an observer. Board discussions and reviews are open to the public.

FOR FURTHER INFORMATION CONTACT: Wendy Comes, Acting Executive Director, 750 First St., N.E., Room 1001, Washington, D.C. 20002, or call (202) 512–7350.

Authority: Federal Advisory Committee Act. Pub. L. No. 92–463, Section 10(a)(2), 86 Stat. 770, 774 (1972) (current version at 5 U.S.C. app. section 10(a)(2) (1988); 41 CFR 101–6.1015 (1990).

Dated: December 30, 1996.

Wendy M. Comes,

Acting Executive Director.

[FR Doc. 97–71 Filed 1–2–97; 8:45 am]

BILLING CODE 1610–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. 96S–0285]

Establishment of a Public Docket for Documents and Other Information Pertaining to Exports and Import-for-Export of Certain FDA-Regulated Products Under the FDA Export Reform and Enhancement Act of 1996

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing the establishment of a public docket for documents and other information pertaining to the export and the import-for-export of certain FDA-regulated products (such as drugs, biologics, and devices) under the FDA Export Reform and Enhancement Act of 1996. This action will ensure that this information is equally available to all interested persons on a timely basis.

ADDRESSES: The public docket is available under the docket number found in brackets in the heading of this notice and is located in the Dockets Management Branch (HFA–305), Food and Drug Administration, 12420 Parklawn Dr., rm. 1–23, Rockville, MD 20857. The public docket may be reviewed between 9 a.m. and 4 p.m., Monday through Friday.

FOR FURTHER INFORMATION CONTACT: Philip L. Chao, Office of Policy (HF–23), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301–827–3380.

SUPPLEMENTARY INFORMATION: On April 26, 1996, the President signed the FDA Export Reform and Enhancement Act of 1996 (Pub. L. 104–134) into law. This law significantly alters the statutory requirements for the export of unapproved drugs (including biologics and animal drugs) and devices. The law also permits the importation of components of drugs and devices and food additives, color additives, and dietary supplements into the United States if those components are incorporated into articles (''import-for-export'') that are exported in accordance with the Federal Food, Drug, and Cosmetic Act, as amended.

On August 6, 1996, the President signed Pub. L. 104–180, which included, in section 603, minor technical amendments. The public may obtain a document that sets forth the current statutory provisions (combining the pre-existing law with the amendments made in April and August 1996) on FDA's home page on the Internet (www.FDA.gov).

FDA employees, in the usual discharge of their responsibilities and in response to inquiries and requests from companies, firms, and trade associations, often provide information on FDA's export and import activities. The information provided often addresses historical and current information on statutory or regulatory requirements and on current FDA export and import policies and programs.

To help make information regarding FDA's interpretation and implementation of the FDA Export Reform and Enhancement Act of 1996 available to all interested persons, FDA has developed a mechanism for providing public access to relevant documents and other information created by FDA employees. Specifically, FDA has created a public docket where documents, such as letters on the export of unapproved drugs for investigational use and sent by FDA to various companies and trade associations and guidance to field personnel concerning procedures for articles imported for manufacturing and subsequent export, will be maintained. The documents placed in the public docket are not intended to create or confer any rights for or on any person and do not operate to bind or otherwise obligate or commit FDA or the public to the views expressed. Instead, the documents represent either the agency's current thinking on a particular issue at the time the document was created or at best the best advice of that employee at that time on the issue. (See 21 CFR 10.85(k)).

To ensure that the information in the public docket is kept current, FDA will remove information in the docket that is more than 3 years old. FDA will review the public docket annually to determine its usage; if FDA determines that it is not being used, FDA will discontinue its use.

The public docket is available for public review in the Dockets Management Branch (address above) between 9 a.m. and 4 p.m., Monday through Friday.

Dated: December 23, 1996.

William K. Hubbard,

Associate Commissioner for Policy Coordination.

[FR Doc. 96–35 Filed 1–2–96; 8:45 am]

BILLING CODE 4160–01–F

Product, Establishment, and Biologics License Applications, Refusal to File; Meeting of Oversight Committee; Correction

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice; correction.

SUMMARY: The Food and Drug Administration (FDA) is correcting a notice that appeared in the Federal Register of December 19, 1996 (61 FR 67020). The document announced a meeting of the FDA standing oversight committee in the Center for Biologics Evaluation and Research (CBER) that conducts a periodic review of CBER's use of its refusal to file (RTF) practices on product license applications, establishment license applications, and biologics license applications. The agency inadvertently omitted two sentences. This document corrects that error.

DATES: The meeting will be held on January 7, 1997.

FOR FURTHER INFORMATION CONTACT: Joy A. Cavagnaro, Center for Biologics Evaluation and Research (HFM–4), Food and Drug Administration, 1401 Rockville Pike, Rockville, MD 20852–1448, 301–594–3079.

In FR Doc. 96–32272, appearing on page 67020 in the Federal Register of Thursday, December 19, 1996, the following correction is made: On page 67020, in the 2d column, under the **SUPPLEMENTARY INFORMATION** caption, in the 3d paragraph, in the 11th line, the sentences ''If there are no RTF decisions to review, however, the meeting may be cancelled. Publication of any meeting cancellation will be made only as time permits.'' are added at the end of the paragraph.

Dated: December 23, 1996.

William K. Hubbard,

Associate Commissioner for Policy Coordination.

[FR Doc. 97–91 Filed 1–2–97; 8:45 am]

BILLING CODE 4160–01–F

[Docket Nos. 96N–0325 and 96N–0335]

Agency Information Collection Activities; Announcement of OMB Approval

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing that the reinstatement of four collections of information have been approved by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995. This document announces the OMB approval numbers.

FOR FURTHER INFORMATION CONTACT: Margaret R. Wolff, Office of Information Resources Management (HFA–80), Food and Drug Administration, 5600 Fishers Lane, rm. 16B–19, Rockville, MD 20857, 301–827–1223.

SUPPLEMENTARY INFORMATION: In the Federal Register of October 29, 1996 (61 FR 55805 and 55807), the agency announced that the following proposed information collections had been submitted to OMB for review and clearance:

1. Food Canning Establishment Registration, Process Filing and Recordkeeping for Acidified Foods and Thermally Processed Low-Acid Foods in Hermetically Sealed Containers—(21 CFR 108.25(c)(1), (c)(2), (d), (e), (f), and (g); 108.35(c)(1), (c)(2), (d), (e), (f), and (h); 113.60(c); 113.83; 113.87; 113.89; 113.100; 114.80(b); 114.89; and 114.100(a) through (d));

2. Temporary Marketing Permit Applications—(21 CFR 130.17(c) and (i));

3. State Petitions for Exemption From Preemption—(21 CFR 100.1(d)); and

4. State Enforcement Notification—(21 CFR 100.2(d)).

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520), OMB has approved the reinstatement of the information collections and has assigned OMB control numbers as follows:

For Food Canning Establishment Registration, Process Filing and Recordkeeping for Acidified Foods and Thermally Processed Low-Acid Foods in Hermetically Sealed Containers, OMB has approved the reinstatement and assigned OMB control number 0910–0037. The approval expires on November 30, 1999.

For Temporary Marketing Permit Applications, OMB has approved the reinstatement of the information collection and assigned OMB control number 0910–0133. The approval expires on November 30, 1999.

For State Petitions for Exemption From Preemption, OMB has approved the reinstatement of the information collection and assigned OMB control number 0910–0277. The approval expires on November 30, 1999.

For State Enforcement Notification, OMB has approved the reinstatement of the information collection and assigned OMB control number 0910–0275. The approval expires on November 30, 1999.

Under 5 CFR 1320.5(b), an agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection displays a valid control number.

Dated: December 23, 1996.

William K. Hubbard.

Associate Commissioner for Policy Coordination.

[FR Doc. 97–36 Filed 1–02–96; 8:45 am]

BILLING CODE 4160–01–F

Substance Abuse and Mental Health Services Administration

Current List of Laboratories Which Meet Minimum Standards To Engage in Urine Drug Testing for Federal Agencies, and Laboratories That Have Withdrawn From the Program

AGENCY: Substance Abuse and Mental Health Services Administration, HHS (Formerly: National Institute on Drug Abuse, ADAMHA, HHS).

ACTION: Notice.

SUMMARY: The Department of Health and Human Services notifies Federal agencies of the laboratories currently certified to meet standards of Subpart C of Mandatory Guidelines for Federal Workplace Drug Testing Programs (59 FR 29916, 29925). A similar notice listing all currently certified laboratories will be published during the first week of each month, and updated to include laboratories which subsequently apply for and complete the certification process. If any listed laboratory's certification is totally suspended or revoked, the laboratory will be omitted from updated lists until such time as it is restored to full certification under the Guidelines.

If any laboratory has withdrawn from the National Laboratory Certification Program during the past month, it will be identified as such at the end of the current list of certified laboratories, and will be omitted from the monthly listing thereafter.

FOR FURTHER INFORMATION CONTACT: Mrs. Giselle Hersh, Division of Workplace Programs, Room 13A–54, 5600 Fishers Lane, Rockville, Maryland 20857; Tel.: (301) 443–6014.

SUPPLEMENTARY INFORMATION: Mandatory Guidelines for Federal Workplace Drug Testing were developed in accordance with Executive Order 12564 and section 503 of Public Law 100–71. Subpart C of the Guidelines, ''Certification of Laboratories Engaged in Urine Drug Testing for Federal Agencies,'' sets strict standards which laboratories must meet in order to conduct urine drug testing for Federal agencies. To become certified an applicant laboratory must undergo three rounds of performance testing plus an on-site inspection. To maintain that certification a laboratory must participate in a quarterly performance testing program plus periodic, on-site inspections.

Laboratories which claim to be in the applicant stage of certification are not to be considered as meeting the minimum requirements expressed in the HHS Guidelines. A laboratory must have its letter of certification from SAMHSA, HHS (formerly: HHS/NIDA) which attests that it has met minimum standards.

In accordance with Subpart C of the Guidelines, the following laboratories meet the minimum standards set forth in the Guidelines:

Aegis Analytical Laboratories, Inc., 624 Grassmere Park Rd., Suite 21, Nashville, TN 37211, 615–331–5300

Alabama Reference Laboratories, Inc., 543 South Hull St., Montgomery, AL 36103, 800–541–4931 / 334–263–5745

American Medical Laboratories, Inc., 14225 Newbrook Dr., Chantilly, VA 22021, 703–802–6900

Associated Pathologists Laboratories, Inc., 4230 South Burnham Ave., Suite 250, Las Vegas, NV 89119–5412, 702–733–7866 / 800–433–2750

Associated Regional and University Pathologists, Inc. (ARUP), 500 Chipeta Way, Salt Lake City, UT 84108, 801–583–2787 / 800–242–2787

Baptist Medical Center—Toxicology Laboratory, 9601 I–630, Exit 7, Little Rock, AR 72205–7299, 501–227–2783 (formerly: Forensic Toxicology Laboratory Baptist Medical Center)

Bayshore Clinical Laboratory, 4555 W. Schroeder Dr., Brown Deer, WI 53223, 414–355–4444 / 800–877–7016

Cedars Medical Center, Department of Pathology, 1400 Northwest 12th Ave., Miami, FL 33136, 305–325–5784

Centinela Hospital Airport Toxicology Laboratory, 9601 S. Sepulveda Blvd., Los Angeles, CA 90045, 310–215–6020

Clinical Reference Lab, 8433 Quivira Rd., Lenexa, KS 66215–2802, 800–445–6917

CompuChem Laboratories, Inc., 1904 Alexander Drive, Research Triangle Park, NC 27709, 919–549–8263 / 800–833–3984 (Formerly: CompuChem Laboratories, Inc., A Subsidiary of Roche Biomedical Laboratory, Roche CompuChem Laboratories, Inc., A Member of the Roche Group)

Cox Health Systems, Department of Toxicology, 1423 North Jefferson Ave., Springfield, MO 65802, 800–876–3652 / 417–269–3093 (formerly: Cox Medical Centers)

Dept. of the Navy, Navy Drug Screening Laboratory, Great Lakes, IL, P.O. Box 88–6819, Great Lakes, IL 60088–6819, 847–688–2045 / 847–688–4171

Diagnostic Services Inc., dba DSI, 4048 Evans Ave., Suite 301, Fort Myers, FL 33901, 941–418–4700 / 800–735–5416

Doctors Laboratory, Inc., P.O. Box 2658, 2906 Julia Dr., Valdosta, GA 31604, 912–244–4468

DrugProof, Division of Dynacare/ Laboratory of Pathology, LLC, 1229 Madison St., Suite 500, Nordstrom Medical Tower, Seattle, WA 98104, 800–898–0180 / 206–386–2672 (formerly: Laboratory of Pathology of Seattle, Inc., DrugProof, Division of Laboratory of Pathology of Seattle, Inc.)

DrugScan, Inc., P.O. Box 2969, 1119 Mearns Rd., Warminster, PA 18974, 215–674–9310

ElSohly Laboratories, Inc., 5 Industrial Park Dr., Oxford, MS 38655, 601–236–2609

General Medical Laboratories, 36 South Brooks St., Madison, WI 53715, 608–267–6267

Harrison Laboratories, Inc., 9930 W. Highway 80, Midland, TX 79706, 800–725–3784/915–563–3300 (formerly: Harrison & Associates Forensic Laboratories)

Jewish Hospital of Cincinnati, Inc., 3200 Burnet Ave., Cincinnati, OH 45229, 513–569–2051

LabOne, Inc., 8915 Lenexa Dr., Overland Park, Kansas 66214, 913–888–3927/ 800–728–4064 (formerly: Center for Laboratory Services, a Division of LabOne, Inc.)

Laboratory Corporation of America Holdings, 69 First Ave., Raritan, NJ 08869, 800–437–4986 (Formerly: Roche Biomedical Laboratories, Inc.)

Laboratory Specialists, Inc., 113 Jarrell Dr., Belle Chasse, LA 70037, 504–392–7961

Marshfield Laboratories, Forensic Toxicology Laboratory, 1000 North Oak Ave., Marshfield, WI 54449, 715–389–3734/800–331–3734

MedExpress/National Laboratory Center, 4022 Willow Lake Blvd., Memphis, TN 38118, 901–795–1515/ 800–526–6339

Medical College Hospitals Toxicology Laboratory, Department of Pathology, 3000 Arlington Ave., Toledo, OH 43614, 419–381–5213

Medlab Clinical Testing, Inc., 212 Cherry Lane, New Castle, DE 19720, 302–655–5227

MedTox Laboratories, Inc., 402 W. County Rd. D, St. Paul, MN 55112, 800–832–3244/612–636–7466

Methodist Hospital of Indiana, Inc., Department of Pathology and

Laboratory Medicine, 1701 N. Senate Blvd., Indianapolis, IN 46202, 317–929–3587
Methodist Medical Center Toxicology Laboratory, 221 N.E. Glen Oak Ave., Peoria, IL 61636, 800–752–1835/309–671–5199
MetroLab-Legacy Laboratory Services, 235 N. Graham St., Portland, OR 97227, 503–413–4512, 800–237–7808(x4512)
Minneapolis Veterans Affairs Medical Center, Forensic Toxicology Laboratory, 1 Veterans Drive, Minneapolis, Minnesota 55417, 612–725–2088
National Toxicology Laboratories, Inc., 1100 California Ave., Bakersfield, CA 93304, 805–322–4250
Northwest Toxicology, Inc., 1141 E. 3900 South, Salt Lake City, UT 84124, 800–322–3361
Oregon Medical Laboratories, P.O. Box 972, 722 East 11th Ave., Eugene, OR 97440–0972, 541–687–2134
Pathology Associates Medical Laboratories, East 11604 Indiana, Spokane, WA 99206, 509–926–2400/800–541–7891
PharmChem Laboratories, Inc., 1505–A O'Brien Dr., Menlo Park, CA 94025, 415–328–6200/800–446–5177
PharmChem Laboratories, Inc., Texas Division, 7606 Pebble Dr., Fort Worth, TX 76118, 817–595–0294 (formerly: Harris Medical Laboratory)
Physicians Reference Laboratory, 7800 West 110th St., Overland Park, KS 66210, 913–338–4070/800–821–3627
Poisonlab, Inc., 7272 Clairemont Mesa Blvd., San Diego, CA 92111, 619–279–2600/800–882–7272
Premier Analytical Laboratories, 15201 I–10 East, Suite 125, Channelview, TX 77530, 713–457–3784/800–888–4063 (formerly: Drug Labs of Texas)
Presbyterian Laboratory Services, 1851 East Third Street, Charlotte, NC 28204, 800–473–6640
Puckett Laboratory, 4200 Mamie St., Hattiesburgh, MS 39402, 601–264–3856/800–844–8378
Quest Diagnostics Incorporated, 4770 Regent Blvd., Irving, TX 75063, 800–526–0947/972–916–3376 (formerly: Damon Clinical Laboratories, Damon/MetPath, CORNING Clinical Laboratories)
Quest Diagnostics Incorporated, 875 Greentree Rd., 4 Parkway Ctr., Pittsburgh, PA 15220–3610, 800–574–2474/412–920–7733 (formerly: Med-Chek Laboratories, Inc., Med-Chek/Damon, MetPath Laboratories, CORNING Clinical Laboratories)
Quest Diagnostics Incorporated, 4444 Giddings Road, Auburn Hills, MI 48326, 810–373–9120 (formerly: HealthCare/Preferred Laboratories, HealthCare/MetPath, CORNING Clinical Laboratories)
Quest Diagnostics Incorporated, 1355 Mittel Blvd., Wood Dale, IL 60191, 630–595–3888 (formerly: MetPath, Inc., CORNING MetPath Clinical Laboratories, CORNING Clinical Laboratories Inc.)
Quest Diagnostics Incorporated, 2320 Schuetz Rd., St. Louis, MO 63146, 800–288–7293/314–991–1311 (formerly: Metropolitan Reference Laboratories, Inc., CORNING Clinical Laboratories, South Central Division)
Quest Diagnostics Incorporated, One Malcolm Ave., Teterboro, NJ 07608, 201–393–5590 (formerly: MetPath, Inc., CORNING MetPath Clinical Laboratories, CORNING Clinical Laboratory)
Quest Diagnostics Incorporated, 1901 Sulphur Spring Rd., Baltimore, MD 21227, 410–536–1485 (formerly: Maryland Medical Laboratory, Inc., National Center for Forensic Science, CORNING National Center for Forensic Science)
Quest Diagnostics Incorporated, 7470 Mission Valley Rd., San Diego, CA 92108–4406, 800–446–4728/619–686–3200 (formerly: Nichols Institute, Nichols Institute Substance Abuse Testing (NISAT), CORNING Nichols Institute, CORNING Clinical Laboratories)
Scientific Testing Laboratories, Inc., 463 Southlake Blvd., Richmond, VA 23236, 804–378–9130
Scott & White Drug Testing Laboratory, 600 S. 25th St., Temple, TX 76504, 800–749–3788
S.E.D. Medical Laboratories, 500 Walter NE, Suite 500, Albuquerque, NM 87102, 505–727–8800/800–999–LABS
Sierra Nevada Laboratories, Inc., 888 Willow St., Reno, NV 89502, 702–334–3400
SmithKline Beecham Clinical Laboratories, 7600 Tyrone Ave., Van Nuys, CA 91405, 818–989–2520/800–877–2520
SmithKline Beecham Clinical Laboratories, 801 East Dixie Ave., Leesburg, FL 34748, 352–787–9006 (formerly: Doctors & Physicians Laboratory)
SmithKline Beecham Clinical Laboratories, 3175 Presidential Dr., Atlanta, GA 30340, 770–452–1590 (formerly: SmithKline Bio-Science Laboratories)
SmithKline Beecham Clinical Laboratories, 506 E. State Pkwy., Schaumburg, IL 60173, 847–447–4379/800–447–4379 (formerly: International Toxicology Laboratories)
SmithKline Beecham Clinical Laboratories, 400 Egypt Rd., Norristown, PA 19403, 800–523–0289/610–631–4600 (formerly: SmithKline Bio-Science Laboratories)
SmithKline Beecham Clinical Laboratories, 8000 Sovereign Row, Dallas, TX 75247, 214–638–1301 (formerly: SmithKline Bio-Science Laboratories)
South Bend Medical Foundation, Inc., 530 N. Lafayette Blvd., South Bend, IN 46601, 219–234–4176
Southwest Laboratories, 2727 W. Baseline Rd., Suite 6, Tempe, AZ 85283, 602–438–8507
St. Anthony Hospital (Toxicology Laboratory), P.O. Box 205, 1000 N. Lee St., Oklahoma City, OK 73102, 405–272–7052
Toxicology & Drug Monitoring Laboratory, University of Missouri Hospital & Clinics, 2703 Clark Lane, Suite B, Lower Level, Columbia, MO 65202, 573–882–1273
Toxicology Testing Service, Inc., 5426 N.W. 79th Ave., Miami, FL 33166, 305–593–2260
TOXWORX Laboratories, Inc., 6160 Variel Ave., Woodland Hills, CA 91367, 818–226–4373/800–966–2211 (formerly: Laboratory Specialists, Inc.; Abused Drug Laboratories; MedTox Bio-Analytical, a Division of MedTox Laboratories, Inc.)
UNILAB, 18408 Oxnard St., Tarzana, CA 91356, 800–492–0800/818–996–7300 (formerly: MetWest-BPL Toxicology Laboratory)
UTMB Pathology-Toxicology Laboratory, University of Texas Medical Branch, Clinical Chemistry Division, 301 University Boulevard, Room 5.158, Old John Sealy, Galveston, TX 77555–0551, 409–772–3197

Richard Kopanda,

Executive Officer, Substance Abuse and Mental Health Services Administration.

[FR Doc. 97–109 Filed 1–2–97; 8:45 am]

BILLING CODE 4160–20–U

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

Office of Administration

[Docket No. FR–4200–N–01]

Submission for OMB Review: Comment Request

AGENCY: Office of Administration, HUD.

ACTION: Notice.

SUMMARY: The proposed information collection requirement described below has been submitted to the Office of Management and Budget (OMB) for review, as required by the Paperwork Reduction Act. The Department is

soliciting public comments on the subject proposal.

DATES: Comments due date: February 3, 1997.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Comments must be received within thirty (30) days from the date of this Notice. Comments should refer to the proposal by name and/or OMB approval number and should be sent to: Joseph F. Lackey, Jr., OMB Desk Officer, Office of Management and Budget, Room 10235, New Executive Office Building, Washington, DC 20503.

FOR FURTHER INFORMATION CONTACT: Kay F. Weaver, Reports Management Officer, Department of Housing and Urban Development, 451 7th Street, Southwest, Washington, DC 20410, telephone (202) 708–0050. This is not a toll-free number. Copies of the proposed forms and other available documents submitted to OMB may be obtained from Ms. Weaver.

SUPPLEMENTARY INFORMATION: The Department has submitted the proposal for the collection of information, as described below, to OMB for review, as required by the Paperwork Reduction Act (44 U.S.C. Chapter 35).

The Notice lists the following information: (1) The title of the information collection proposal; (2) the office of the agency to collect the information; (3) the OMB approval number, if applicable; (4) the description of the need for the information and its proposed use; (5) the agency form number, if applicable; (6) what members of the public will be affected by the proposal; (7) how frequently information submissions will be required; (8) an estimate of the total number of hours needed to prepare the information submission including number of respondents, frequency of response, and hours of response; (9) whether the proposal is new, an extension, reinstatement, or revision of an information collection requirement; and (10) the names and telephone numbers of an agency official familiar with the proposal and of the OMB Desk Officer for the Department.

Authority: Section 3507 of the Paperwork Reduction Act of 1995, 44 U.S.C. 35, as amended.

Dated: December 24, 1996.

Kay Weaver,

Acting Director, Information Resources, Management Policy and Management Division.

Notice of Submission of Proposed Information Collection to OMB

Title of Proposal: Customer Satisfaction Survey.

Office: Government National Mortgage Association.

OMB Approval Number: None.

Description of the Need for the Information and its Proposed Use: The purpose of this information collection will be to evaluate existing Government National Mortgage Association (Ginnie Mae) services and programs. This request to conduct the Ginnie Mae customer satisfaction survey is in response to Executive Order 12862 on setting customer driven standards. The survey will be used to evaluate what benefits would be needed to understand and satisfy the customers.

Form Number: None.

Respondents: Not-For-Profit Institutions and State, Local, or Tribal government

Frequency of Submission: One-Time.

Reporting Burden:

	Number of respondents	×	Frequency of response	×	Hours per response	=	Burden hours
Survey	520	....	1	....	.25	....	130

Total Estimated Buden Hours: 130.

Status: New.

Contact: Sonya Suarez, HUD, (202) 708–2772 x4772, Joseph F. Lackey, Jr., OMB, (202) 395–7316.

Dated: December 24, 1996.

[FR Doc. 97–17 Filed 1–2–97; 8:45 am]

BILLING CODE 4210–01–M

[Docket No. FR–4124–N–19]

Federal Property Suitable as Facilities to Assist the Homeless

AGENCY: Office of the Assistant Secretary for Community Planning and Development, HUD.

ACTION: Notice.

SUMMARY: This Notice identifies unutilized, underutilized, excess, and surplus Federal property reviewed by HUD for suitability for possible use to assist the homeless.

EFFECTIVE DATE: January 3, 1997.

FOR FURTHER INFORMATION CONTACT: Mark Johnston, Department of Housing and Urban Development, Room 7256, 451 Seventh Street SW, Washington, DC 20410; telephone (202) 708– 1226; TDD number for the hearing- and speech-impaired (202) 708–2565, (these telephone numbers are not toll-free), or call the toll-free Title V information line at 1–800–927–7588.

SUPPLEMENTARY INFORMATION: In accordance with the December 12, 1988 court order in *National Coalition for the Homeless* v. *Veterans Administration*, No. 88–2503–OG (D.D.C.), HUD publishes a Notice, on a weekly basis, identifying unutilized, underutilized, excess and surplus Federal buildings and real property that HUD has reviewed for suitability for use to assist the homeless. Today's Notice is for the purpose of announcing that no additional properties have been determined suitable or unsuitable this week.

Dated: December 27, 1996.

Jacquie M. Lawing,

Deputy Assistant Secretary for Economic Development.

[FR Doc. 97–26 Filed 1–2–97; 8:45 am]

BILLING CODE 4210–29–M

DEPARTMENT OF THE INTERIOR

National Park Service

Subsistence Resource Commission Meeting

SUMMARY: The Superintendent of Lake Clark National Park and the Chairperson of the Subsistence Resource Commission for Lake Clark National Park announce a forthcoming meeting of the Lake Clark National Park Subsistence Resource Commission.

The following agenda items will be discussed:

(1) Chairman's welcome.

(2) Introduction of Commission members and guests.

(3) Review agenda.

(4) Approval of minutes of last meeting.

(5) Old business:

a. Update of roster regulation.

(6) New business:

a. Discussion of Commission appointments.

b. Review of 1997–98 proposals to change federal subsistence regulations.

c. Discussion of NPS position paper.

(7) Agency and public comments.

(8) Determine time and date of next meeting.

(9) Adjourn.

DATE: The meeting will be held Wednesday, January 15, 1997. The meeting will begin at 10 a.m. and conclude around 5 p.m.

LOCATION: The meeting will be held at the Lake Clark National Park Visitor Center, Port Alsworth, Alaska.

FOR FURTHER INFORMATION CONTACT: Bill Pierce, Superintendent, Lake Clark National Park and Preserve, 4230 University Drive, #311, Anchorage, Alaska 99508. Phone (907) 271–3751.

SUPPLEMENTARY INFORMATION: The Subsistence Resource Commissions are authorized under Title VIII, Section 808, of the Alaska National Interest Lands Conservation Act, Public Law 96–487, and operate in accordance with the provisions of the Federal Advisory Committees Act.

Paul R. Anderson,

Acting Field Director.

[FR Doc. 97–68 Filed 1–2–97; 8:45 am]

BILLING CODE 4310–70–M

DEPARTMENT OF JUSTICE

Federal Bureau of Investigation

DNA Advisory Board Meeting

Pursuant to the provisions of the Federal Advisory Committee Act, notice is hereby given that the DNA Advisory Board (DAB) will meet on January 13, 1997, from 10:00 am until 5:00 pm at The Crystal Gateway Marriott, 1700 Jefferson Davis Highway, Arlington, Virginia 22202. All attendees will be admitted only after displaying personal identification which bears a photograph of the attendee.

The DAB's scope of authority is: To develop, and if appropriate, periodically revise, recommended standards for quality assurance to the Director of the FBI, including standards for testing the proficiency of forensic laboratories, and forensic analysts, in conducting analysis of DNA; To recommend standards to the Director of the FBI which specify criteria for quality assurance and proficiency tests to be applied to the various types of DNA analysis used by forensic laboratories, including statistical and population genetics issues affecting the evaluation of the frequency of occurrence of DNA profiles calculated from pertinent population database(s); To recommend standards for acceptance of DNA profiles in the FBI's Combined DNA Index System (CODIS) which take account of relevant privacy, law enforcement and technical issues; and, To make recommendations for a system for grading proficiency testing performance to determine whether a laboratory is performing acceptably.

The topics to be discussed at this meeting include: a review of minutes from the June 1996 meeting; a review of DAB Calendar of Events through March 1997; a review and discussion of outstanding standards from last meeting and standards referred for further detail; a presentation by the American Society of Crime Lab Directors; and a presentation concerning the National Forensic Science Training Center.

The meeting is open to the public on a first-come, first seated basis. Anyone wishing to address the DAB must notify the Designated Federal Employee (DFE) in writing at least twenty-four hours before the DAB meets. The notification must include the requestor's name, organizational affiliation, a short statement describing the topic to be addressed, and the amount of time requested. Oral statements to the DAB will be limited to five minutes and limited to subject matter directly related to the DAB's agenda, unless otherwise permitted by the Chairman.

Any member of the public may file a written statement for the record concerning the DAB and its work before or after the meeting. Written statements for the record will be furnished to each DAB member for their consideration and will be included in the official minutes of a DAB meeting. Written statements must be type-written on 8½″ × 11″ xerographic weight paper, one side only, and bound only by a paper clip (not stapled). All pages must be numbered. Statements should include the Name, Organizational Affiliation, Address, and Telephone number of the author(s). Written statements for the record will be included in minutes of the meeting immediately following the receipt of the written statement, unless the statement is received within three weeks of the meeting. Under this circumstance, the written statement will be included with the minutes of the following meeting. Written statements for the record should be submitted to the DFE.

Inquiries may be addressed to the DFE, Dr. Randall S. Murch, Chief, Scientific Analysis Section, Laboratory Division, Tenth Street Northwest, Washington, D.C. 20535, (202) 324–4416, FAX (202) 324–1462.

Dated: December 24, 1996.

Randall S. Murch,

Chief, Scientific Analysis Section, Federal Bureau of Investigation.

[FR Doc. 97–86 Filed 1–2–97; 8:45 am]

BILLING CODE 4410–02–P

DEPARTMENT OF LABOR

Employment Standards Administration

Wage and Hour Division

Minimum Wages for Federal and Federally Assisted Construction; General Wage Determination Decisions

General wage determination decisions of the Secretary of Labor are issued in accordance with applicable law and are based on the information obtained by the Department of Labor from its study of local wage conditions and data made available from other sources. They specify the basic hourly wage rates and fringe benefits which are determined to be prevailing for the described classes of laborers and mechanics employed on construction projects of a similar character and in the localities specified therein.

The determinations in these decisions of prevailing rates and fringe benefits have been made in accordance with 29 CFR Part 1, by authority of the Secretary of Labor pursuant to the provisions of the Davis-Bacon Act of March 3, 1931, as amended (46 Stat. 1494, as amended, 40 U.S.C. 275a) and of other Federal statutes referred to in 29 CFR Part 1, Appendix, as well as such additional statutes as may from time to time be enacted containing provisions for the payment of wages determined to be prevailing by the Secretary of Labor in accordance with the Davis-Bacon Act. The prevailing rates and fringe benefits determined in these decisions shall, in accordance with the provisions of the foregoing statutes, constitute the minimum wages payable on Federal and federally assisted construction projects to laborers and mechanics of the specified classes engaged on contract work of the character and in the localities described therein.

Good cause is hereby found for not utilizing notice and public comment procedure thereon prior to the issuance of these determinations as prescribed in 5 U.S.C. 553 and not providing for delay in the effective date as prescribed in that section, because the necessity to issue current construction industry wage determinations frequently and in large volume causes procedures to be impractical and contrary to the public interest.

General wage determination decisions, and modifications and supersedes decisions thereto, contain no expiration dates and are effective from their date of notice in the Federal Register, or on the date written notice is received by the agency, whichever is earlier. These decisions are to be used in accordance with the provisions of 29 CFR Parts 1 and 5. Accordingly, the applicable decision, together with any modifications issued, must be made a part of every contract for performance of the described work within the geographic area indicated as required by an applicable Federal prevailing wage law and 29 CFR Part 5. The wage rates and fringe benefits, notice of which is published herein, and which are contained in the Government Printing Office (GPO) document entitled ''General Wage Determinations Issued Under The Davis-Bacon And Related Acts,'' shall be the minimum paid by contractors and subcontractors to laborers and mechanics.

Any person, organization, or governmental agency having an interest in the rates determined as prevailing is encouraged to submit wage rate and fringe benefit information for consideration by the Department. Further information and self-explanatory forms for the purpose of submitting this data may be obtained by writing to the U.S. Department of Labor, Employment Standards Administration, Wage and Hour Division, Division of Wage Determinations, 200 Constitution Avenue, N.W., Room S–3014, Washington, D.C. 20210.

Modifications to General Wage Determination Decisions

The number of decisions listed in the Government Printing Office document entitled ''General Wage Determinations Issued Under the Davis-Bacon and Related Acts'' being modified are listed by Volume and State. Dates of publication in the Federal Register are in parentheses following the decisions being modified.

Volume I

New York
NY960004 (March 15, 1996)
NY960005 (March 15, 1996)
NY960008 (March 15, 1996)
NY960010 (March 15, 1996)
NY960013 (March 15, 1996)
NY960018 (March 15, 1996)
NY960019 (March 15, 1996)
NY960026 (March 15, 1996)
NY960033 (March 15, 1996)
NY960039 (March 15, 1996)
NY960040 (March 15, 1996)
NY960045 (March 15, 1996)
NY960048 (March 15, 1996)
NY960049 (March 15, 1996)
NY960050 (March 15, 1996)
NY960051 (March 15, 1996)
NY960067 (March 15, 1996)
NY960075 (March 15, 1996)

Volume II

Pennsylvania
PA960004 (March 15, 1996)
PA960042 (March 15, 1996)

Volume III

Georgia
GA960003 (March 15, 1996)
GA960004 (March 15, 1996)
GA960022 (March 15, 1996)
GA960023 (March 15, 1996)
GA960031 (March 15, 1996)
GA960032 (March 15, 1996)
GA960033 (March 15, 1996)
GA960044 (March 15, 1996)
GA960050 (March 15, 1996)
GA960065 (March 15, 1996)
GA960073 (March 15, 1996)
GA960084 (March 15, 1996)
GA960085 (March 15, 1996)
GA960086 (March 15, 1996)
GA960087 (March 15, 1996)
GA960088 (March 15, 1996)

Volume IV

Michigan
MI960001 (March 15, 1996)
MI960002 (March 15, 1996)
MI960030 (March 15, 1996)
MI960062 (March 15, 1996)

Volume V

Nebraska
NE960001 (March 15, 1996)
NE960003 (March 15, 1996)
NE960005 (March 15, 1996)
NE960007 (March 15, 1996)
NE960010 (March 15, 1996)
NE960011 (March 15, 1996)
NE960038 (March 15, 1996)
NE960058 (March 15, 1996)
NE960059 (March 15, 1996)

Volume VI

California
CA960001 (March 15, 1996)
CA960002 (March 15, 1996)
CA960027 (March 15, 1996)
CA960028 (March 15, 1996)
CA960031 (March 15, 1996)
CA960032 (March 15, 1996)
CA960033 (March 15, 1996)
CA960034 (March 15, 1996)
CA960035 (March 15, 1996)
CA960036 (March 15, 1996)
CA960037 (March 15, 1996)
CA960038 (March 15, 1996)
CA960039 (March 15, 1996)
CA960040 (March 15, 1996)
CA960041 (March 15, 1996)
CA960042 (March 15, 1996)
CA960047 (March 15, 1996)
CA960069 (April 12, 1996)
CA960100 (December 27, 1996)
CA960105 (December 27, 1996)
CA960109 (December 27, 1996)
CA960110 (December 27, 1996)

Idaho
ID960001 (March 15, 1996)
ID960003 (March 15, 1996)
ID960014 (March 15, 1996)

Montana
MT960001 (March 15, 1996)

Washington
WA960005 (March 15, 1996)

Wyoming
WY960004 (March 15, 1996)
WY960009 (March 15, 1996)
WY960021 (March 15, 1996)

General Wage Determination Publication

General wage determinations issued under the Davis-Bacon and related Acts, including those noted above, may be found in the Government Printing Office (GPO) document entitled ''General Wage Determinations Issued Under the Davis-Bacon and Related Acts''. This publication is available at each of the 50 Regional Government Depository Libraries and many of the 1,400 Government Depository Libraries across the country.

The general wage determinations issued under the Davis-Bacon and related Acts are available electronically by subscription to the FedWorld Bulletin Board System of the National Technical Information Service (NTIS) of the U.S. Department of Commerce at (703) 487–4630.

Hard-copy subscriptions may be purchased from: Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402, (202) 512–1800.

When ordering hard-copy subscription(s), be sure to specify the State(s) of interest, since subscriptions may be ordered for any or all of the six separate volumes, arranged by State. Subscriptions include an annual edition (issued in January or February) which includes all current general wage determinations for the States covered by each volume. Throughout the remainder of the year, regular weekly updates are distributed to subscribers.

Signed at Washington, D.C. this 26th day of December 1996.

Philip J. Gloss,

Chief, Branch of Construction Wage Determinations.

[FR Doc. 97–25 Filed 1–2–97; 8:45 am]

BILLING CODE 4510–27–M

Mine Safety and Health Administration

Petitions for Modification

This notice amends a petition document listed below to include the mandatory safety standard. This document was published in the Federal Register on December 4, 1996 (61 FR 64374). The standard was inadvertently left out of the previous notice.

Mountain Coal Company (Correction)

[Docket No. M–96–104–C]

Mountain Coal Company, P.O. Box 591, Somerset, Colorado 81434 has filed a petition to modify the application of 30 CFR 75.503) (permissible electric face equipment; maintenance) to its West Elk Mine (I.D. No. 05–03672) located in Gunnison County, Colorado. The petitioner proposes to use 1,100 feet of 2/0, type SHD–GC cable on continuous miners, 1,000 feet of #2, type GC cable on roof bolters, and 1,000 feet of #2, type SHD–GC cable on auxiliary face fans. The petitioner states that the maximum circuit breaker instantaneous settings for the cables would be 1,500 amperes, 800 amperes and 800 amperes respectively. The petitioner asserts that the proposed alternative method would provide at least the same measure of protection as would the mandatory standard.

The following parties have filed the petitions listed below to modify the application of mandatory safety standards under section 101(c) of the Federal Mine Safety and Health Act of 1977.

1. Minton Hickory Coal Company

[Docket No. M–96–143–C]

Minton Hickory Coal Company, P.O. Box 1733, Corbin, Kentucky 40702 has filed a petition to modify the application of 30 CFR 75.380(f)(4)(i) (escapeways; bituminous and lignite mines) to its Mine No. 9 (I.D. No. 15–17691) located in Knox County, Kentucky. The petitioner proposes to install two five pound or one ten pound portable fire extinguisher in the operator deck of each Mescher Tractor operated at the mine; to have the fire extinguisher readily accessible to the operator; and to have the equipment operator inspect each fire extinguisher daily prior to entering the escapeway. The petitioner asserts that this petition is based on the safety of the miners involved at the mine.

2. Minton Hickory Coal Company

[Docket No. M–96–144–C]

Minton Hickory Coal Company, P.O. Box 1733, Corbin, Kentucky 40702 has filed a petition to modify the application of 30 CFR 75.342 (methane monitors) to its Mine No. 9 (I.D. No. 15–17691) located in Knox County, Kentucky. The petitioner proposes to use hand-held continuous-duty methane and oxygen indicators instead of machine mounted methane monitors on three-wheel tractors with drag bottom buckets. The petitioner asserts that this petition is based on the safety of the miners involved at the mine.

3. F–M Coal Company

[Docket No. M–96–145–C]

F–M Coal Company, P.O. Box 1733, Corbin, Kentucky 40702 has filed a petition to modify the application of 30 CFR 75.342 (methane monitors) to its Mine No. 2 (I.D. No. 15–17812) located in Knox County, Kentucky. The petitioner proposes to use hand-held continuous-duty methane and oxygen indicators instead of machine mounted methane monitors on three-wheel tractors with drag bottom buckets. The petitioner asserts that this petition is based on the safety of the miners involved at the mine.

4. F–M Coal Company

[Docket No. M–96–146–C]

F–M Coal Company, P.O. Box 1733, Corbin, Kentucky 40702 has filed a petition to modify the application of 30 CFR 75.380(f)(4)(i) (escapeways; bituminous and lignite mines) to its Mine No. 2 (I.D. No. 15–17812) located in Knox County, Kentucky. The petitioner proposes to install two five pound or one ten pound portable fire extinguisher in the operator deck of each Mescher Tractor operated at the mine; to have the fire extinguisher readily accessible to the operator; and to have the equipment operator inspect each fire extinguisher daily prior to entering the escapeway. The petitioner asserts that this petition is based on the safety of the miners involved at the mine.

5. Old Ben Coal Company

[Docket No. M–96–147–C]

Old Ben Coal Company, P.O. Box 456, Coulterville, Illinois 62237 has filed a petition to modify the application of 30 CFR 75.900 (low- and medium-voltage circuits serving three-phase alternating current equipment; circuit breakers) to its Ziegler No. 11 Mine (I.D. No. 11–02408) located in Randolph County, Illinois. The petitioner proposes to use contactors capable of dropping out at 40–60 percent the voltage loss on belt starting equipment in the Mine's New Main East and New Main South Development areas instead of using undervoltage release breakers for undervoltage protection. The petitioner has outlined in the petition specific procedures to be followed when implementing its proposed alternative method. The petitioner asserts that the proposed alternative method would provide at least the same measure of protection as would the mandatory standard.

6. Jim Walter Resources, Inc.

[Docket No. M–96–148–C]

Jim Walter Resources, Inc., P.O. Box 133, Brookwood, Alabama 35444 has filed a petition to modify the application of 30 CFR 75.1002 (location of trolley wires, trolley feeder wires, high-voltage cables and transformers) to its No. 7 Mine (I.D. No. 01–01401) located in Tuscaloosa County, Alabama. The petitioner requests that Paragraph 9 of the Proposed Decision and Order for granted petition, Docket No. M–85–09–C, be amended as follows: The high-voltage circuit from the longwall power center to the longwall controller shall be provided with short circuit protection set at not more than 2,500 amperes or the value of current indicated in the longwall approval plan. A time delay of not more than 0.25 second shall be permitted for coordination with downstream short-circuit protection devices or the time delay specified in the Longwall Approval Plan. The petitioner asserts that the proposed alternative method would provide at least the same measure of protection as would the mandatory standard.

7. Eighty-Four Mining Company

[Docket No. M–96–149–C

Eighty-Four Mining Company, P.O. Box 729, Indiana, Pennsylvania 15701 has filed a petition to modify the application of 30 CFR 75.507 (power connection points) to its Mine No. 84 (I.D. No. 36–00958) located in Washington County, Pennsylvania. The petitioner proposes to use non-permissible submersible pumps to dewater a sump in which it is installed. The petitioner states that the pumps would be operated on a 480-volt three-phase alternating-current electrical power circuit with power supplied from a resistor grounded wye transformer and protected with a line power ground fault, pilot combination unit. The petitioner asserts that the proposed alternative method would provide at least the same measure of protection as would the mandatory standard.

8. Eighty-Four Mining Company

[Docket No. M–96–150–C]

Eighty-Four Mining Company, P.O. Box 729, Indiana, Pennsylvania 15701 has filed a petition to modify the application of 30 CFR 75.512 (electrical equipment) to its Mine No. 84 (I.D. No. 36–00958) located in Washington County, Pennsylvania. The petitioner proposes to use non-permissible submersible pumps to dewater a sump in which it is installed. The petitioner states that the pumps would be operated on a 480-volt three-phase alternating-

current electrical power circuit with power supplied from resistor grounded wye transformer and protected with a line power ground fault, pilot combination unit. The petitioner asserts that the proposed alternative method would provide at least the same measure of protection as would the mandatory standard.

9. Costain Coal, Inc.

[Docket No. M–96–151–C]

Costain Coal, Inc., P.O. Box 448, Clay, Kentucky 42404 has filed a petition to modify the application of 30 CFR 75.312(d) (main mine fan and examinations and records) to its Wheatcroft Mine (I.D. No. 15–13920) and its Baker Mine (I.D. No. 15–14492) both located in Webster County, Kentucky. The petitioner proposes to test the automatic closing doors every thirty-one (31) days by de-energizing the operating fan along with simultaneously starting the idle fan and then observe the previously operating fan for proper operation as the previously idle fan powers up and maintains ventilation without materially affecting the system. The petitioner states that both fans would be set up with the same blade setting and a visual indicator that shows when the anti-reversal doors are open or closed; and that application of the standard would result in a diminution of safety to the miners. In addition, the petitioner asserts that the proposed alternative method would provide at least the same measure of protection as would the mandatory standard.

10. Road Fork Development Company

[Docket No. M–96–152–C]

Road Fork Development Company, P.O. Box 565, Matewan, West Virginia 25678 has filed a petition to modify the application of 30 CFR 75.503 (permissible electric face equipment; maintenance) to its Calloway Mine (I.D. No. 15–17252); its Pegs Branch Mine (I.D. No. 15–17541); its Burnwell Energy Mine (I.D. No. 15–16599); and its Extra Energy Mine (I.D. No. 15–15386) all located in Pike County, Kentucky. The petitioner proposes to use permanently installed, spring-loaded locking devices to secure battery plugs on mobile equipment to prevent unintentional loosening of the battery plugs from battery receptacles and to eliminate the hazards associated with difficult removal of padlocks during emergency situations. The petitioner states that application of the standard would result in a diminution of safety to the miners. In addition, the petitioner asserts that the proposed alternative method would provide at least the same measure of protection as would the mandatory standard.

11. Boone Resources, Inc.

[Docket No. M–96–153–C]

Boone Resources, Inc., 1051 Oak Mountain Drive, Pelham, Alabama 35124 has filed a petition to modify the application of 30 CFR 75.350 (air courses and belt haulage entries) to its Boone No. 1 Mine (I.D. No. 01–02908) located in Shelby County, Alabama. The petitioner requests a modification of the standard to permit the use of belt air to provide ventilation for the sections and possibly a longwall system in the future. The petitioner proposes to install a carbon monoxide monitoring system as an early warning fire detection system in all belt entries used as intake aircourses. The petitioner asserts that the terms and conditions in this petition would ensure that the high level of safety standards that Boone No. 1 has provided to its workforce in the past will be maintained.

12. Costain Coal, Inc.

[Docket No. M–96–154–C]

Costain Coal, Inc., P.O. Box 448, Clay, Kentucky 42404 has filed a petition to modify the application of 30 CFR 75.364(b)(4) (weekly examinations) to its Smith Underground No. 1 Mine (I.D. No. 15–16020) located in Webster County, Kentucky. Due to a roof fall, one of the seals in the 1st South seals off the South Main of the mine cannot be examined safely. The petitioner proposes to continuously monitor the air passing by the seals to determine the levels of methane, carbon monoxide, and oxygen. The petitioner asserts that the proposed alternative method would provide at least the same measure of protection as would the mandatory standard.

13. Road Fork Development Company

[Docket No. M–96–155–C]

Road Fork Development Company, P.O. Box 565, Matewan, West Virginia 25678 has filed a petition to modify the application of 30 CFR 75.901 (protection of low- and medium-voltage three-phase circuits used underground) to its Calloway Mine (I.D. No. 15–17252); its Pegs Branch Mine (I.D. No. 15–17541); its Burnwell Energy Mine (I.D. No. 15–16599); and its Extra Energy Mine (I.D. No. 15–15386) all located in Pike County, Kentucky. The petitioner proposes to use a diesel generator to power mobile equipment in and out of the mines. The petitioner has outlined in this petition specific changes and adjustments that would be made to the generator set to ensure that the proposed alternative method would provide at least the same measure of protection as would the mandatory standard.

14. Rawl Sales and Processing Company

[Docket No. M–96–156–C]

Rawl Sales and Processing Company, P.O. Box 722, Matewan, West Virginia 25678 has filed a petition to modify the application of 30 CFR 75.901(a) (protection for low- and medium-voltage three-phase circuits used underground) to its Tall Timber Mine (I.D. No. 15–13720) located in Pike County, Kentucky. The petitioner proposes to use a diesel generator to power mobile equipment in and out of the mine. The petitioner has outlined in this petition specific changes and adjustments that would be made to the generator set to ensure that the proposed alternative method would provide at least the same measure of protection as the mandatory standard.

15. Crystal Fuels Company

[Docket No. M–96–157–C]

Crystal Fuels Company, P.O. Box 269, Matewan, West Virginia 25678 has filed a petition to modify the application of 30 CFR 75.503 (permissible electric face equipment; maintenance) to its Mine No. 1 (I.D. No. 46–03408) located in Mingo County, West Virginia. The petitioner proposes to use permanently installed, spring-loaded locking devices to secure battery plugs on mobile equipment to prevent unintentional loosening of the battery plugs from battery receptacles and to eliminate the hazards associated with difficult removal of padlocks during emergency situations. The petitioner states that application of the standard would result in a diminution of safety to the miners. In addition, the petitioner asserts that the proposed alternative method would provide at least the same measure of protection as would the mandatory standard.

16. Vantage Mining Company

[Docket No. M–96–158–C]

Vantage Mining Company, P.O. Box 780, Matewan, West Virginia has filed a petition to modify the application of 30 CFR 75.503 (permissible electric face equipment; maintenance) to its Mine No. 1 (I.D. No. 46–01939) located in Wayne County, West Virginia. The petitioner proposes to use permanently installed, spring-loaded locking devices to secure battery plugs on mobile equipment to prevent unintentional loosening of the battery plugs from battery receptacles and to eliminate the hazards associated with difficult

removal of padlocks during emergency situations. The petitioner states that application of the standard would result in a diminution of safety to the miners. In addition, the petitioner asserts that the proposed alternative method would provide at least the same measure of protection as would the mandatory standard.

17. Rawl Sales and Processing Company

[Docket No. M–96–159–C]

Rawl Sales Processing Company, P.O. Box 722, Matewan, West Virginia 25678 has filed a petition to modify the application of 30 CFR 75.503 (permissible electric face equipment; maintenance) to its Tall Timber Mine (I.D. No. 15–13720) located in Pike County, Kentucky. The petitioner proposes to use permanently installed, spring-loaded locking devices to secure battery plugs on mobile equipment to prevent unintentional loosening of the battery plugs from battery receptacles and to eliminate the hazards associated with difficult removal of padlocks during emergency situations. The petitioner states that application of the standard would result in a diminution of safety to the miners. In addition, the petitioner asserts that the proposed alternative method would provide at least the same measure of protection as would the mandatory standard.

18. Sycamore Fuels, Inc.

[Docket No. M–96–160–C]

Sycamore Fuels, Inc., P.O. Box 703, Matewan, West Virginia 25678 has filed a petition to modify the application of 30 CFR 75.503 (permissible electric face equipment; maintenance) to its Mine No. 1 (I.D. No. 46–01756) located in Mingo County, West Virginia. The petitioner proposes to use permanently installed, spring-loaded locking devices to secure battery plugs on mobile equipment to prevent unintentional loosening of the battery plugs from battery receptacles and to eliminate the hazards associated with difficult removal of padlocks during emergency situations. The petitioner states that application of the standard would result in a diminution of safety to the miners. The petitioner asserts that the proposed alternative method would provide at least the same measure of protection as would the mandatory standard.

19. Rawl Sales and Processing Company

[Docket No. M–96–161–C]

Rawl Sales and Processing Company, P.O. Box 722, Matewan, West Virginia 25678 has filed a petition to modify the application of 30 CFR 75.503 (permissible electric face equipment; maintenance) to its Rocky Hollow Mine (I.D. No. 46–05195) located in Mingo County, West Virginia. The petitioner proposes to use permanently installed, spring-loaded locking devices to secure battery plugs on mobile equipment to prevent unintentional loosening of the battery plugs from battery receptacles and to eliminate the hazards associated with difficult removal of padlocks during emergency situations. The petitioner states that application of the standard would result in a diminution of safety to the miners. In addition, the petitioner asserts that the proposed alternative method would provide at least the same measure of protection as would the mandatory standard.

20. Cyprus Shoshone Coal Corporation

[Docket No. M–96–162–C]

Cyprus Shoshone Coal Corporation, One Oxford Centre, 301 Grant Street, 20th Floor, Pittsburgh, Pennsylvania 15219 has filed a petition to modify the application of 30 CFR 75.362(d)(2) (on-shift examination) to its Shoshone No. 1 Mine (I.D. No. 48–01186) located in Carbon County, Wyoming. The petitioner proposes to use an extendable 20-foot probe to take methane tests. The petitioner has outlined in this petition specific procedures to be followed when using its alternative method. The petitioner states that application of the standard would result in a diminution of safety to the miners. In addition, the petitioner asserts that the proposed alternative method would provide at least the same measure of protection as would the mandatory standard.

21. Cyprus Plateau Mining Corporation

[Docket No. M–96–163–C]

Cyprus Plateau Mining Corporation, One Oxford Centre, 301 Grant Street, 20th Floor, Pittsburgh, Pennsylvania 15219 has filed a petition to modify the application of 30 CFR 75.362 (on-shift examination) to its Star Point No. 2 Mine (I.D. No. 42–00171) located in Carbon County, Utah. The petitioner proposes to use an extendable 20-foot probe to take methane tests. The petitioner has outlined in this petition specific procedures to be followed when using its alternative method. The petitioner states that application of the standard would result in a diminution of safety to the miners. In addition, the petitioner asserts that the proposed alternative method would provide at least the same measure of protection as would the mandatory standard.

22. Twentymile Coal Company

[Docket No. M–96–164–C]

Twentymile Coal Company, One Oxford Centre, 301 Grant Street, 20th Floor, Pittsburgh, Pennsylvania 15219 has filed a petition to modify the application of 30 CFR 75.362(d)(2) (on-shift examination) to its Foidel Creek Mine (I.D. No. 05–03836) located in Routt County, Colorado. The petitioner proposes to use an extendable 20-foot probe to take methane tests. The petitioner has outlined in this petition specific procedures to be followed when using its alternative method. The petitioner states that application of the standard would result in a diminution of safety to the miners. In addition, the petitioner asserts that the proposed alternative method would provide at least the same measure of protection as would the mandatory standard.

23. Bar-K, Inc.

[Docket No. M–96–165–C]

Bar-K, Inc., P.O. Box 8, Madison, West Virginia 25130 has filed a petition to modify the application of 30 CFR 75.503 (permissible electric face equipment; maintenance) to its Camp Creek No. 1 Mine (I.D. No. 46–08523), and its Sugar Tree No. 1 Mine (I.D. No. 46–08573) both located in Boone County, West Virginia. The petitioner proposes to use a threaded ring and a spring loaded device on battery plug connectors on mobile battery-powered machines used inby the last open cross-cut to prevent the plug connector from accidently disengaging while under load instead of using a padlock. The petitioner states that application of the standard would result in a diminution of safety to the miners. In addition, the petitioner asserts that the proposed alternative method would provide at least the same measure of protection as would the mandatory standard.

Request for Comments

Persons interested in these petitions may furnish written comments. These comments must be filed with the Office of Standards, Regulations, and Variances, Mine Safety and Health Administration, Room 627, 4015 Wilson Boulevard, Arlington, Virginia 22203. All comments must be postmarked or received in that office on or before February 3, 1997. Copies of these petitions are available for inspection at that address.

Dated: December 20, 1996.

Patricia W. Silvey,

Director, Office of Standards, Regulations, and Variances.

[FR Doc. 97–69 Filed 1–2–97; 8:45 am]

BILLING CODE 4510–43–P

NATIONAL SCIENCE FOUNDATION

Notice of Permit Issued Under the Antarctic Conservation Act of 1978, Public Law 95–541

SUMMARY: The National Science Foundation (NSF) is required to publish notice of permits issued under the Antarctic Conservation Act of 1978.

FOR FURTHER INFORMATION CONTACT: Nadene Kennedy or Robert S. Cunningham, Permit Office, Office of Polar Programs, National Science Foundation, 4201 Wilson Blvd., Rm 755, Arlington, VA 22230, telephone: (703) 306–1033.

SUPPLEMENTARY INFORMATION: On November 20, 1996, the National Science Foundation published a notice in the Federal Register of waste management permit applications received from Quark Expeditions for the operation of field support incidental to shipboard tour operations in Antarctica and for operation of a small research camp at Cape Shirreff, Livingston Island, Antarctica by Dr. Rennie S. Holt. The waste management permits authorize activities as described in permit applications on file at the Office of Polar Programs. These files may be viewed during normal business hours. The effective date of each waste management permit is December 27, 1996 to April 30, 2001.

Robert S. Cunningham,

Environmental Compliance Manager, Office of Polar Programs, National Science Foundation.

[FR Doc. 97–28 Filed 1–2–97; 8:45 am]

BILLING CODE 7555–01–M

Advisory Committee for Small Business Industrial Innovation; Notice of Meeting

In accordance with the Federal Advisory Committee Act (Pub. L. 92–463, as amended), the National Science Foundation announces the following meeting:

Name: Advisory Committee for Small Business Industrial Innovation (SBIR)–(61).

Date and Time: January 22–23, 1997, 8:00 a.m.–5:00 p.m.

Type of Meeting: Open.

Place: Room 1235, National Science Foundation, 4201 Wilson Boulevard, Arlington, VA 22230.

Contact Person: Cheryl Albus, SBIR Program Coordinator, (703) 306–1390, National Science Foundation, 4201 Wilson Boulevard, Arlington, VA 22230.

Minutes: May be obtained from the contact person listed above.

Purpose of Committee: To provide advice and recommendations concerning research programs pertaining to the small business community.

Agenda

January 22, 1997, Room 1235

8:00 a.m. to 8:30 a.m.—Welcome and Introductions
8:30 a.m. to 12:00 noon—Review and Discussion of Programs
- SBIR Phase I
- SBIR Phase II
- STTR Phase I/II

12:00 noon to 1:30 p.m.—Lunch
1:30 p.m. to 3:30 p.m.—Discussion of Program Issues
3:30 p.m. to 3:45 p.m.—Break
3:45 p.m. to 5:00 p.m.—Further Discussions
5:00—Adjourn

January 23, 1996—Room 1235

8:00 a.m. to 10:00 a.m.—Preparation of Committee Report
10:00 a.m. to 10:30 a.m.—Break
10:30 a.m. to 12:30 p.m.—Feedback from Committee
12:30 p.m.—Adjourn

Dated: December 30, 1996.

M. Rebecca Winkler,

Committee Management Officer.

[FR Doc. 97–27 Filed 1–2–97; 8:45 am]

BILLING CODE 7555–01–M

NUCLEAR REGULATORY COMMISSION

[Docket No. 50–245]

Northeast Nuclear Energy Company, Millstone Nuclear Power Station, Unit 1; Issuance of Partial Director's Decision Under 10 CFR 2.206

Notice is hereby given that the Acting Director, Office of Nuclear Reactor Regulation, has issued a Partial Director's Decision with regard to a Petition dated August 21, 1995, and supplemented on August 28, 1995, submitted by Mr. George Galatis and We the People, Inc. (the Petitioners), requesting action under 10 CFR 2.206. The Petition pertains to Millstone Nuclear Power Station, Unit 1, operated by Northeast Nuclear Energy Company (Licensee).

The Petitioners requested that the NRC (1) suspend the license for the Millstone Unit 1 facility for a period of 60 days after the unit is brought into compliance with the license and the design basis; (2) revoke the operating license until the facility is in full compliance with the terms and conditions of its license; (3) perform a detailed independent analysis of the offsite dose consequences of the total loss of spent fuel pool water; and (4) take enforcement action pursuant to 10 CFR 50.5 and 50.9. As bases for their requests, the Petitioners raised the following three issues: (1) The Licensee has knowingly, willingly, and flagrantly operated Millstone Unit 1 in violation of License Amendments Nos. 39 and 40; (2) License Amendments Nos. 39 and 40 for Millstone Unit 1 are based on material false statements made by the Licensee in documents submitted to the NRC; and (3) the license amendment proposed in a letter dated July 28, 1995, should be denied and the Licensee should be required to operate in full conformance with License Amendment No. 40. Issue 3 was determined to be a request for a licensing action and so was beyond the scope of 10 CFR 2.206.

The Acting Director of the Office of Nuclear Reactor Regulation has partially granted Requests 1, 2, and 3 of the Petition. The reasons for this decision are explained in the ''Partial Director's Decision Pursuant to 10 CFR 2.206'' (DD–96–23), the complete text of which follows this notice. With regard to Petitioner's Request 4, the NRC staff activities are not yet complete. A Final Director's Decision will be issued upon completion of NRC activities in this area.

A copy of this Partial Director's Decision will be available for public inspection at the Commission's Public Document Room, the Gelman Building, 2120 L Street, NW., Washington, D.C., and at the local public document room located at the Learning Resources Center, Three Rivers Community-Technical College, 574 New London Turnpike, Norwich, Connecticut, and at the temporary local public document room located at the Waterford Library, ATTN: Vince Juliano, 49 Rope Ferry Road, Waterford, Connecticut.

A copy of this Partial Director's Decision has been filed with the Secretary of the Commission for review in accordance with 10 CFR 2.206(c) of the Commission's regulations. This Decision will become the final action of the Commission (for Petitioners' requests dispositioned in this Partial Director's Decision) 25 days after the date of issuance unless the Commission, on its own motion, institutes review of the Decision within that time.

Dated at Rockville, Maryland, this 26th day of December 1996.

For the Nuclear Regulatory Commission.

Frank J. Miraglia, Jr.,

Acting Director, Office of Nuclear Reactor Regulation.

Partial Director's Decision Under 10 CFR 2.206

I. Introduction

On August 21, 1995, Mr. George Galatis and We the People, Inc. (Petitioners), filed a Petition with the Executive Director for Operations of the U.S. Nuclear Regulatory Commission (NRC) pursuant to Section 2.206 of Title 10 of the *Code of Federal Regulations* (10 CFR 2.206). A supplement to the Petition was submitted on August 28, 1995. These two submittals will hereinafter be referred to as the ''Petition.''

The Petition raised three issues regarding the Millstone Nuclear Power Station, Unit 1 (Millstone Unit 1), operated by Northeast Nuclear Energy Company (NNECO or Licensee). First, Petitioners asserted that the Licensee has knowingly, willingly, and flagrantly operated Millstone Unit 1 in violation of License Amendments Nos. 39 and 40. Specifically, Petitioners assert that NNECO has offloaded more fuel assemblies into the Millstone Unit 1 spent fuel pool (SFP) during refueling outages than permitted under these license amendments. Second, Petitioners asserted that License Amendments Nos. 39 and 40 for Millstone Unit 1 are based on material false statements made by the Licensee in documents submitted to the NRC. Third, the license amendment proposed by the Licensee in a letter dated July 28, 1995, regarding offloading of the entire core of spent fuel assemblies at Millstone Unit 1 should be denied and the Licensee should be required to operate in full conformance with License Amendment No. 40.

On the basis of these assertions, the Petitioners requested that the NRC institute a proceeding under 10 CFR 2.202 to suspend the license for the Millstone Unit 1 facility for a period of 60 days after the unit is brought into compliance with the license and the design basis and to revoke the operating license for the Millstone Unit 1 facility until it is in full compliance with the terms and conditions of its license. Petitioners also requested that before reinstatement of the license, a detailed independent analysis of the offsite dose consequences of the total loss of SFP water be conducted and that the NRC take enforcement action against NNECO pursuant to 10 CFR 50.5 and 50.9. Finally, Petitioners requested that the license amendment sought by NNECO be denied.

By letter dated October 26, 1995, the NRC informed the Petitioners that the Petition had been referred to the Office of Nuclear Reactor Regulation pursuant to 10 CFR 2.206 of the Commission's regulations for preparation of a response. The NRC also informed the Petitioners that the NRC staff would take appropriate action within a reasonable time regarding the specific concerns raised in the Petition. Additionally, the Petitioners were informed that their request with regard to issues associated with the requested license amendment (i.e., Petitioners' third issue) was not within the scope of 10 CFR 2.206 and thus was not appropriate for consideration under 10 CFR 2.206. *See Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI–81–6, 13 NRC 443 (1981).[1] Therefore, this issue will not be addressed in this or any subsequent Director's Decision.

Petitioners' supplement of August 28, 1995, provided additional information. A portion of the Petitioners' supplemental letter of August 28, 1995, contained assertions relating to the third issue. Specifically, regarding Millstone Unit 3, the Petitioners asserted that there is a material false statement in a submission used to support a previous license amendment and that there is an unanalyzed condition in the Updated Final Safety Analysis Report (UFSAR) with regard to system piping not being analyzed for the full-core offload normal end-of-cycle event. Also, with regard to Seabrook Station Unit 1, Petitioners asserted that there are Technical Specification violations related to criticality analysis and gaps in Boraflex material. As the third issue is outside the scope of 10 CFR 2.206, these assertions will not be addressed in this or subsequent Director's Decisions. However, the staff is reviewing these assertions and the staff's findings will be forwarded to the Petitioners by separate correspondence.

Petitioners' supplemental letter also provided additional information on the first issue. Specifically, the Petitioners asserted that the licensees for Millstone Units 2 and 3 and Seabrook Unit 1 also performed full-core offloads in violation of their licenses. These assertions will be addressed in this Partial Director's Decision.

Petitioners' issues 1 and 2 assert wrongdoing on the part of the Licensee. The NRC staff has not yet completed its review of possible wrongdoing on the part of the Licensee and will address this issue in a subsequent Director's Decision.

The NRC staff has, however, completed its technical assessment of core offloading practices at Millstone Units 1, 2, and 3 and Seabrook Unit 1 and these areas are discussed below. As explained below, the NRC staff has taken actions that, in part, address the Petitioners' requests.

II. Discussion

A. Requests To Revoke and Suspend the Operating License for Millstone Unit 1

The Petitioners based their requests on their issues that the Licensee has knowingly, willingly, and flagrantly operated Millstone Unit 1 in violation of License Amendments Nos. 39 and 40 and that License Amendments Nos. 39 and 40 for Millstone Unit 1 are based on material false statements. Specifically, the Petitioners stated that the Licensee conducted full-core offloads as a routine practice when its licensing basis analyses assumed one-third core offloads as the normal refueling practice. In their August 28 supplemental letter, the Petitioners asserted that the licensees for Millstone Units 2 and 3 and Seabrook Unit 1 also performed full-core offloads in violation of their licenses. The Petitioners further contend that the Licensee's actions subjected the public to an unacceptable risk. As previously noted, the wrongdoing aspects of the Licensee's actions will not be addressed in this Director's Decision. However, the technical aspects associated with core offloading practices will be addressed in the following paragraphs. For perspective, the NRC staff's conclusions are prefaced by an abbreviated history of this issue.

On October 18, 1993, the Licensee issued Licensee Event Report (LER) 93–11. The LER stated that the Licensee had made inappropriate assumptions in the analysis that was performed in support of License Amendment No. 40 for Millstone Unit 1. Specifically, the normal refueling analysis assumed a one-third core offload when Unit 1 routinely performed full-core refueling offloads. Following issuance of LER 93–11, the Licensee conducted refueling

[1] Petitioners' concerns related to the license amendment were considered by the NRC staff during the license amendment review process. A license amendment was issued by the NRC staff on November 9, 1995. A number of petitioners, including We the People, Inc., sought to intervene in the license amendment proceeding. Two petitioners, including We the People, Inc., were found to have standing to intervene and were admitted to the proceeding subject to the filing of at least one admissible contention. Based upon confirmation by counsel for these petitioners that no contention would be filed, the Atomic Safety and Licensing Board terminated the proceeding on April 15, 1996.

outage (RFO) 14 in 1994. The Licensee used a waiting period between the one-third core offload and the full-core offload during RFO 14 to ensure that the SFP bulk temperature remained within the temperature design parameters identified in LER 93–11 and the UFSAR.

On April 22, 1994, the NRC issued Inspection Report (IR) 50–245/94–01, 50–336/94–01, and 50–423/94–01. The NRC staff's review of LER 93–11 was included in this inspection report. The NRC staff found that the Licensee for Millstone Unit 1 had historically removed all of the fuel assemblies to the SFP during refueling outages. The NRC staff noted that this operating practice was not consistent with the spent fuel analysis design-basis assumptions in the UFSAR. Therefore, the NRC staff concluded that the Licensee had failed to maintain spent fuel analysis design assumptions in plant operating practices. However, because the violation was a Licensee-identified Severity Level IV violation meeting the criteria set out in Section VII.B of the NRC Enforcement Policy,[2] a Notice of Violation was not issued. The purpose of this policy regarding NRC discretion for citing violations is to encourage and support licensee initiatives for self-identification and correction of problems.[3]

From July 10 through July 14, 1995, the NRC staff conducted a safety inspection of several previously identified technical issues at Millstone Units 1, 2, and 3, including the Licensee's refueling offload practices that were reviewed previously. The results of the inspection were documented in NRC IR 50–245/95–28, 50–336/95–28, and 50–423/95–28 issued on September 1, 1995. The staff noted that during RFOs 12, 13, and 14, the Licensee performed full-core offloads at Millstone Unit 1. The staff concluded that these outages may have been performed outside the design basis of Millstone Unit 1. The staff also concluded that the Licensee did not completely and accurately describe in its submittals for License Amendments Nos. 39 and 40 the refueling activities as they were actually conducted. The Licensee was routinely performing full-core offloads during refueling outages, but the amendment submittals stated that ''normal'' refueling offloads were one-third core offloads. Enforcement action associated with the staff's findings will be taken, as appropriate, upon final resolution of the Petitioners' contentions regarding possible wrongdoing.

On July 28, 1995, the Licensee requested a license amendment to use full-core offloads as the normal refueling practice at Millstone Unit 1. The Licensee proposed plant modifications to support this license amendment. The staff granted the Licensee's amendment request on November 9, 1995. The NRC's approval of the Licensee's request was based on design changes, procedure revisions, and enhanced administrative controls that did not exist during prior refueling activities. In the cover letter forwarding the granted license amendment, the staff noted that NNECO's design and operational practices for full-core offloads were more conservative than NRC recommendations and industry standards.

On November 4, 1995, the Licensee shut down Millstone Unit 1 for the planned 50-day RFO 15. The Licensee for Millstone Unit 1 has not yet restarted the plant from this shutdown.

In part, in response to the concerns the Petitioners raised, from October 24 to November 10, 1995, the NRC staff performed an inspection at Millstone Unit 1 to ensure the Licensee's planned refueling operation would be done safely and in accordance with its license, design basis, and plant procedures. The inspection was continued from March 4 to 14, 1996. The results of this Millstone Unit 1 inspection were documented in NRC IR 50–245/95–82, issued July 10, 1996. The NRC staff concluded that the Licensee could safely offload fuel for RFO 15. However, the inspection identified design control questions related to the SFP cooling system. Consequently, the staff concluded that additional Licensee efforts were needed to identify and correct deficiencies related to the Licensee's SFP cooling systems and their operation. Two areas of concern involved the Licensee's failure (1) to conduct adequate safety evaluations in accordance with 10 CFR 50.59 and (2) to take adequate design control measures in accordance with Appendix B of 10 CFR Part 50. These items were cited as apparent violations. NRC is considering enforcement action associated with the staff's findings.

At a public meeting on December 5, 1995, the NRC's Acting Inspector General stated that, based on an investigation conducted by his office, refueling activities at Millstone Unit 1 may not have been conducted consistent with the Millstone Unit 1 UFSAR.[4]

On December 13, 1995, pursuant to 10 CFR 50.54(f), the NRC required that NNECO provide the NRC with additional information to describe the actions taken to ensure that future operation of Millstone Unit 1 will be conducted in accordance with the terms and conditions of the Millstone Unit 1 operating license, the Commission's regulations, and the Millstone Unit 1 UFSAR. NRC concerns related to past refueling activities at Millstone Unit 1 were a major impetus for this request. The December 13, 1995, letter required this information to be submitted before the plant's restart.

In January 1996, the NRC placed the Millstone facility on NRC's ''Watch List'' as a Category 2 facility. Plants in this category have been identified as having weaknesses that warrant increased NRC attention. The NRC staff based its actions on the numerous problems identified by both the NRC and the Licensee and the repeated failure of the Licensee's corrective action programs to prevent recurrence of these problems.

On February 20, 1996, the Licensee shut down Millstone Unit 2 when both trains of the high-pressure safety injection (HPSI) system were declared inoperable due to the potential to clog the HPSI discharge throttle valves during the recirculation phase following a loss-of-coolant accident. The Licensee for Millstone Unit 2 has not yet restarted the plant from this shutdown.

On February 22, 1996, the Licensee issued ''ACR 7007—Event Response Team Report,'' which describes the underlying causes for numerous inaccuracies contained in Millstone Unit 1's UFSAR. The 7007 Report also acknowledged that because of the nature of the identified causes, the potential existed for the presence of similar configuration management problems at the Haddam Neck Plant and Millstone Units 2 and 3. In response to the 7007 Report and on the basis the NRC's own inspections of Millstone Unit 2 indicating problems such as those described in the 7007 Report, the NRC issued a letter on March 7, 1996, to NNECO, pursuant to 10 CFR 50.54(f), requiring that the type of information requested for Millstone Unit 1 on December 13, 1995, also be provided for Millstone Unit 2. This information had to be submitted before the plant's restart. In addition, although the NRC's

[2] ''General Statement of Policy and Procedure for NRC Enforcement Actions,'' at that time contained in Appendix C to 10 CFR Part 2.

[3] The NRC staff, in response to Petitioners' requests, is evaluating possible wrongdoing associated with this violation and will reassess the appropriateness of exercising enforcement discretion when the NRC staff's review is complete.

[4] The results of the investigation were documented on December 21, 1995, in Office of Inspector General Event Inquiry, ''NRC Failure to Adequately Regulate—Millstone Unit 1,'' Case No. 95–77I.

inspection history did not indicate that similar problems existed at Millstone Unit 3 and Haddam Neck Plant, the NRC issued a separate letter on March 7, 1996, pursuant to 10 CFR 50.54(f) requiring the Licensee to address the applicability of the conclusions of the 7007 Report to these plants.

Following the March 7 letters, the NRC conducted a special inspection at Millstone Unit 3 that identified design and other deficiencies similar to those reported in the 7007 Report. On March 30, 1996, the Licensee for Millstone Unit 3 shut down the plant after it was determined that containment isolation valves for the auxiliary feedwater turbine-driven pump were inoperable because the valves did not meet NRC requirements. The Licensee for Millstone Unit 3 has not yet restarted the plant from this shutdown.

In a letter dated April 4, 1996, to the Licensee pursuant to 10 CFR 50.54(f), the NRC stated that an NRC special inspection team found programmatic issues and design deficiencies at Millstone Unit 3 that were similar to those at Millstone Units 1 and 2. Thus, by this letter, the NRC required information for Millstone Unit 3 that was similar to that previously required for Millstone Units 1 and 2. This information had to be submitted before the plant's restart.

On April 8, 1996, the NRC staff held the informal public hearing that the Petitioners requested. Information gained at this hearing was considered in the preparation of this Partial Director's Decision and will be considered in the preparation of the Final Director's Decision.

On May 21, 1996, pursuant to 10 CFR 50.54(f), the NRC issued a letter to the Licensee requiring specific information regarding design and configuration deficiencies identified at each of the Millstone units, as well as a detailed description of the Licensee's plans for completion of the work required to respond to the NRC's previous letters.

By letters dated June 20 and July 2, 1996, the Licensee responded to the NRC's letter of May 21, 1996. In its letters, the Licensee informed the NRC that Millstone Unit 3 would be the first Millstone unit that the Licensee planned to restart. The Licensee also described its configuration management plan (CMP) that is intended to provide reasonable assurance that the future operation of Millstone Unit 3 will be conducted in accordance with its design basis.

In June 1996, at the direction of the Commission, the staff informed the Licensee that the Millstone facility had been designated a ''Watch List'' Category 3 facility. Plants in this category have been identified as having significant weaknesses that warrant keeping the plant shut down until the licensee can demonstrate to the NRC that adequate programs have been established and implemented to ensure substantial improvement in the plant. This designation also requires the NRC staff to obtain the Commission's approval before restart of the facility.

During an August 12, 1996, meeting with the Licensee, the staff informed the Licensee that the NRC staff believed NNECO should establish an independent corrective action verification program to provide additional assurance that the Licensee has effectively corrected its configuration management problems at all Millstone units. The NRC concluded that the Licensee's CMP was not sufficient to ensure the correction of the problems noted at the Millstone units, given the Licensee's history of poor performance in ensuring complete implementation of the corrective action for both known degraded and non-conforming conditions and past violations of NRC requirements.

In response to the staff's comments in the August 12 meeting, in a letter dated August 13, 1996, the Licensee submitted its plan for conducting an independent review of the results of the Licensee's CMP regarding establishment of adequate design bases and design controls.

On August 14, 1996, the NRC issued a Confirmatory Order Establishing an Independent Corrective Action Verification Program (Effective Immediately) for Millstone Units 1, 2, and 3 (ICAVP Order). The NRC issued the order because of the Licensee's history of poor performance in ensuring complete implementation of corrective actions for both known degraded and non-conforming conditions and past violations of NRC requirements. In addition, the magnitude and scope of the design and configuration deficiencies identified at the Millstone units indicated ineffective implementation of oversight programs, including the NRC-approved quality assurance program. Thus, the NRC ordered the Licensee to obtain the services of an organization independent of the Licensee and its design contractors to conduct a multi-disciplinary review of Millstone Units 1, 2, and 3. The ICAVP is to provide independent verification that for the selected systems, the Licensee's CMP has identified and resolved existing problems, documented licensing and design bases, and established programs, processes, and procedures for effective configuration management in the future.

Additionally, on the basis, in part, of the UFSAR compliance deficiencies found at Millstone Units 1, 2, and 3, on October 9, 1996, pursuant to 10 CFR 50.54(f), the NRC issued letters to all operating reactor licensees. The letters required licensees to submit information to provide confidence and assurance that licensees are operating and maintaining their plants within the design bases and that any design-bases deviations are reconciled in a timely manner. Specifically, the NRC staff required licensees to describe their configuration management processes, provide their rationale for concluding that the design-bases requirements have been translated into procedures, provide their rationale for concluding that the plant configuration and performance are consistent with the design-bases, describe their processes for identifying and correcting design-bases problems, and provide their assessment of the effectiveness of their current programs.

On the basis of its review and inspections of the Millstone Unit 1 SFP issues, the NRC staff has concluded that the design of the SFP and related systems at Millstone Unit 1 was adequate to protect public health and safety during full-core offloads.[5] The staff concluded that the probability of reaching boiling conditions in the SFP when there has been a full-core offload would be low.

At Millstone Unit 1, the systems that have an SFP cooling capability (i.e., SFP cooling system (SFPCS) and shutdown cooling system (SDCS)) are designed to receive power from two separate and independent emergency buses that can receive power from either of two onsite power supplies following a loss of normal power. The independence of the systems reduces the probability of an event capable of causing a sustained loss of SFP cooling. Assuming the SFP cooling function is lost, despite this feature, there would be a substantial period of time available in which to restore cooling before boiling occurs because of the large volume of water in the SFP and the reactor cavity during refueling outages. In the unlikely event that boiling occurs, the adverse safety impact of a boiling SFP is relatively low because the safety systems subject to adverse environmental conditions from

[5] Based on its inspection and Licensee submittals, the NRC staff has identified some instances when the Licensee prematurely performed full-core offloads at Millstone Unit 1. Although the safety significance of these offloads was low, there is a regulatory concern associated with this practice and the NRC staff is considering enforcement action with regard to it.

SFP boiling would not have a necessary function when irradiated fuel has been transferred from the reactor vessel to the SFP. The water lost because of boiling can be replaced by the condensate system, which is a seismic Category I safety-related makeup source, or from the fire protection system.

In addition to the design features previously discussed, to support its license amendment request of July 28, 1995, to conduct full-core offloads as the normal refueling practice at Millstone Unit 1, the Licensee further upgraded its SFP cooling capability by installing a cross-connect between the SDCS and the SFPCS. This modification provided a redundant train of shutdown cooling for use during full-core offloads.

The Petitioners' supplemental letter of August 28, 1995, contained three allegations regarding core offloading practices at other facilities. The Petitioners noted that the allegations were given to Mr. Galatis and that he had no firsthand knowledge of the veracity of the allegations and did not, himself, allege the conditions exist or existed. However, Mr. Galatis contended that, considering the source, the allegations would appear to have substantial merit. These allegations are addressed in the following paragraphs.

The Petitioners asserted that at Millstone Unit 2, the Licensee engaged in violations of its Technical Specifications by offloading more than one-third of the core into the SFP during normal end-of-cycle refueling outages.

On the basis of the NRC staff's review of Licensee documentation, the NRC staff found that the Licensee routinely, with justified exceptions, conducted one-third core offloads for the Millstone Unit 2 refueling outages in accordance with its licensing basis.

The Petitioners asserted that at Millstone Unit 3, the Licensee also engaged in full-core offloads during normal refueling outages in violation of the applicable license amendment.

The staff found that License Amendment No. 60, dated March 31, 1991, was the applicable license amendment for current SFP storage issues. The Licensee requested this amendment in a letter dated November 30, 1990. In this letter, the Licensee stated that, although the design basis had assumed that normal refueling outages would use partial-core offloads, for Millstone Unit 3, a full-core discharge is the actual normal refueling practice. The design-bases analyses limited the allowed number of full-core discharges to six for the 40-year life of the plant. The Licensee stated that, if it decides to continue offloading a full-core as a normal event, the design basis would be changed before it exceeded the design-basis limit of six full-core offloads. The staff did not object to the Licensee's use of full-core offloads when License Amendment No. 60 was issued.

The staff notes that the practice at Millstone Unit 3 is inconsistent with the original design-basis assumptions regarding normal RFO offloads. As was the case with Millstone Unit 1, the Licensee was routinely performing full-core RFO offloads when the design basis assumed partial-core offloads would be the normal RFO offload. Since the plant was analyzed for at least six full-core offloads and the Licensee has not exceeded this number of full-core offloads, the safety significance of this issue is low. The staff, on a generic basis, is considering the appropriate actions for licensees that have been conducting full-core offloads as their routine refueling practice when their design-basis assumptions for normal fuel offloads were based on partial RFO offloads. The staff will take appropriate action for Millstone Unit 3 once it makes this generic determination.

The Petitioners asserted that Seabrook Unit 1, which is operated by the North Atlantic Energy Service Corporation, was also operated in violation of the terms of its operating license by discharging the full-core to the SFP during routine refueling outages.

The NRC staff found that all RFOs at Seabrook Unit 1 have involved discharge of the entire core to the SFP. Neither the Seabrook Unit 1 operating license nor the plant Technical Specifications contain a limit on the fraction of the core that may be discharged to the SFP during refueling. The UFSAR originally did not state which type of offload would be performed routinely. However, the UFSAR did contain heat load assumptions. Before the first two RFO offloads, the Licensee verified that these assumptions would not be exceeded during the RFO. Before the third refueling outage, under the provisions of 10 CFR 50.59, the UFSAR was revised to explicitly state that full-core discharge is routinely performed as part of a normal refueling. On the basis of its review, the staff found that the Licensee for Seabrook Unit 1 has conducted its core offloads in accordance with the facility's design basis.

The Petitioners requested suspension and revocation of the operating license for Millstone Unit 1. As previously discussed, the relative safety significance of the full-core offloads performed at Millstone Unit 1 is low. However, all three Millstone units have been found to have significant design-basis deficiencies. The NRC has issued letters to NNECO for each Millstone facility requiring that certain information pertaining to actions taken to address design configuration issues be submitted to the NRC and requesting its submittal before the restart of the facilities. Additionally, the NRC has issued the ICAVP Order to the Licensee requiring an independent verification of its broad configuration management corrective actions before restarting of any Millstone units.

These actions taken by the NRC are relevant to the issues raised by the Petitioners regarding adherence by the Licensee to its licensing basis. Further, the actions taken are much broader than those requested by Petitioners in that Petitioners' requests were limited to the SFP design basis at Millstone Unit 1. Thus, the NRC's actions to date constitute a partial grant of the Petitioners' requests regarding suspension and revocation of the operating license for Millstone Unit 1.

B. Request to Perform a Detailed Independent Analysis of the Offsite Dose Consequences of the Total Loss of Spent Fuel Pool Water

The risk of accidents in spent fuel storage pools beyond the design basis was examined in WASH–1400.[6] In this study, it was concluded that the risks associated with the spent fuel are orders of magnitude below those involving the reactor core because of the simplicity of the SFP.

This issue was reexamined in the late 1980s because (1) spent fuel was being stored onsite instead of being reprocessed and (2) some laboratory studies provided evidence of the possibility of fire propagation between assemblies stored in an air-cooled environment. The dose estimate portions of the study were performed by the Brookhaven National Laboratory. The results of this reexamination were published in NUREG–1353.[7] The NRC staff concluded that SFP accidents beyond the design basis did not warrant additional regulatory action because of the large inherent safety margins in the design and construction of the SFP.

Additionally, because of SFP safety questions that were first reported to the NRC staff in November 1992 by two engineers who formerly worked under contract for the Pennsylvania Power & Light Company, the NRC again revisited

[6] U.S. Nuclear Regulatory Commission (USNRC), ''Reactor Safety Study—An Assessment of Accident Risk in U.S. Commercial Nuclear Power Plants,'' WASH–1400, October 1975.

[7] U.S. Nuclear Regulatory Commission (USNRC), ''Regulatory Analysis for the Resolution of Generic Issue 82, 'Beyond Design Basis Accidents in Spent Fuel Pools,' '' NUREG–1353, April 1989.

this issue. The principal safety concern the staff reviewed involved the potential for a sustained loss of SFP cooling and the potential for a substantial loss of spent fuel coolant inventory that could expose irradiated fuel.[8]

The NRC staff completed its work under the task action plan in July 1996. The staff forwarded the results of its review to the Commission on July 26, 1996.[9] In the report, the staff concluded that existing SFP structures, systems, and components provide adequate protection for public health and safety. Protection is provided by several layers of defense involving accident prevention (e.g., quality controls on design, construction, and operation), accident mitigation (e.g., multiple cooling systems and multiple makeup water paths), radiation protection, and emergency preparedness. The staff has reviewed and approved design features addressing each of these areas for spent fuel storage for each operating reactor. In addition, the limited risk analyses available for spent fuel storage suggest that current design features and operational constraints cause issues related to SFP storage to be a small fraction of the overall risk associated with an operating light-water reactor.

The NRC's actions to date in evaluating SFP accidents beyond the design basis constitute a partial grant of the Petitioners' request to perform analyses of such accidents.

C. Request for Enforcement Action Pursuant to 10 CFR 50.5 and 50.9

The NRC staff is still considering the Petitioners' assertions that the Licensee knowingly, willfully, and flagrantly operated Millstone Unit 1 in violation of License Amendments Nos. 39 and 40 and submitted material false statements to obtain License Amendments Nos. 39 and 40, which will be addressed in a subsequent Director's Decision.

III. Conclusion

The staff has completed its technical review of the full-core offload issue at Millstone Units 1, 2, and 3, and Seabrook Unit 1. The staff has concluded that Millstone Unit 1 could safely offload a full core. The staff also found that Millstone Unit 3 and Seabrook Unit 1 could safely offload full cores. Additionally, the staff found that Millstone Unit 2 was not routinely performing full-core offloads as asserted by the Petitioners. However, the staff followup of spent fuel pool issues raised by the Petitioners led, in part, to the identification of a broad spectrum of configuration management concerns that must be corrected before the restart of any Millstone unit.

The three Millstone units are currently shut down and the NRC staff has issued a Confirmatory Order establishing an ICAVP for each Millstone unit to ensure that the plant's physical and functional characteristics are in conformance with its licensing and design basis. The ICAVP shall be performed and completed for each unit, to the satisfaction of the NRC, before restart of any unit. To this extent, Petitioners' requests for suspension and revocation of the Millstone Unit 1 operating license are granted. In addition, the staff has evaluated spent fuel accidents beyond the design bases and, to this extent, Petitioners' request to perform analyses of such accidents is granted.

A copy of this Partial Director's Decision will be placed in the Commission's Public Document Room, the Gelman Building, 2120 L Street, NW., Washington, D.C., and at the local public document room located at the Learning Resources Center, Three Rivers Community-Technical College, 574 New London Turnpike, Norwich, Connecticut, and at the temporary local public document room located at the Waterford Library, ATTN: Vince Juliano, 49 Rope Ferry Road, Waterford, Connecticut.

A copy of this Partial Director's Decision will also be filed with the Secretary of the Commission for review in accordance with 10 CFR 2.206(c) of the Commission's regulations. This Partial Decision will become the final action of the Commission (for Petitioners' requests 1, 2, and 3) 25 days after its issuance, unless the Commission, on its own motion, institutes review of the Decision within that time.

Dated at Rockville, Maryland, this 26th day of December 1996.

For the Nuclear Regulatory Commission.

Frank J. Miraglia, Jr.,

Acting Director, Office of Nuclear Reactor Regulation.

[FR Doc. 97–64 Filed 1–2–97; 8:45 am]

BILLING CODE 7590–01–P

[8] "Task Action Plan for Spent Fuel Storage Pool Safety."

[9] Memorandum to the Commission from J. Taylor, "Resolution of Spent Fuel Storage Pool Action Plan Issues," dated July 26, 1996.

POSTAL RATE COMMISSION

[Docket No. A97–8]

Pleasant Prairie, WI 53158 (Anthony J. Dzian, et al., Petitioners); Notice and Order Accepting Appeal and Establishing Procedural Schedule Under 39 U.S.C. § 404(b)(5)

Issued December 27, 1996.

Before Commissioners: Edward J. Gleiman, Chairman; H. Edward Quick, Jr., Vice-Chairman; George W. Haley; W.H. "Trey" LeBlanc III

Docket Number: A97–8.
Name of Affected Post Office: Pleasant Prairie, Wisconsin 53158.
Name(s) of Petitioner(s): Anthony J. Dzian, *et al.*
Type of Determination: Consolidation.
Date of Filing of Appeal Papers: December 23, 1996.
Categories of Issues Apparently Raised:
1. Effect on the community [39 U.S.C. § 404(b)(2)(A)].
2. Effect on postal services [39 U.S.C. § 404(b)(2)(C)].

After the Postal Service files the administrative record and the Commission reviews it, the Commission may find that there are more legal issues than those set forth above. Or, the Commission may find that the Postal Service's determination disposes of one or more of those issues.

The Postal Reorganization Act requires that the Commission issue its decision within 120 days from the date this appeal was filed (39 U.S.C. § 404(b)(5)). In the interest of expedition, in light of the 120-day decision schedule, the Commission may request the Postal Service to submit memoranda of law on any appropriate issue. If requested, such memoranda will be due 20 days from the issuance of the request and the Postal Service shall serve a copy of its memoranda on the petitioners. The Postal Service may incorporate by reference in its briefs or motions, any arguments presented in memoranda it previously filed in this docket. If necessary, the Commission also may ask petitioners or the Postal Service for more information.

The Commission Orders

(a) The Postal Service shall file the record in this appeal by January 7, 1997.

(b) The Secretary of the Postal Rate Commission shall publish this Notice and Order and Procedural Schedule in the Federal Register.

By the Commission.

Margaret P. Crenshaw,

Secretary.

Appendix

December 23, 1996

Filing of Appeal letter
December 27, 1996
Commission Notice and Order of Filing of Appeal
January 17, 1997
Last day of filing of petitions to intervene [see 39 CFR § 3001.111(b)]
January 27, 1997
Petitioners' Participant Statement or Initial Brief [see 39 CFR § 3001.115 (a) and (b)]
February 18, 1997
Postal Service's Answering Brief [see 39 CFR § 3001.115(c)]
March 5, 1997
Petitioners' Reply Brief should Petitioner choose to file one [see 39 CFR § 3001.115(d)]
March 12, 1997
Deadline for motions by any party requesting oral argument. The Commission will schedule oral argument only when it is a necessary addition to the written filings [see 39 CFR § 3001.116]
April 22, 1997
Expiration of the Commission's 120-day decisional schedule [see 39 U.S.C. § 404(b)(5)]

[FR Doc. 96–30 Filed 1–2–97; 8:45 am]

BILLING CODE 7710–FW–M

SECURITIES AND EXCHANGE COMMISSION

Submission for OMB Review; Comment Request

Proposed New Rules

Rule 203A–2; SEC File No. 270–431; OMB Control No. 3235-new.
Rule 203A–5; SEC File No. 270–432; OMB Control No. 3235-new.

Proposed Amendments

Rule 203–1 and Form ADV: SEC File No. 270–39; OMB Control No. 3235–0049.
Rule 204–1; SEC File No. 270–41; OMB Control No. 3235–0048.
Rule 204–2; SEC File No. 270–315; OMB Control No. 3235–0278.

Upon Written Request, Copies Available From: Securities and Exchange Commission, Office of Filings and Information Services, Washington, D.C. 20549.

Notice is hereby given that pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), the Securities and Exchange Commission (''Commission'') has submitted to the Office of Management and Budget requests for approval of the following proposed rules and forms.

On October 11, 1996 President Clinton signed into law the National Securities Markets Improvement Act of 1996 (''1996 Act''). Title III of the 1996 Act, the Investment Advisers Supervision Coordination Act (''Coordination Act''), amended the Investment Advisers Act of 1940 to, among other things, reallocate the responsibilities for regulating investment advisers between the Commission and the securities regulatory authorities of the states. The most significant of these amendments reallocates federal and state responsibilities for the regulation of the approximately 22,500 investment advisers currently registered with the Commission. These amendments will become effective on April 9, 1997. Based on information provided by advisers, the Commission estimates that approximately 72 percent of the advisers currently registered with the Commission will not be eligible for Commission registration after April 9, 1997.

The Commission has published for comment new rules and rule amendments to implement Congressional intent to reallocate regulatory responsibilities for investment advisers between the Commission and state securities authorities. The Commission is also revising several of its rules that currently apply to all investment advisers to make such rules applicable only to advisers registered or required to be registered with the Commission. The proposed rules would establish the process by which certain advisers would withdraw from Commission registration, exempt certain advisers from the prohibition on Commission registration, and define certain terms. The proposed amendments to rules under the Advisers Act would reflect the changes made by the Coordination Act. Certain provisions of the proposed rules and rule amendments contain ''collection of information'' requirements within the meaning of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq*,). Those provisions are summarized below.

Rule 203A–2(d)

Proposed rule 203A–2(d) would exempt from the prohibition on Commission registration a newly formed adviser that has a reasonable expectation that it will be eligible for Commission registration within 90 days, provided certain conditions are met. Proposed rule 203A–2(d) contains two related collection of information requirements. The collection of information would be necessary to determine the eligibility of certain investment advisers to rely on the proposed ''reasonable expectation'' exemption from the prohibition on Commission registration, and to implement that exemption. It is anticipated that this collection of information would be found at 17 CFR 275.203A–2(d). An adviser relying on the exemption provided by proposed rule 203A–2(d) would be required to file a short written undertaking on Schedule E to Form ADV, indicating that the adviser will withdraw from registration if on the 90th day after registering with the Commission the adviser does not meet the eligibility requirements for registration under section 203A of the Advisers Act and rules thereunder. At the end of the 90-day period, the adviser also would be required to file an amended Schedule I to Form ADV. If the adviser indicates on the amended Schedule I that it has not become eligible to register with the Commission, the adviser would be required to file a Form ADV–W concurrently with the Schedule I, thereby withdrawing its registration with the Commission. The likely respondents to this information collection are newly formed investment advisers that are not currently registered with the Commission or with the states. The Commission estimates that there would be 100 such respondents per year, and that each respondent would respond one time per year. The weighted average total annual time burden for each respondent is estimated to be 57.5 minutes. This figure is based upon the following estimates: (i) 45 minutes for the approximately 90 advisers that advise registered investment companies, that do not need to calculate assets under management to complete Schedule I, or that need to calculate assets under management but do so as part of their normal business operations; (ii) 2 hours for the approximately 10 advisers that must calculate assets under management for the sole purpose of filing Schedule I; and (iii) 5 minutes for all respondents to prepare the undertaking required on Schedule E to Form ADV. The Commission estimates that the aggregate annual burden for all respondents would be 95.83 hours. Providing this information would be mandatory to qualify for the exemption under proposed rule 203A–2(d), and responses would not be kept confidential.

Rule 203A–5 and Form ADV–T

Proposed rule 203A–5 and Form ADV–T contain collection of information requirements. This collection of information is necessary for the Commission to determine whether advisers meet the proposed eligibility criteria for Commission registration set forth in section 203A of the Advisers Act and rules thereunder, and to provide for the orderly withdrawal from Commission

registration for advisers that are no longer eligible. It is anticipated that this collection of information would be found at 17 CFR 275.203A–5 and 17 CFR 279.3. Under proposed rule 203A–5 and 17 CFR 279.3. Under proposed rule 203A–5, all advisers registered with the Commission on April 9, 1997 would be required to file a completed Form ADV–T no later than that date. Form ADV–T would require each adviser to declare whether it remains eligible for Commission registration. For an adviser that declares itself *not* eligible for Commission registration, Form ADV–T would serve as a request for withdrawal of the adviser's registration as of April 9, 1997. The likely respondents to this information collection are all investment advisers registered with the Commission on April 9, 1997. The Commission estimates that there would be 22,500 such respondents to this collection of information. Each respondent would respond once. The weighted average annual time burden for each respondent is estimated to be 53.33 minutes. This figure is based upon the following estimates: (i) 45 minutes for the approximately 20,000 advisers that advise registered investment companies, that do not need to calculate assets under management to complete Form ADV–T, or that need to calculate assets under management but do so as part of their normal business operations; (ii) 2 hours for the approximately 2,500 advisers that must calculate assets under management for the sole purpose of filing Form ADV–T. The aggregate annual burden for all 22,500 advisers is estimated to be 19,998 hours. Providing the information would be mandatory, and responses would not be kept confidential.

Rule 203–1 and Form ADV

Rule 203–1 and Form ADV, including the proposed new Schedule I to Form ADV, contain information collection requirements. Form ADV is required by rule 201–1 to be filed by every applicant for registration with the Commission as an investment adviser, is mandatory, and responses are not kept confidential. This collection of information is found at 17 CFR 275.203–1 and 17 CFR 279.1. The Commission in the past received approximately 3,500 applications for registration on Form ADV in one year. The weighted average burden hours for completing Form ADV is currently 9.0063, and the total annual burden hours currently approved by OMB for this form is 31, 522 hours.

The Commission is proposing to amend Form ADV to include a new Schedule I. The Commission is not proposing to amend rule 203–1. Schedule I would require an applicant to declare whether it is eligible for Commission registration. This new requirement is necessary for the Commission to determine whether advisers meet the eligibility criteria for Commission registration set forth in section 203A of the Advisers Act and rules thereunder. The likely respondents to this information collection would be all applicants for registration with the Commission after April 9, 1997. Based on the Commission's experience in processing adviser applications, and the percentage of applicants in the past without assets under management, the Commission estimates that after April 9, 1997 the number of applicants for registration will decrease from approximately 3,500 to between 500 and 1000 annually. The weighted average total annual time burden for each applicant to complete Schedule I on average is estimated to be 52.5 minutes. This figure is based upon the following estimates. Compliance with the requirement to complete Schedule I imposes a total burden per applicant of approximately 45 minutes for the approximately 90 percent of applicants that advise registered investment companies, that do not need to calculate assets under management to complete Schedule I, or that need to calculate assets under management but do so as a part of their normal business operations. For the approximately 10 percent of applicants that must calculate assets under management for Schedule I, however, this burden would be 2 hours. Providing this information would be mandatory. Amending Form ADV to include new Schedule I is estimated to increase the weighted average burden hours for applicants completing Form ADV to 9.8813 hours. As a result of the new Schedule I, together with the reduction of the number of investment advisers registered with the Commission, the annual aggregate burden for all respondents for completing amended Form ADV is estimated to be between 4,940.65 and 9,881.3 hours.

Rule 204–1

Rule 204–1, including the proposed amendment to the rule, includes collection of information requirements. Rule 204–1 sets forth the circumstances requiring the filing of an amendment to Form ADV, the form that must be filed with the Commission to register as an investment adviser. This collection of information is found at 17 CFR 275.204–1, is mandatory, and responses are not kept confidential. The total annual burden currently approved by OMB for rule 204–1 is approximately 21,438 hours for the 20,088 advisers registered with the Commission in 1994.

The proposed amendments to rule 204–1 would require an adviser to file an amended Schedule I to Form ADV annually within 90 days of the end of the adviser's fiscal year. Schedule I would require an adviser to declare whether it remains eligible for Commission registration. The new requirement is necessary for the Commission to determine whether advisers continue to meet the eligibility criteria for Commission registration set forth in section 203A of the Advisers Act and rules thereunder. The likely respondents to this information collection are all investment advisers registered with the Commission after April 9, 1997. The Commission estimates that there would be 6,300 such respondents to this collection of information (28% of the approximately 22,500 registered investment advisers as of April 9, 1997). Each respondent would respond one time per year. The total annual time burden for each respondent is estimated to be 52.14 minutes. This figure is based upon the following estimates. Compliance with the requirement to file an amended Schedule I would impose a total annual burden per adviser of approximately 45 minutes for the approximately 5,700 advisers that advise registered investment companies, that do not need to calculate assets under management to complete Schedule I, or that need to calculate assets under management but do so as part of their normal business operations. For the approximately 600 advisers that must calculate assets under management for Schedule I, however, this burden would be 2 hours. Providing the information would be mandatory and responses would not be kept confidential. Based on the Commission's experience under rule 204–1, and taking into account the new requirement to annually amend Schedule I, the Commission anticipates that each adviser eligible for Commission registration after April 9, 1997 will respond to the information collection requirements of rule 204–1, as proposed to be amended, an average of 1.5 times annually. The Commission estimates that the annual aggregate burden for all respondents under rule 204–1 will be 18,297.09 hours.

Rule 204–2

Section 204 of the Advisers Act provides that investment advisers required to register with the Commission must make and keep for prescribed periods such records, and furnish such copies thereof, and make and disseminate such reports as the

Commission, by rule, may prescribe as necessary or appropriate in the public interest or for the protection of investors. Rule 204–2 sets forth requirements for keeping, maintaining and preserving specified books and records by investment advisers. This collection of information is found at 17 CFR 275.204–2, is mandatory, is used by the Commission staff in its oversight program, and generally is kept confidential. See section 210(b) of the Advisers Act [15 U.S.C. 80b–10(b)]. Currently, compliance with the rule requires approximately 235.47 hours each year per Commission-registered investment adviser, for a total of 5,180,340 hours for all 22,000 advisers registered last year.

The proposed amendments to rule 204–2 would clarify the application of the rule's recordkeeping requirements to advisers that register with the Commission after having been registered with the states. The proposed amendments are necessary (i) to make the books and recordkeeping requirements of that rule applicable only to advisers registered with the Commission, and (ii) to clarify the rule's application to investment advisers that transfer from state to Commission registration after April 9, 1997. The Commission is proposing to amend rule 204–2 to make the rule's books and recordkeeping requirements applicable only to advisers registered with the Commission after the Coordination Act's effective date. This amendment would relieve the approximately 16,200 of the 22,500 advisers currently registered that will not be eligible for Commission registration after April 9, 1997 from the recordkeeping burdens imposed by this rule.

The Commission is also proposing to amend rule 204–2 to require an adviser that registers with the Commission after April 9, 1997 to preserve any books and records that the adviser was previously required to maintain under state law. These books and records would be required to be maintained in the manner and for the period of time as the other books and records required to be maintained under rule 204–2(a). This collection of information would be found at 17 CFR 275.204–2. The likely respondents to this information collection are all investment advisers registered with the Commission after April 9, 1997. The Commission estimates that there would be 6,300 such respondents to this collection of information. Each respondent would retain records on an ongoing basis. The total annual time burden for each respondent is estimated to be 235.47 hours. The proposed amendments would not change the burden last reported to the OMB. As a result of the reduction of the number of investment advisers registered with the Commission, the annual aggregate burden for all respondents to the recordkeeping requirements under rule 204–2 is estimated to be 1,483,461 hours.

The estimated average burden hours are made solely for the purposes of the Paperwork Reduction Act, and are not derived from a comprehensive or even representative survey or study of the cost of SEC rules and forms.

General comments regarding the estimated burden hours should be directed to the Desk Officer for the Securities and Exchange Commission at the address below. Any comments concerning the accuracy of the estimated average burden hours for compliance with Commission rules and forms should be directed to Michael E. Bartell, Associate Executive Director, Office of Information Technology, Securities and Exchange Commission, 450 Fifth Street NW., Washington, DC 20549 and Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Office of Management and Budget, Room 3208, New Executive Office Building, Washington, DC 20503.

Dated: December 20, 1996.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 97–21 Filed 1–2–97; 8:45 am]

BILLING CODE 8010–01–M

Submission for OMB Review; Comment Request

Approval of Existing Collections

Rule 9b–1; SEC File No. 270–429; OMB Control No. 3235–New.

Rule 15c2–8; SEC File No. 270–421; OMB Control No. 3235–New.

Extensions

Rule 12f–1; SEC File No. 270–139; OMB Control No. 3235–0128.

Rule 12f–2 and Form 27; SEC File No. 270–140; OMB Control No. 3235–0248.

Rule 12f–3 and Form 28; SEC File No. 270–141; OMB Control No. 3235–0249.

Rule 12a–5 and Form 26; SEC File No. 270–85; OMB Control No. 3235–0079.

Rule 15Aj–1, Form X–15AJ–1 and Form X–15AJ–2; SEC File No. 270–25; OMB Control No. 3235–0044.

Rule 15c2–11; SEC File No. 270–196; OMB Control No. 3235–0202.

Upon Written Request, Copies Available From: Securities and Exchange Commission, Office of Filings and Information Services, Washington, DC 20549.

Notice is hereby given that pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), the Securities and Exchange Commission (''Commission'') has submitted to the Office of Management and Budget requests for approval of existing collections without OMB approval and extension on previously approved collections of information:

Rule 9b–1 sets forth the categories of information required to be disclosed in an options disclosure document (ODD) and requires the options markets to file an ODD with the Commission 60 days prior to the date it is distributed to investors. In addition, Rule 9b–1 provides that the ODD must be amended if the information in the document becomes materially inaccurate or incomplete and that amendments must be filed with the Commission 30 days prior to the distribution to customers. Finally, Rule 9b–1 requires a broker-dealer to furnish to each customer and ODD and any amendments, prior to accepting an order to purchase or sell an option on behalf of that customer.

There are 5 options markets that must comply with Rule 9b–1, These 5 respondents work together to prepare a single ODD covering options traded on each market, as well as amendments to the ODD. These respondents file no more than one amendment per year, which requires approximately 8 hours per year for each respondent. Thus, the total compliance burden for options markets per year is 40 hours. The approximate cost per hour is $100, resulting in a total cost of compliance for these respondents of $4,000 per year (40 hours @ $100).

In addition, approximately 2,000 broker-dealers must comply with Rule 9b–1. Each of these respondents will process an average of three new customers for options each week and, therefore, will have to furnish approximately 156 ODDs per year. The postal mailing or electronic delivery of the ODD takes respondents no more than 30 seconds to complete for an annual compliance burden for each of these respondents of 78 minutes, or 1.3 hours. Thus, the total compliance burden per year is 2,600 hours (2,000 broker-dealers × 1.3 hours). The approximate cost per hour to these respondents is $10 per hour, resulting in a total cost of compliance for these respondents of $26,000 per year (2,600 hours @ 1.3 hours).

The total compliance burden for all respondents under this rule (both

options markets and broker-dealers) is 2,640 hours per year (40 + 2,600), and total compliance costs of $30,000 ($4,000 + $26,000).

Rule 15c2–8 requires broker-dealers to deliver preliminary or final prospectuses to specified persons in association with securities offerings. This requirement ensures that information concerning issuers flows to purchasers of the issuers' securities in a timely fashion. There are approximately 8,500 broker-dealers, any of which potentially may participate in an offering subject to Rule 15c2–8. The Commission estimates that Rule 15c2–8 creates approximately 40,290 burden hours with respect to approximately 579 initial public offerings and 1,344 other offerings.

Estimating that records are to be kept by compliance or other related personnel paid at an hourly rate of $28, the total annualized cost burden for recordkeeping is $1,128,120 (28 × 40,290). Added to this are the costs of copying and mailing. These costs are estimated to be approximately $100,000 per initial public offering, for a total of $59,200,000, with other costs expected to be de minimis, as they would be incurred for purposes of complying with Securities Act of 1933 provisions. The total annualized cost burden is therefore $60,328,120.

Rule 12f–1 sets forth the information which an exchange must include in an application for unlisted trading privileges in a security. There are 5 national securities exchanges that require an aggregate total of 670 hours to comply with this rule. Each of these 5 respondents makes an estimated 134 annual responses, for an aggregate of 670 responses per year. Each response takes approximately 1 hours to complete. Thus, the total compliance burden per year is 670 burden hours. The approximate cost per hour is $100, resulting in a total cost of compliance for the respondents of $67,000 (670 hours @ $100).

Rule 12f–2 requires that a national securities exchange must report to the Commission certain changes in a security admitted to unlisted trading privileges. This report is generally made by filing Form 27. There is one respondent that requires an aggregate total of 42 minutes to comply with this rule. Thus, the total compliance burden per year is 42 minutes. The total cost of compliance for the respondents is $27.

Rule 12f–3 prescribes the information which must be included in applications for and notices of termination or suspension of unlisted trading privileges in a security. An exchange must notify the Commission of such action by promptly filing a Form 28. Each of the five national securities exchange respondents incurs an average of 20 burden hours per year in complying with the rule, for a total burden of 100 hours. The approximate cost per hour is $100, for a total annualized cost burden of $10,000.

Rule 12a–5, under paragraph (d), directs that after an exchange has taken action to admit any security to trading pursuant to the provisions of the Rule 12a–5, the exchange is required to file with the Commission a notification on Form 26. Form 26 provides the Commission with certain information regarding a security admitted to trading on an exchange pursuant to Rule 12a–5, including: (1) The name of the exchange, (2) the name of the issuer, (3) a description of the security, (4) the date(s) the security was or will be admitted to when issued and/or regular trading, and (5) a brief description of the transaction pursuant to which the security was or will be issued.

The Commission generally is responsible for overseeing the national securities exchanges, and is particularly responsible under Section 12(a) of the Securities Exchange Act of 1934 (''Act'') to receive notification of any securities that are permitted to trade on an exchange pursuant to the temporary exemption under Rule 12a–5. Without the Rule and the Form, the Commission would be unable fully to implement these statutory responsibilities.

There are nine national securities exchanges which may avail themselves of the exemption provided by Rule 12a–5. While approximately 45 Form 26s are filed annually, the reporting burdens typically are not spread evenly among the exchanges. For purposes of this filing, the staff has assumed that each exchange files an equal number (five) of Form 26 reports. Each report requires approximately 20 minutes to complete, and so the aggregate annual compliance burden is estimated to be 100 minutes for each exchange and 15 hours for all nine exchanges.

The Commission staff estimates that the cost to respondents of completing Form 26 ranges from approximately $10 to $15, with an average cost per response of $13. The estimated total annual cost for complying with the Rule 12a–5 is about $65 for each exchange, and $585 for all exchanges combined.

Rule 15Aj–1 implements the requirements of Sections 15A, 17, and 19 of the Act by requiring every association applying for registration or registered as a national, or as an affiliated securities association to keep its registration statement up to date by filing with the Commission on Form X–15AJ–1 and Form X–15AJ–2.

Rule 15Aj–1 requires a securities association to promptly notify the Commission on Form X–15AJ–1 of any change which renders inaccurate any information contained or incorporated in the registration statement or in any amendment or supplement thereto. Rule 15Aj–1 also requires a securities association to file each year with the Commission an annual consolidated supplement on Form X–15AJ–2.

There is presently only one registered securities association that is required to comply with Rule 15Aj–1. The number of hours necessary to comply with the rule by filing an amendment is approximately one-half hour per response. The average number of hours necessary to file the annual supplement is three reporting hours. The average cost per response for Rule 15Aj–1 is approximately $7. The average cost of annual supplements pursuant to Rule 15Aj–1 is approximately $45.

Rule 15c2–11 requires broker-dealers to collect information regarding issuers prior to initiating or resuming publication of quotations of the issuer's securities. The Commission estimates that 142 respondents collect information annually under Rule 15c2–11 and that approximately 13,580 hours would be required annually for these collections. The Commission estimates that the annual cost to comply with Rule 15c2–11 is $271,600 ($20 per hour times 13,580 hours).

Written 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 the burden 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 through the use of automated collection techniques or other forms of information technology. Consideration will be given to comments and suggestions submitted in writing within 60 days of this publication.

General comments regarding the estimated burden hours should be directed to the Desk Officer for the Securities and Exchange Commission at the address below. Any comments concerning the accuracy of the estimated average burden hours for compliance with Commission rules and forms should be directed to Michael E. Bartell, Associate Executive Director,

Office of Information Technology, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549 and Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Office of Management and Budget, Room 3208, New Executive Office Building, Washington, DC 20503.

Dated: December 19, 1996.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 97–22 Filed 1–2–97; 8:45 am]

BILLING CODE 8010–01–M

[Release No. 35–26636]

Filings Under the Public Utility Holding Company Act of 1935, as Amended (''Act'')

December 24, 1996.

Notice is hereby given that the following filing(s) has/have been made with the Commission pursuant to provisions of the Act and rules promulgated thereunder. All interested persons are referred to the application(s) and/or declaration(s) for complete statements of the proposed transaction(s) summarized below. The application(s) and/or delcaration(s) and any amendments thereto is/are available for public inspection through the Commission's Office of Public Reference.

Interested persons wishing to comment or request a hearing on the application(s) and/or declaration(s) should submit their views in writing by January 21, 1997, to the Secretary, Securities and Exchange Commission, Washington, D.C. 20549, and serve a copy on the relevant applicant(s) and/or declarant(s) at the address(es) specified below. Proof of service (by affidavit or, in case of an attorney at law, by certificate) should be filed with the request. Any request for hearing shall identify specifically the issues of fact or law that are disputed. A person who so requests will be notified of any hearing, if ordered, and will receive a copy of any notice or order issued in the matter. After said date, the application(s) and/or declaration(s), as filed or as amended, may be granted and/or permitted to become effective.

National Fuel Gas Company (70–8975)

Notice of Proposal to Issue Common Stock; Order Authorizing Solicitation of Proxies

National Fuel Gas Company (''NFG''), 10 Lafayette Square, Buffalo, New York 14203, a gas registered holding company, has filed a declaration under sections 6(a), 7 and 12(e) of the Act and rules 62 and 65 thereunder.

NFG proposes to issue shares of NFG common stock in connection with the NFG 1997 Award and Option Plan (''Plan''). The Plan will be administered by the Compensation Committee of the Board of Directors or another committee so designated (''Committee''). No member of the Committee is eligible to be selected to participate in the Plan. The Plan authorizes the Committee, at its discretion, to grant awards from December 13, 1996 through December 12, 2006 to key employees of NFG or any of its 80% or more owned subsidiaries. Under the Plan, 1.9 million shares of NFG common stock are available for grants. Awards covering no more than 300,000 shares of Common Stock may be granted to any participant in any fiscal year.

NFG's Board of Directors (''Board'') may suspend or terminate the Plan at any time and may also amend the Plan at any time, provided however, that any such amendment may be subject to shareholder approval (1) at the discretion of the Board and (2) to the extent that shareholder approval may be required by law.

The following types of awards may be available under the Plan: (1) Stock options, including incentive stock options; (2) stock appreciation rights (''SARs''), the right to receive a payment equal to the appreciation in market value of a stated number of shares of common stock from the SARs' exercise price to the market value on the date of exercise; (3) common stock of NFG, including restricted stock; (4) common stock units; (5) performance shares; (6) performance units; and (7) any award established by the Committee which is consistent with the Plan's purpose, as described in the Plan.

The Plan provides for the forfeiture of awards in the event of termination of employment for a reason other than death, disability, retirement, or any approved reason, unless the award provides otherwise. Forfeiture is also required if, in the Committee's opinion, the participant competes with NFG without its written consent, or if the participant acts in a manner inimical to NFG's best interests.

The Committee may unilaterally amend any award if, in the Committee's opinion, such amendment is not adverse to the participant. NFG may deduct from any payment under the Plan the amount of any applicable income and employment taxes, or may require the participant to pay such taxes as a condition to making such payment. The Committee may also allow the participant to satisfy this obligation by withholding from any payment of common stock due, or by delivering to NFG, shares of common stock with a fair market value equal to the amount of applicable taxes.

NFG proposes to solicit proxies from its common shareholders to approve the Plan at NFG's Annual Meeting of Stockholders on or about February 20, 1997. Accordingly, NFG request that an order authorizing the solicitation of proxies be issued as soon as practicable pursuant to rule 62(d).

It appearing to the Commission that NFG's declaration regarding the proposed solicitation of proxies should be permitted to become effective forthwith:

It is ordered, that the declaration regarding the proposed solicitation of proxies be, and it hereby is, permitted to become effective forthwith, pursuant to rule 62 and subject to the terms and conditions prescribed in rule 24 under the Act.

For the Commission, by the Division of Investment Management, pursuant to delegated authority.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 97–18 Filed 1–2–97; 8:45 am]

BILLING CODE 8010–01–M

[Release No. 34–38085; File No. SR–CBOE–96–70]

Self-Regulatory Organizations; Chicago Board Options Exchange, Inc.; Notice of Filing of Proposed Rule Change Relating to Reporting Requirements for Securities Accounts and Orders of Market-Makers and Joint Account Provisions

December 24, 1996.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'',[1] notice is hereby given that on November 20, 1996, the Chicago Board Options Exchange, Inc. (''CBOE'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II, and III below, which items have been prepared primarily by CBOE. 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

CBOE is proposing to amend Rule 8.9 regarding certain reporting requirements

[1] 15 U.S.C. § 78s(b)(1) (1988).

for securities accounts, orders of market-makers and joint account provisions.[2]

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, CBOE included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. CBOE has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

CBOE is proposing to amend Rule 8.9, Securities Accounts and Orders of Market-Makers. CBOE proposes to amend Rule 8.9(a), regarding the identification of accounts. Currently, Exchange market-makers are required to identify and report to the Exchange all accounts in which the market-maker may engage in stock, option and securities trading, directly or indirectly, or over which it has investment discretion. The rule in its current form is broad enough to require market-makers to report professional trading accounts held at clearing firms, as well as outside personal accounts such as brokerage accounts.

The Exchange has received comment from CBOE members stating that it is burdensome and unnecessary to require market-makers to identify all non-professional trading accounts, or 'outside accounts' to the Exchange. Exchange staff agrees that the reporting requirement may be overly broad, in that the outside account data has little significance to the Exchange's surveillance programs unless there is a specific reason for monitoring the outside accounts. The Exchange is most concerned with monitoring the professional trading activity of market-makers in accounts cleared and guaranteed by The Options Clearing Corporation member clearing firms.

Upon review and analysis, the Exchange has determined that the reporting requirements of Rule 8.9(a) should be amended to eliminate the routine submission of information respecting non-market-maker trading accounts, or 'outside accounts.' The proposes rule change would require market-makers to report outside account information only when requested by the Exchange.

CBOE proposes to amend Rule 8.9(b), regarding the reporting of market-maker orders. Currently, each market-maker is required to report to the Exchange every order entered into by that market-maker within the specifications of the Rule. CBOE is proposing to amend Rule 8.9(b) to require the clearing firm for the professional trading account, rather than the market-maker personally, to report executed order information to the Exchange. CBOE believes that this revision recognizes that a clearing firm can most accurately gather and report order information to the Exchange in a timely manner, and in fact already transmits such order information for Exchange review. In addition, the proposed rule will require the order information submitted be restricted to executed orders only, as CBOE has received few surveillance benefits by gathering unexecuted order information on a routine basis.

According to the proposed rule change, the market-maker will be held responsible for the reporting requirements only if the clearing firm is not reporting executed order information to the Exchange and/or if the Exchange has requested that the market-maker provide the information. Further, the proposed rule change will clarify that this reporting requirement applies to professional trading accounts (*i.e.*, transactions cleared into all accounts carried for market-makers who are the subject of a clearing firm letter of guarantee issued to the Exchange pursuant to CBOE Rule 8.5).

The clearing firm thus will be the primary source for the reporting of market-maker executed order information to the Exchange. However, all firms which represent and execute market-maker orders, including order service firms as defined in Exchange Rule 6.77, will continue to be responsible for maintaining and retaining executed and unexecuted order information as required by Rules 17a–3 and 17a–4 under the Act and by Exchange Rule 15.1. CBOE proposed that the continuing recordkeeping obligations of such firms pursuant to Exchange rules and other applicable securities laws and regulations will be noted in an Exchange regulatory circular upon approval of the proposed rule change.

CBOE proposes to eliminate the existing description of specific order information required to be reported as set forth in Rule 8.9(b). Upon approval of this filing, the Exchange will issue a regulatory circular to clearing firms which will list the order reporting requirements that were previously embodied in Rule 8.9(b), and list additional requirements as they are implemented. The existing Rule 8.9(b) already provides that the Exchange will prescribe the manner of order reporting.

Finally, CBOE proposes to amend Interpretation and Policy .06 to Rule 8.9 to clarify that the existing prohibition against a joint account participant effecting a transaction with another member acting on behalf of the same joint account applies whether the transaction is effected in person or via order. CBOE will also revise Interpretation and Policy .06 to Rule 8.9 to prohibit transactions between two joint accounts if the member who causes a transaction to be executed for one of the joint accounts knows or has reason to know that the two joint accounts have one or more common participants.

The addition to Interpretation .06 to Rule 8.9 codifies in the rule current provisions in regulatory circulars which seek to ensure that joint account transactions result in a bona fide change in beneficial ownership. Existing regulatory circulars RG96–28 (item 7(b)) and RG95–64 (item 8(b)) provide that a member has the responsibility to ensure that in-person transactions or the entry of orders with floor brokers do not result in trades occurring ''between two joint accounts that have common participants.'' The proposed rule change expressly imposes a knowledge requirement as an element of the offense of effecting a transaction between joint accounts with common participants. This recognizes that members are not always able to know whether there are common participants in two joint accounts because of the frequency with which joint account composition may change.

The CBOE believes the proposed rule change is consistent with and furthers the objectives of Section 6(b)(5)[3] of the Act in that it should result in more effective and efficient reporting of market-maker accounts and executed order information to the Exchange. CBOE believes the proposed rule change also should clarify market-maker joint account provisions, removing impediments to a free and open market, thereby protecting investors and the public interest.

B. Self-Regulatory Organization's Statement on Burden on Competition

CBOE does not believe that the proposed rule change will impose any burden on competition.

[2] The text of the proposed rule change is available at the Office of the Secretary, CBOE and in the Public Reference Section of the Commission.

[3] 15 U.S.C. § 78f(b)(5).

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others

No written comments relating to the proposed rule change have been solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing For Commission Action

Within thirty-five days of the date of publication of this notice in the Federal Register or within such longer period (i) as the Commission may designate up to ninety days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which CBOE consents, the Commission will:

(A) By order approve such proposed rule change or

(B) Institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street NW., Washington, DC 20549. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. § 552, will be available for inspection and copying in the Commission's Public Reference Section, 450 Fifth Street NW., Washington, DC 20549. Copies of such filing will also be available for inspection and copying at the principal office of CBOE. All submissions should refer to File No. SR–CBOE–96–70 and should be submitted by January 24, 1997.

For the Commission by the Division of Market Regulation, pursuant to delegated authority.[4]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 97–19 Filed 1–2–97; 8:45 am]

BILLING CODE 8010–01–M

[4] 17 CFR 200.30-3(a)(12) (1996).

[Release No. 34–38089; File No. SR–NASD–96–50]

Self-Regulatory Organizations; Notice of Proposed Rule Change by the National Association of Securities Dealers, Inc. Relating to Amendments to the NASD's Excess Spread Rule Applicable to Market Maker Quotations

December 27, 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 December 16, 1996, the National Association of Securities Dealers, Inc. (''NASD'' or ''Association'') filed with the Securities and Exchange Commission (''Commission'' or ''SEC'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the NASD. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The NASD proposes to amend NASD Rule 4613(d) on a one-year pilot basis to provide that a registered market maker in a security listed on The Nasdaq Stock Market, Inc. (''Nasdaq'') shall be precluded from being a registered market maker in that issue for twenty (20) business days if its average spread in the security over the course of any full calendar month exceeds 150 percent of the average of all dealer spreads in such issue for the month. The text of the proposed rule change is as follows. (Additions are italicized; deletions are bracketed.)

* * * * *

NASD Rule 4613 Character of Quotations

(d) *Reasonably Competitive Quotations* [Excess Spreads]

A registered market maker in a security listed on The Nasdaq Stock Market will be withdrawn as a registered market maker and precluded from re-registering as a market maker in such issue for 20 business days if its average spread in the security over the course of any full calendar month exceeds 150 percent of the average of all dealer spreads in such issue for the month.

(1) If a registered market maker has not satisfied the average spread requirement set forth in this subparagraph (d) for a particular Nasdaq security, its registration in such issue shall be withdrawn commencing on the next business day following the business day on which the market maker was sent notice of its failure to comply with the requirement. A market maker may request reconsideration of the withdrawal notification. Requests for reconsideration will be reviewed by the Market Operations Review Committee, whose decisions are final and binding on the members. A request for reconsideration shall not operate as a stay of the withdrawal or toll the twenty business day period noted in subparagraph (d) above.

(2) Grounds for requests for reconsideration shall be limited to claims that Nasdaq's calculation of the market maker's average spread for the month was in error.

(3) This subparagraph (d) shall be in effect until January 31, 1998.

[A market maker shall not enter quotations in The Nasdaq Stock Market securities that exceed the parameters for maximum allowable spreads as approved by the Association's Board of Governors and that may be published from time to time by the Association. The maximum allowable spreads for Nasdaq securities shall be 125 percent of the average of the three (3) narrowest market maker spreads in each security (if there are fewer than three (3) market makers in a security, the maximum allowable spread will be 125% of the average spread); provided however, that the maximum allowable spread shall never be less than ¼ point.]

* * * * *

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

NASD Rule 4613(d), which is commonly known as the NASD's ''excess spread rule,'' presently provides that registered market makers in Nasdaq securities shall not enter quotations that exceed the NASD's parameter for maximum allowable spreads. Specifically, the rule provides that the maximum allowable spread for any Nasdaq security is 125 percent of the

average of the three narrowest market maker spreads in that issue (''125 percent test''), provided, however, that the maximum allowable spread shall never be less than ¼ of a point.[1]

The excess spread rule was originally designed to bring a measure of quality to the Nasdaq market by preventing firms from holding themselves out as market makers without having a meaning quote in the system. Despite the laudable regulatory objectives underlying the excess spread rule, however, many market participants believe the rule has produced a variety of unintended consequences that have undermined the integrity of Nasdaq. Most notably, the SEC found in its 21(a) Report on the NASD and The Nasdaq Stock Market that ''the interdependence of quotes mandated by the rule may deter market makers from narrowing their dealer spreads, because, once the spread is tightened, the rule in some instances precludes a market maker from widening the spread to earlier levels.'' [2] As a result, the SEC found that the excess spread rule creates an economic incentive for market makers to discourage one another from narrowing their quotes, thereby interfering with the ''free flow of prices in the market and imped[ing] attempts by the market to reach the optimal competitive spread.'' [3] Accordingly, the SEC has requested that the NASD ''modify the rule to eliminate its undesirable effects, or to repeal it.'' [4] In addition, because of the constraints on quote movements created by the rule, market participants claim that the excess spread rule has contributed to locked and crossed markets during periods of market turbulence.

Accordingly, Nasdaq and the NASD are submitting this rule proposal to help to ameliorate adverse consequences the current excess spread rule could potentially have on the competitiveness and independence of quotations displayed on the Nasdaq market. In formulating this proposal Nasdaq and the NASD felt that it was important to strike a reasonable balance between the need to eliminate any constraints that the excess spread rule places on firms to adjust their quotations and the need to avoid fostering a market environment where registered market makers can maintain inordinately wide spreads and still receive the benefits of being a market maker (*e.g.*, affirmative determination exemption and preferential margin treatment). Nasdaq and the NASD also believe it is critical to transform the excess spread rule into a performance standard used to determine market maker eligibility, instead of a strict regulatory requirement applicable to every quote update in a Nasdaq security, violations of which are punishable by disciplinary action.

With these considerations in mind, Nasdaq and the NASD discussed a variety of proposals to amend the excess spread rule. Ultimately, as discussed below, Nasdaq and the NASD reached a determination to eliminate the current ''125 percent test'' and instead substitute a new minimal market maker performance requirement that would help to ensure that all registered market makers are providing some threshold level of market making support in their issues. Specifically, under the proposal, a registered market maker would be required to maintain an average spread over the course of any full calendar month equal to or less than 150 percent of the average of all market makers in the issue over the course of the month (''150 percent test''). If a market maker failed to satisfy this standard with respect to a particular issue, it would be forced to withdraw from that issue for at least 20 business days.

Even though the proposed minimal market maker performance standard would have adverse ramifications for those market makers who quote inordinately wide spreads, Nasdaq and the NASD believe the proposal is responsive to the SEC's request that the NASD eliminate the undesirable effects of the excess spread rule. Specifically, because the proposed ''150 percent test'' is based on the average of all market makers in an issue and not just the three market makers quoting the narrowest spreads and because of the magnitude of increase to 150 percent, Nasdaq and the NASD do not believe that the interdependence of market maker quote movements noted by the SEC in its 21(a) Report will occur with this standard. Moreover, Nasdaq and the NASD believe market makers will not feel constrained to narrow or widen their spreads under the proposal because the ''150 percent test'' would evaluate a market maker's quotation behavior over the course of a full calendar month, rather than each time a market maker updates its quote, as is presently the case.

Nasdaq and the NASD also believe it is important to eliminate the current excess spread rule because of the order-driven nature of the Nasdaq market that will be brought about by implementation of the SEC's new limit order display rule on January 10, 1997.[5] In particular, because spreads in Nasdaq securities likely will narrow because of the display of customer limit orders, the average of the three narrowest market maker spreads will be commensurately narrowed. As a result, the interdependence of market maker quotations highlighted by the SEC in its 21(a) Report will be exacerbated and some market makers may even choose to withdraw from making markets, thus dampening liquidity on Nasdaq and reducing competition among market makers. Conversely, under the current excess spread rule, market makers may have an economic incentive to not accept customer limit orders or only accept those limit orders priced at the inside bid or offer so as to not narrow the maximum allowance spread parameters. Such a development would be completely contradictory to the important investor protection objectives underlying adoption of the SEC's limit order display rule. Because neither result is acceptable, Nasdaq and the NASD believe that the current excess spread rule should be eliminated.

While Nasdaq and the NASD believe the proposed ''150 percent test'' will help to ensure that market makers maintain at least a minimal level of commitment to their issues, Nasdaq and the NASD, nevertheless, believe it would be prudent to not impose the ''150 percent test'' on a permanent basis until there is a substantial basis to conclude that the ''150 percent test'' has not contributed to or fostered the same unintended consequences created by the current excess spread rule (*e.g.*, the interdependence of market maker quote movements and the exacerbation of locked and crossed market situations). Accordingly, Nasdaq and the NASD propose that the ''150 percent test'' be implemented on a one-year pilot basis until January 31, 1998. During the pilot period, Nasdaq and the NASD will analyze market maker quotation behavior to determine whether the rule

[1] Unrelated to the excess spread rule, there is also a dealer spread test that is part of the NASD's Primary Market Maker (''PMM'') standards that are used to determine the eligibility of market makers to an exemption from the NASD's short sale rule for short sales effected during the course of bona fide market making activity. Specifically, the market maker spread component of the PMM standards provides that a market maker must maintain a spread no greater than 102 percent of the average dealer spread.

[2] *See* Appendix to Report Pursuant to Section 21(a) of the Securities Exchange Act of 1934 Regarding the NASD and The Nasdaq Stock Market (''21(a) Report''), SEC, August 8, 1996, at p. 98.

[3] *Id.* at p. 99.

[4] *Id.*

[5] SEC Rule 11Ac1–4 requires the display of customer limit orders that are priced better than a market maker's quote or that add to the size associated with a market maker's quote when the market maker is at the best price in the market. *See* Securities Exchange Act Release 37619A (September 6, 1996), 61 FR 48290 (September 12, 1996) (''Order Handling Rule Adopting Release'').

has met its dual objectives of removing constraints on market maker quotation movements and ensuring some minimal level of commitment by market makers to their issues. Throughout the pilot period, Nasdaq and the NASD also will proactively explore whether there are other alternative means to achieve these objectives without reliance on a quotation-based evaluation criteria.

In addition, because a market maker would be precluded from functioning as a registered market maker in a particular Nasdaq security for twenty business days if it failed to meet the ''150 percent test'', the proposal also amends NASD Rule 4613(d) to afford market makers the opportunity to request reconsiderations of their withdrawal notices. Requests for reconsideration will be reviewed by the Market Operations Review Committee, whose decisions will be final and binding on the members. Because Nasdaq and the NASD believe that such reconsiderations should be exclusively limited to an evaluation as to whether the ''150 percent test'' was indeed satisfied, the proposed rule change provides that the grounds for reconsideration shall be limited to claims that Nasdaq's calculation of the market maker's average spread for the month was in error.

The NASD believes that the proposed rule change is consistent with Sections 15A(b)(6), 15A(b)(9), 15A(b) (11) and 11A(a)(1)(C) of the Act. Among other things, Section 15A(b)(6) requires that the rules of a national securities association be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system and in general to protect investors and the public interest. Section 15A(b)(9) provides that the rules of the Association may not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. Section 15A(b)(11) empowers the NASD to adopt rules governing the form and content of quotations relating to securities in the Nasdaq market. Such rules must be designed to produce fair and informative quotations, prevent fictious and misleading quotations, and promote orderly procedures for collecting and distributing quotations. Section 11A(a)(1)(C) provides that it is in the public interest to, among other things, assure the economically efficient execution of securities transactions and the availability to brokers, dealers, and investors of information with respect to quotations for and transactions in securities. Specifically, because Nasdaq and the NASD believe the proposed ''150 percent test'' will help to ameliorate adverse consequences the current excess spread could potentially have on the competitiveness and independence of quotations displayed on the Nasdaq market, Nasdaq and the NASD believe the proposed rule change will promote the integrity of quotations on the Nasdaq market and enhance competition among market makers, thereby contributing to greater market liquidity, improved price discovery, and the best execution of customer orders. At the same time, while Nasdaq and the NASD believe the proposed ''150 percent test'' will remove a constraint on market maker quote movements, Nasdaq and the NASD also believe that the proposal will help to ensure that all registered market makers are providing some threshold level of market making support in their issues. Nasdaq and the NASD also believe that use of the ''150 percent test'' will avoid fostering a market environment where registered market makers can maintain inordinately wide spreads and still receive the benefits of being a market maker. Accordingly, the NASD and Nasdaq believe the proposed rule change is consistent with all of the above-cited Sections of the Act and the rules thereunder.

B. Self-Regulatory Organization's Statement on Burden on Competition

The NASD believes that the proposed rule change will not result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The NASD and Nasdaq request that the Commission find good cause to accelerate the effectiveness of the proposed rule change pursuant to Section 19(b)(2) of the Act by January 10, 1997. As noted above in the text accompanying footnote 5, Nasdaq and the NASD believe that serious market consequences could potentially result from retention of the current excess spread rule in a market environment where customer limit orders are required to be displayed. Accordingly, since implementation of the SEC's new limit order display rule is scheduled to commence on January 10, 1997, Nasdaq and the NASD believe good cause exists to accelerate approval of the proposed rule change on or prior to January 10, 1997. In addition, in a separate rule filing, SR–NASD–96–43, Nasdaq and the NASD proposed to modify the SOES Automated Quotation Update Feature so that only one side of a market maker's quote would be updated when its quote size has been decremented to zero through SOES executions. By updating the bid or the offer, but not both, the NASD and Nasdaq believe the auto-refresh feature will not exacerbate or contribute to locked or crossed markets, as has been the case with the current update feature during turbulent market conditions. Accordingly, Nasdaq and the NASD believe that the instant rule filing and SR–NASD–96–43 should be approved in tandem and, therefore, that good cause exists to accelerate approval of the instant rule filing if such acceleration is necessary to ensure that both filings are approved at the same time.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, N.W., Washington, D.C. 20549. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of such filing will also be available for inspection and copying at the principal office of the NASD. All submissions should refer to file number SR–NASD–96–50 and should be submitted by January 24, 1997.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[6]

[6] 17 CFR 200.30–3(a)(12).

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 97–20 Filed 1–2–97; 8:45 am]

BILLING CODE 8010–01–M

SMALL BUSINESS ADMINISTRATION

Data Collection Available for Public Comments and Recommendations

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, this notice announces the Small Business Administration's intentions to request approval on a new, and/or currently approved information collection.

DATES: Comments should be submitted on or before March 4, 1997.

FOR FURTHER INFORMATION CONTACT: Curtis B. Rich, Management Analyst, Small Business Administration, 409 3rd Street, SW., Suite 5000, Washington, DC 20416. Phone Number: 202–205–6629.

SUPPLEMENTARY INFORMATION:

Title: ''Disaster Home Loan Application.''

Type of Request: Extension of a Currently Approved Collection.

Form No's.: 5C, 739, 1632.

Description of Respondents: Applicants Requesting SBA Disaster Home Loans.

Annual Responses: 26,100.

Annual Burden: 52,200.

Comments: Send all comments regarding this information collection to Bridget Dusenbury, Disaster Resource Specialist, Office of Disaster Assistance, Small Business Administration, 409 3rd Street, SW., Suite 6500 Washington, DC 20416. Phone No.: 202205–6734.

Send comments regarding whether this information collection is necessary for the proper performance of the function of the agency, accuracy of burden estimate, in addition to ways to minimize this estimate, and ways to enhance the quality.

Jacqueline White,

Chief, Administrative Information Branch.

[FR Doc. 97–3 Filed 1–2–97; 8:45 am]

BILLING CODE 8025–01–P

Small Business Administration Interest Rates; Notice

The Small Business Administration publishes an interest rate called the optional ''peg'' rate (13 CFR 120.214) on a quarterly basis. This rate is a weighted average cost of money to the government for maturities similar to the average SBA direct loan. This rate may be used as a base rate for guaranteed fluctuating interest rate SBA loans. This rate will be 6⅝ percent for the January–March quarter of FY 97.

Pursuant to 13 CFR 120.932, the maximum legal interest rate for a commercial loan which funds any portion of the cost of a project (see 13 CFR 120.801) shall be 6% over the New York prime rate. The initial rate for a fixed rate loan shall be the legal rate for the term or the loan.

John. R. Cox,

Associate Administrator for Financial Assistance.

[FR Doc. 97–2 Filed 1–2–97; 8:45 am]

BILLING CODE 8025–01–M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

RTCA, Inc., Special Committee 182; Minimum Operational Performance Standards (MOPS) for an Avionics Computer Resource

Pursuant to section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463, 5 U.S.C., Appendix 2), notice is hereby given for Special Committee 182 meeting to be held January 22–24, 1997, starting at 9:00 a.m. The meeting will be held at RTCA, Inc., 1140 Connecticut Avenue, NW., Suite 1020, Washington, DC 20036.

The agenda will include: (1) Chairman's Introductory Remarks; (2) Review and Approval of Meeting Agenda; (3) Review and Approval of Minutes from the Previous Meeting; (4) Reports from Related Industry Meetings; (5) Role of ARP 4754, Certification Consideration for Highly Integrated or Complex Aircraft Systems; (6) Review of MOPS Draft Version 0.3; (7) Web Forum: Plan for MOPS Document Administration; (8) Discussion Papers; (9) Position Papers; (10) Glossary Additions; (11) Other Business; (12) Date and Place of Next Meeting.

Attendance is open to the interested public but limited to space availability. With the approval of the chairman, members of the public may present oral statements at the meeting. Persons wishing to present statements or obtain information should contact the RTCA Secretariat, 1140 Connecticut Avenue, NW., Suite 1020, Washington, DC 20036; (202) 833–9339 (phone) or (202) 833–9434 (fax). Members of the public may present a written statement to the committee at any time.

Issued in Washington, DC, on December 27, 1996.

Steve Zaidman,

Director, Office of System Architecture and Investment Analysis, Designated Official.

[FR Doc. 97–80 Filed 1–2–97; 8:45 am]

BILLING CODE 4810–13–M

RTCA, Inc. Special Committee 169; Aeronautical Data Link Applications

Pursuant to section 10(a) (2) of the Federal Advisory Committee Act (P.L. 92–463, 5 U.S.C., Appendix 2), notice is hereby given for Special Committee (SC)–169 meeting to be held January 28–29, 1997, starting at 9:00 a.m. The meeting will be held at RTCA, Inc. 1140 Connecticut Avenue, N.W., Suite 1020, Washington, DC, 20036.

The agenda will include: (1) Plenary Administration: Chairman's Introductory Remarks; Review and Approval of Meeting Agenda; Review and Approval of Minutes from the Previous Meeting; Review of Outstanding Action Items; (2) Working Group (WG) Progress: WG–1, Air/Ground Air Traffic Service Applications; WG–2, Systems Architecture/ Performance; WG–3, Flight Information Services Applications; WG–4, International Coordination; WG–5, Ground/Ground Traffic Flow Management Applications; (3) Plenary Business; Final Review/Approval of *Minimum Aviation System Performance Standards (MASPS) for Air Traffic Management (ATM)—Aeronautical Operational Control (AOC) Ground-Ground Information Exchange,* RTCA Paper No. 440–96/SC169–273; Review of SARP Compliant Documents; Discussion of Future of SC–169 Work Efforts; (4) Other Business; (5) Date and Place of Next Meeting.

Attendance is open to the interested public but limited to space availability. With the approval of the chairman, members of the public may present oral statements at the meeting. Persons wishing to present statements or obtain information should contact the RTCA Secretariat, 1140 Connecticut Avenue, N.W., Suite 1020, Washington, DC, 20036; (202) 833–9339 (phone) or (202) 833–9434 (fax). Members of the public may present a written statement to the committee at any time.

Issued in Washington, DC, on December 27, 1996.

Steve Zaidman,

Director, Office of System Architecture and Investment Analysis, Designated Official.

[FR Doc. 97–81 Filed 1–2–97; 8:45 am]

BILLING CODE 4810–13–M

Research and Special Programs Administration

Office of Hazardous Materials Safety; Notice of Delays in Processing of Exemption Applications

AGENCY: Research and Special Programs Administration, DOT.

ACTION: List of applications delayed more than 180 days.

SUMMARY: In accordance with the requirements of 49 U.S.C. 5117(c), RSPA is publishing the following list of exemption applications that have been in process for 180 days or more. The reason(s) for delay and the expected completion date for action on each application is provided in association with each identified application.

FOR FURTHER INFORMATION CONTACT: J. Suzanne Hedgepeth, Director, Office of Hazardous Materials, Exemptions and Approvals, Research and Special Programs Administration, U.S. Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590–0001, (202) 366–4535.

Key to ''Reasons for Delay''

1. Awaiting additional information from applicant
2. Extensive public comment under review
3. Application is technically very complex and is of significant impact or precedent-setting and requires extensive analysis
4. Staff review delayed by other priority issues or volume of exemption applications

Meaning of Application Number Suffixes

N—New application

M—Modification request

PM—Party to application with modification request

Issued in Washington, DC, on December 27, 1996.

J. Suzanne Hedgepeth,

Director, Office of Hazardous Materials, Exemptions and Approval.

NEW EXEMPTION APPLICATIONS

Application No.	Applicant	Reason for delay	Estimated date of completion
10581–N	Luxfer UK Limited, Nottingham, England	4	02/28/1997
11193–N	U.S. Department of Defense, Falls Church, VA	4	01/31/1997
11322–N	Hydra Rig, Inc., Ft. Worth, TX	1	12/31/1996
11375–N	Oceaneering Space Systems, Houston, TX	4	12/31/1996
11396–N	Laidlaw Environmental Services, LaPorte, TX	4	12/31/1996
11409–N	Pure Solve, Inc., Irving, TX	4	02/28/1997
11442–N	Union Tank Car Co., East Chicago, IN	4	02/28/1997
11443–N	Hercules Inc., Wilmington, DE	4	01/31/1997
11465–N	Monsanto Co., St. Louis, MO	4	02/28/1997
11491–N	P.M. Industrial Gas Ltd., Georgetown	1	02/28/1997
11511–N	Brenner Tank INc., Fond du Lac, WI	4	02/28/1997
11523–N	Bio-Lab, Inc., Conyers, GA	4	02/28/1997
11527–N	Technical Service Co., Long Beach, CA	4	12/31/1996
11537–N	Babson Bros. Co., Romeoville, IL	4	02/28/1997
11540–N	Convenience Products, Fenton, MO	1	02/28/1997
11559–N	Japan Oxygen, Inc., Long Beach, CA	4	02/28/1997
11561–N	Solkatronic Chemicals, Fairfield, NJ	4	12/31/1996
11572–N	North American Biologicals, Inc., Miami, FL	4	01/31/1997
11578–N	General Alum & Chemical Co., Searsport, MA	4	02/28/1997
11586–N	Chem Coast Inc., La Porte, TX	4	02/28/1997
11591–N	Clearwater Distributors, Inc., Woodridge, NY	4	12/31/1996
11592–N	Amtrol Inc., West Warwick, RI	4	01/31/1997
11597–N	Zeneca, Inc., Wilmington, DE	4	02/28/1997
11598–N	Metalcraft Inc., Baltimore, MD	1	02/28/1997
11599–N	Haviland Products Co., Grand Rapids, MI	1	02/28/1997
11606–N	Safety-Kleen Corp., Elgin, IL	4	02/28/1997
11609–N	Rubbermaid Commercial Products Inc., Winchester, VA	4	12/31/1996
11621–N	Aerojet Industrial Products, North Las Vegas, NV	1	02/28/1997
11626–N	DeVilbiss Health Care, Inc., Ft. Pierce, FL	4	01/31/1997
11627–N	Cabot Corporation, Revere, PA	4	01/31/1997
11631–N	Health Care Incinerators, Fargo, ND	4	01/31/1997
11645–N	Chemical Products Corp., Cartersville, GA	4	03/31/1997
11646–N	Barton Solvents Inc., Des Moines, IA	4	01/31/1997
11649–N	VTG USA, Inc., West Chester, PA	4	01/31/1997
11653–N	Phillips Petroleum Co., Bartlesville, OK	4	01/31/1997
11654–N	Hoechst Celanese Corp., Dallas, TX	4	01/31/1997
11662–N	FIBA Technologies, Inc., Westboro, MA	4	02/28/1997
11663–N	Pfizer Inc., Groton, CT	4	03/31/1997
11664–N	Breed Technologies, Inc., Lakeland, FL	4	03/31/1997
11667–N	Weldship Corp., Bethlehem, PA	4	02/28/1997
11668–N	AlliedSignal, Inc., Morristown, NJ	4	02/15/1997
11670–N	Oilphase Sampling Services Limited, Dye, Aberdeen, Scotland	4	02/28/1997
11671–N	Matheson Gas Products, Secaucus, NJ	4	02/28/1997
11677–N	Chaparral, Inc., Lubbock, TX	4	03/15/1997
11678–N	Air Transport Association, Washington, DC	4	03/31/1997
11679–N	Dorbyl Engineering Container Division (DHE), Republic of South Africa	4	02/28/1997
11682–N	Cryolor, Argancy, 57365 Ennery—France	4	02/28/1997
11687–N	Tri Tank Corp., Syracuse, NY	4	02/28/1997
11692–N	SCM Technologies, Tilbury, ON	4	02/28/1997

NEW EXEMPTION APPLICATIONS—Continued

Application No.	Applicant	Reason for delay	Estimated date of completion
4354–M	PPG Industries, Inc., Pittsburgh, PA	4	02/28/1997
5493–M	Montana Sulphur & Chemical Co., Billings, MT	4	02/28/1997
6117–M	Montana Sulphur & Chemical Co., Billings, MT	4	03/31/1997
8556–M	Air Products & Chemicals, Inc., Allentown, PA	4	01/31/1997
9184–M	The Carbide/Graphite Group, Inc., Louisville, KY	4	12/31/1996
9413–M	EM Science, Cincinnati, OH	4	03/31/1997
9706–M	Taylor-Wharton, Harrisburg, PA	4	01/31/1997
9909–M	Taylor-Wharton, Harrisburg, PA	4	01/31/1997
10511–M	Schlumberger Technology Corporation, Houston, TX	4	12/31/1996
10517–M	Nalco Chemical Co., Naperville, IL	4	12/31/1996
10798–M	Olin Corp., Stamford, CT	4	02/28/1997
11005–M	Pressure Technology, Inc., Hanover, MD	4	12/31/1996
11058–M	Spex Certiprep Inc., Metuchen, NJ	4	03/31/1997
11171–M	Dart Container Corp. of PA, Leola, PA	4	01/31/1997
11321–M	E.I. du Pont de Nemours & Company, Inc., Wilmington, DE	4	01/31/1997

[FR Doc. 97–70 Filed 1–2–97; 8:45 am]

BILLING CODE 4910–60–M

Surface Transportation Board

[STB Finance Docket No. 33305]

Union Pacific Railroad Company—Acquisition Exemption—Idaho Northern & Pacific Railroad Company

Union Pacific Railroad Company (UP), a Class I rail carrier, has filed a notice of exemption under 49 CFR 1180.2 to acquire trackage and right-of-way owned by Idaho Northern & Pacific Railroad Company (INP) and previously authorized for abandonment, subject to negotiations for trail use,[1] between milepost 1.0, near Weiser, and milepost 84.1 at Rubicon, in Washington and Adams Counties, ID (Line). UP notes that it has no plan to reactivate rail service on the Line at this time, although reactivation for rail service would be possible in the future if the Line were conveyed to a trail user under the Trails Act. In its notice, UP has stated that, if trail use negotiations are unsuccessful, UP will abandon the Line pursuant to the authorization granted in Docket No. AB–433 (Sub-No. 2X).

UP's acquisition transaction was expected to be consummated on or after December 19, 1996.

As a condition to this exemption, any employees adversely affected by the transaction will be protected under *New York Dock Ry.—Control—Brooklyn Eastern Dist.*, 360 I.C.C. 60 (1979).

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 does not automatically stay the transaction.

An original and 10 copies of all pleadings, referring to STB Finance Docket No. 33305, must be filed with the Surface Transportation Board, Office of the Secretary, Case Control Branch, 1201 Constitution Avenue, N.W., Washington, DC 20423. In addition, a copy of each pleading must be served on Joseph D. Anthofer, Esq., 1416 Dodge Street, Omaha, NE 68179.

Decided: December 23, 1996.

By the Board, David M. Konschnik, Director, Office of Proceedings.

Vernon A. Williams,

Secretary.

[FR Doc. 97–67 Filed 1–2–97; 8:45 am]

BILLING CODE 4915–00–P

[1] Abandonment of the Line was authorized in *Idaho Northern & Pacific Railroad Company—Abandonment and Discontinuance Exemption—in Washington and Adams Counties, ID*, Docket No. AB–433 (Sub-No. 2X) (ICC served Nov. 1, 1995). In addition, the Interstate Commerce Commission, by decision served December 28, 1995, issued a notice of interim trail use under the National Trails System Act, 16 U.S.C. 1247(d) (Trails Act).

[STB Docket No. AB–481X]

South Plains Lamesa Railroad, Ltd.—Abandonment Exemption—in Dawson and Lynn Counties, TX

AGENCY: Surface Transportation Board.

ACTION: Notice of exemption.

SUMMARY: The Board exempts from the prior approval requirements of 49 U.S.C. 10903 the abandonment by South Plains Lamesa Railroad, Ltd., of 49.06 miles of rail line between milepost 5.00 near Slaton and milepost 54.06 near Lamesa, in Dawson and Lynn Counties, TX, subject to standard labor protective conditions.

DATES: Provided no formal expression of intent to file an offer of financial assistance (OFA) has been received, this exemption will be effective on February 3, 1997. Formal expressions of intent to file an OFA under 49 CFR 1152.27(c)(2)[1] must be filed by January 13, 1997; petitions to stay must be filed by January 21, 1997; requests for a public use condition conforming to 49 CFR 1152.28(a)(2) must be filed by January 23, 1997; and petitions to reopen must be filed by January 28, 1997.

ADDRESSES: Send pleadings referring to STB Docket No. AB–481X to: (1) Surface Transportation Board, Office of the Secretary, Case Control Branch, 1201 Constitution Avenue, N.W., Washington, DC 20423, and (2) Petitioner's representative: William R. Power, 5840 West Interstate 20, 260 Cordovan Park, Arlington, TX 76017.

FOR FURTHER INFORMATION CONTACT: Beryl Gordon, (202) 927–5660. [TDD for the hearing impaired: (202) 927–5721.]

SUPPLEMENTARY INFORMATION: Additional information is contained in the Board's decision. To purchase a copy of the full decision, write to, call, or pick up in person from: DC News & Data, Inc., Room 2229, 1201 Constitution Avenue, N.W., Washington, DC 20423. Telephone: (202) 289–4357/4359. [Assistance for the hearing impaired is available through TDD services: (202) 927–5721.]

Decided: December 23, 1996.

By the Board, Chairman Morgan, Vice Chairman Simmons, and Commissioner Owen.

Vernon A. Williams,

Secretary.

[FR Doc. 97–66 Filed 1–2–97; 8:45 am]

BILLING CODE 4915–00–P

[1] *See Exempt. of Rail Abandonment—Offers of Finan. Assist.*, 4 I.C.C.2d 164 (1987).

federal register

Friday
January 3, 1997

Part II

Department of Justice

Immigration and Naturalization Service and Executive Office for Immigration Review

8 CFR Part 1, et al.

Inspection and Expedited Removal of Aliens; Detention and Removal of Aliens; Conduct of Removal Proceedings; Asylum Procedures; Proposed Rule

DEPARTMENT OF JUSTICE

Immigration and Naturalization Service and Executive Office for Immigration Review

8 CFR Parts 1, 3, 103, 204, 207, 208, 209, 211, 212, 213, 214, 216, 217, 221, 223, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 248, 249, 251, 252, 253, 274a, 286, 287, 299, 316, 318, and 329

[INS No. 1788–96; AG Order No. 2065–96]

RIN 1115–AE47

Inspection and Expedited Removal of Aliens; Detention and Removal of Aliens; Conduct of Removal Proceedings; Asylum Procedures

AGENCY: Immigration and Naturalization Service, Justice, and Executive Office for Immigration Review, Justice.

ACTION: Proposed rule.

SUMMARY: This rule proposes to amend the regulations of the Immigration and Naturalization Service (Service) and the Executive Office for Immigration Review (EOIR) governing the conduct of both expedited and regular removal proceedings, and handling of asylum claims. The regulation addresses other activities involving the apprehension, detention, hearing of claims and ultimately the removal of inadmissible and deportable aliens. In addition, this rule incorporates a number of changes which are a part of the Administration's reinvention initiative, mandated in a directive signed by the President on March 4, 1995, requiring all heads of departments and agencies to conduct a page-by-page review of all regulations and to eliminate or revise those that are outdated or otherwise in need of reform. This rule is necessary to implement the provisions of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) and the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA).

DATES: Written comments must be submitted on or before February 3, 1997.

ADDRESSES: Please submit written comments, in triplicate, to the Director, Policy Directives and Instructions Branch, Immigration and Naturalization Service, 425 I Street, NW., Room 5307, Washington, DC 20536. To ensure proper handling, please refer INS number 1788–96 on your correspondence. Comments are available for public inspection at the above address by calling (202) 514–3048 to arrange for an appointment.

FOR FURTHER INFORMATION CONTACT: For matters relating to the Executive Office for Immigration Review—Peggy Philbin, General Counsel, Executive Office for Immigration Review, 5107 Leesburg Pike, Suite 2400, Falls Church, VA 22041, telephone number (703) 305–0470; for asylum issues—Michael Shaul, Field Manual Project Office, Immigration and Naturalization Service, 425 I Street NW., ULLB–4th Floor, Washington, DC 20536, telephone number (202) 616–7439; for inspections issues—Linda Loveless, Office of Inspections, Immigration and Naturalization Service, 425 I Street NW., Room 4064, Washington, DC 20536, telephone number (202) 616–7489; for detention and removal issues—Len Loveless, Office of Detention and Deportation, Immigration and Naturalization Service, 425 I Street NW., Room 3008, Washington, DC 20536, telephone number (202) 616–7799.

SUPPLEMENTARY INFORMATION: The Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Public Law 104–208, enacted on September 30, 1996, amends the Immigration and Nationality Act (Act) in several ways. This rule proposes to implement the IIRIRA by creating a new, expedited removal process for aliens attempting to enter the United States through fraud or misrepresentation or without proper documents while providing a mechanism for the determination and review of applicants who demonstrate a credible fear of persecution if returned to their own country. It consolidates exclusion and deportation proceedings into one unified removal proceeding. It revises the asylum process.

It provides that persons who are present in the United States without inspection are considered applicants for admission and indicates that such persons will not be subject to expedited removal unless and until the INS Commissioner invokes the provisions in the statute and this rule allowing her to expand the use of the expedited removal process to include such individuals. Also, various sections of IIRIRA have revised and expanded the grounds of inadmissibility (formerly exclusion grounds).

The effective date of the changes implementing the expedited removal process is April 1, 1997. The Antiterrorism and Effective Death Penalty Act of 1996, Public Law 104–132, was enacted April 24, 1996. Many of its major provisions were superseded by IIRIRA before they became effective. Several of the remaining provisions will be implemented with this rulemaking.

Taken together, the provisions of IIRIRA have made pervasive changes in the laws governing admission, inspection, removal, and detention of aliens—eliminating or revising old standards, creating new ones, and reorganizing and revising numerous provisions of existing law. In some respects, even after the effective date of the new provisions, existing legal standards will still be applied with respect to legal matters initiated prior to that date. The length of this rulemaking document alone—only one of the regulatory actions necessary to implement IIRIRA— demonstrates the breadth and complexity of these changes.

Congress directed that the provisions of Title III–A of IIRIRA take effect on April 1, 1997, and also directed that the Attorney General publish implementing regulations by March 1, 1997. A five-month period is an extremely short time frame for completing the regulatory process for a rule of this magnitude, given the time needed to draft the rule, coordinate with interested agencies, complete the regulatory review process by OMB pursuant to Executive Order 12866, and allow time for public comment. In particular, it means that there is not adequate time for the usual rulemaking model of 60 days public notice.

Because of these exigencies, the Department has limited the public comment period on this proposed rule to 30 days. However, in order to provide a fuller opportunity for public input on the numerous issues addressed in this rulemaking, the Department will allow a 120-day comment period on the Interim Rule when that is published by the beginning of March, prior to the development of a Final Rule.

As of the date this document was submitted for publication, Public Law 104–208 had not been printed. The conference report accompanying the House version of the bill, however, contains the provisions of IIRIRA. *See* H.R. Conf. Rep. No. 863, 104th Cong. 2d Sess., at 561. The Act should be printed in its entirety in the next few weeks.

Applicants for Admission and Arriving Aliens

Section 302 of IIRIRA amends section 235(a) of the Act to describe as applicants for admission both aliens who are arriving in the United States (whether or not they arrive at a designated port-of-entry) and aliens present in the United States who have not been admitted. This section also includes aliens brought to the United States after having been interdicted in international or United States waters. Prior to the enactment of the IIRIRA, aliens apprehended after entering the

United States without inspection were subject to deportation proceedings under section 242 of the Act. By considering such aliens to be applicants for admission, this amendment significantly changes the manner in which aliens who have entered the United States without inspection are considered under the Act.

In some instances, IIRIRA distinguishes between the broader term ''applicants for admission'' and a narrower group, ''arriving aliens.'' For clarity, ''arriving alien'' has now been specifically defined in 8 CFR part 1. The proposed definition of ''arriving alien'' in section 1.1(q) includes aliens arriving at a port-of-entry, aliens interdicted at sea, and aliens previously paroled upon arrival. The term ''arriving alien'' could also include other classes of aliens, e.g., those apprehended crossing a land border between ports-of-entry. The Department would value commentary on the proper scope of the regulatory definition.

Parole of Aliens

The proposed rule amends § 212.5 to permit chief patrol agents to authorize parole from Service custody of aliens who have not been admitted to the United States. The regulations previously allowed the district director to exercise this authority for emergent reasons or when strictly in the public interest. Because many of the aliens apprehended and processed under the jurisdiction of a chief patrol agent will now be considered applicants for admission, this change is necessary to allow discretionary release of those aliens in the particular circumstances enumerated in § 212.5.

Custody of Aliens Applying at Land Border Ports-of-entry

The proposed regulation implements a new provision added to section 235(b)(2) of the Act to state that an applicant for admission arriving at a land border port-of-entry and subject to a removal hearing under section 240 of the Act may be required to await the hearing in Canada or Mexico. This simply adds to statute and regulation a long-standing practice of the Service. If the alien fails to appear for the hearing, the immigration judge may order the alien removed *in absentia.*

Withdrawal of Application for Admission

Section 302(a) of IIRIRA incorporates into section 235(a)(4) of the Act the longstanding practice used by the Service to permit applicants for admission to voluntarily withdraw their applications for admission to the United States, in lieu of removal proceedings, and to depart immediately. Permitting an alien to withdraw his or her application for admission allows the Service to better manage its resources by removing inadmissible aliens quickly at little or no expense to the Government, and may be considered instead of expedited or regular removal when the circumstances of the inadmissibility may not warrant a formal removal. The option to permit withdrawal is solely at the discretion of the Government, and is not a right of the alien. An immigration judge may allow only arriving aliens to withdraw an application for admission. Such a grant should ordinarily require the Service's concurrence once the issue of inadmissibility or deportability has been resolved. During the pendency of an appeal from an order of removal, permission to withdraw must be obtained from the immigration judge or the Board of Immigration Appeals (Board).

Expedited Removal of Certain Applicants for Admission

Pursuant to section 302(a) of IIRIRA, aliens who attempt to enter the United States by fraud or misrepresentation or who arrive without valid entry documents may be removed under an expedited process without further hearing or review. An exception is provided for Cuban nationals arriving by aircraft at a port-of-entry. Aliens who are inadmissible on other grounds will be referred for proceedings before an immigration judge under the new removal provisions of section 240 of the Act. Although not required by statute, the proposed regulation provides for review and approval of the expedited removal order by a supervisory immigration officer prior to removal of the alien. The expedited removal order bars reentry for 5 years following the removal, or 20 years in the case of a second or subsequent removal, unless the alien obtains advance permission to reenter the Untied States.

The Department requests public comment regarding the appropriate use of the authority conferred by the statute upon the Attorney General to expand the class of aliens subject to expedited removal. Section 235(b)(1)(A)(iii) of the Act permits the Attorney General, in her sole and unreviewable discretion, to apply expedited removal to aliens not admitted or paroled (and not described in section 235(b)(1)(H)) who cannot establish continuous physical presence in the United States for the previous two years.

Under the proposed rule, expedited removal will generally apply only to ''arriving aliens,'' as defined in section 1.1(q), i.e., aliens arriving at a port-of-entry, aliens interdicted at sea, and aliens previously paroled upon arrival. The Commissioner may, however, elect to apply the expedited removal procedures to additional classes of aliens within the limits set by the statute, if, in the Commissioner's discretion, such action is operationally warranted. The Commissioner's designation may be localized, in response to specific needs within a particular region, or nationwide, as appropriate. The designation would become effective upon publication in the Federal Register, except where circumstances require immediate implementation. The Department would value commentary on two alternative approaches as well: (1) application of expedited removal only to ''arriving aliens''; and (2) application of expedited removal to all aliens not admitted or paroled (and not described in section 235(b)(1)(F) who cannot demonstrate continuous physical presence for the previous two years.

Finally, commentary on the proper scope of the term ''arriving alien'' would be helpful to the Department in implementing section 235(b)(1). The proposed regulatory definition in section 1.1(q) includes aliens arriving at a port-of-entry, aliens interdicted at sea, and aliens previously paroled upon arrival. The term ''arriving alien'' could also include other classes of aliens, e.g., those apprehended crossing a land border between ports-of-entry.

Review of Claim to Lawful Permanent Resident, Refugee, or Asylee Status in Expedited Removal

An expedited removal order entered against an alien by an immigration officer at the time of arrival or by an asylum officer following a determination that the alien does not have a credible fear of persecution is not subject to administrative appeal, but may be reviewed by an immigration judge upon request of the alien. An exception is provided in section 235(b)(1)(C) of the act for an alien who claims under oath or under penalty or perjury to be a lawful permanent resident, to have been admitted as a refugee under section 207 of the Act, or to have been granted asylum under section 208 of the Act.

Before entering an expedited removal order against these aliens, the Service will attempt to verify the alien's claim to lawful permanent resident, refugee, or asylee status. If a claim to lawful permanent resident status is verified, the examining officer will determine whether the alien is considered an applicant for admission within the

meaning of section 101(a)(13) of the Act. Section 301(a) of IIRIRA amended section 101(a)(13) of the Act to provide that an alien lawfully admitted for permanent residence is not seeking admission unless the alien has abandoned or relinquished that status, has been absent for a continuous period in excess of 180 days, has engaged in illegal activity after having departed the United States, has departed while under legal process seeking removal, has committed certain criminal offenses, or is attempting to enter at a time or place other than as designated or has not been inspected and admitted to the United States. If the verified lawful permanent resident is determined to be an applicant for admission, the officer may consider appropriate discretionary waivers, if applicable, such as a waiver of documents under section 211(b) or other administrative options.

Current regulations do not provide for a waiver of documents or similar options for refugees and asylees who seek to reenter the United States without a refugee travel document. The regulations at § 223.2(b)(2) require that an application for a refugee travel document be filed before a refugee or asylee departs from the United States. The regulations also require at § 223.1(b) that a refugee or asylee must have a refugee travel document to return to the United States after temporary travel abroad unless he or she is in possession of a valid advance parole document. The combination of these two provisions has resulted in a few refugees and asylees (who had no intention of abandoning their status in the United States at the time of their departure) not being able to be readmitted in such status. With the advent of the expedited removal provisions, including the procedure for a review by an immigration judge of a claim to refugee or asylee status, the need for a formal process for dealing with such individuals has become more critical. The Service proposes to address the problem by giving district directors the discretionary authority to accept an application for a refugee travel document from an alien who is outside the United States, provided that alien: (1) held bonafide refugee or asylee status in the United States at the time of his or her departure from the United States, (2) did not intend to abandon such refugee or asylee status, (3) did nothing while outside the United States which would be inconsistent with refugee or asylum status, (4) has been outside the United States for less than one year (the maximum period of time for which the refugee travel document can be issued), and (5) files the requisite Form I–131, Application for a Travel Document, with the appropriate fee. Upon the filing and approval of such application, the alien may be readmitted to the United States as if he or she were in possession of a valid refugee travel document, provided the alien is otherwise admissible.

If the immigration officer determines that an alien verified to have once held the status of a lawful permanent resident, refugee, or asylee does not merit a waiver, the officer will not issue an expedited removal order; rather, the officer may place the alien in removal proceedings under section 240 of the Act, Section 235(b)(1)(C) of the Act does not specify what should occur if an alien actually establishes to the satisfaction of an inspecting officer or an immigration judge that he or she is a lawful permanent resident, refugee, or asylee. However, section 242(e)(4) of the amended Act provides that if an alien appealing an expedited removal order to Federal district court establishes by a preponderance of the evidence that he or she is a lawful permanent resident, has been admitted as a refugee, or has been granted asylum, then the district court may order that the alien be provided a hearing under section 240 of the Act. In light of these judicial review provisions that would result in such aliens receiving a regular removal proceeding under section 240 of the Act, the Department considers a referral into section 240 removal proceedings upon verification of such status by an immigration officer or demonstration of such status to an immigration judge to be the most practical and efficient implementation of these provisions.

In cases where the alien's claim to lawful permanent resident, refugee, or asylee status cannot be verified, the immigration officer or the asylum officer will order the alien removal under section 235(b)(1)(A)(i) of the Act or for a credible fear determination under section 235(b)(1)(B)(iii), and then refer the alien to an immigration judge for review of the order. If the judge determines that the alien is not a lawful permanent resident, has not been admitted as a refugee, or has not been granted asylum under section 208 of the Act, the order issued by the examining immigration officer or asylum officer will be effected and the alien will be removed from the United States under that order. No further review is available. If the judge determines that the alien was once admitted and/or currently is a lawful permanent resident, refugee, or asylee, the order will be canceled and proceedings under section 235(b)(1) of the Act will be terminated. The Service may then admit the alien or pursue any other grounds of inadmissibility or deportability under section 212 or 237 of the Act in a removal proceeding pursuant to section 240 of the Act, if appropriate.

Revision of Asylum Procedures

The regulation proposes to amend 8 CFR part 208 to create new procedures for the consideration of asylum applications as mandated by section 604 of IIRIRA, to make certain other changes which are not mandated by IIRIRA, but that will significantly improve the asylum process, and to streamline the existing regulations in accordance with the principles discussed elsewhere in the supplementary information.

Of special significance are the provisions in the regulation providing the immigration judges with exclusive jurisdiction over certain categories of asylum applications, including those filed by alien crewmen, stowaways who establish a credible fear of persecution, aliens covered by the Visa Waiver Pilot Program, aliens subject to removal under section 235(c) of the Act, and aliens who have applied for or received an ''S'' visa. Under the current regulations, some of these classes of aliens (stowaways, crewmen, and aliens removable under section 235(c) of the Act) receive only an interview with an asylum officer which is reviewed directly by the Board. However, some problems have arisen with these procedures, most significantly, the difficulty of generating a reliable and complete record and the absence of a government-provided interpreter in asylum officer interviews. The Department believes that giving the immigration judges exclusive jurisdiction over such determinations will certify these problems while still maintaining the high quality and consistency of the interview and decision-making process which the public has come to expect.

The proposed rule's treatment of section 208(a)(2) of the Act, which establishes a number of new grounds barring an alien from applying for asylum, is equally important. Regarding section 208(a)(2)(C) of the Act, which bars an alien from applying for asylum if the alien had a previous asylum application denied, the rule makes clear that this provision applies only to asylum applications that have been denied by an immigration judge or the Board. This ensures that aliens who received a denial of their application from an asylum officer because they applied for asylum while in valid status or under procedures in place prior to January 1995 receive consideration of

their application by an immigration judge. The rule also interprets the terms ''changed circumstances'' and ''extraordinary circumstances'' in section 208(a)(2)(D) of the Act as those terms apply to the 1-year bar in section 208(a)(2)(B) of the Act. The regulation provides minimal guidance on the meaning of the term ''changed circumstances.'' Nevertheless, because of the novelty of the ''extraordinary circumstances'' exception to the 1-year bar, the rule offers a regulatory interpretation of this term. While the Department considered having the regulation identify specific examples of extraordinary circumstances that would justify a waiver of the one-year filing requirement, the proposed rule opts in favor of a provision that generally defines the term as events or factors beyond the alien's control that caused the failure to meet the one-year deadline. The regulation also provides that the alien file the application as soon as practicable under those circumstances. Thus, an event or factor of relatively brief duration would be insufficient to excuse the filing of an application long after the deadline. In our view, such a general definition provides guidance to decision makers while offering more flexibility than a definition by example would. Nevertheless, we can imagine several examples that would likely satisfy this definition: the applicant suffered a physical or mental disability that prevented a timely filing; the applicant was under a legal disability (e.g., an unaccompanied minor) during the one-year period; or the applicant received ineffective assistance of counsel, as that concept has been interpreted by the Board of Immigration Appeals, resulting in a failure to file a timely application. Nevertheless, because of both the novelty and importance of these new provisions, the Department welcomes suggestions from the public on how best to implement them.

The proposed rulemaking also offers guidance on how to apply section 208(d)(6) of the Act, which provides that an alien who knowingly makes a frivolous asylum application shall be permanently ineligible for any benefits under the Act. At § 208.18, the rule first provides that such determinations may only be made in a final order by an immigration judge or the Board of Immigration Appeals. The rule also defines an application as ''frivolous'' if it is fabricated or brought for an improper purpose. In doing so, the Department is carrying out one of the central principles of the asylum reform process begun in 1993; to discourage applicants from making patently false claims.

It should be noted that the proposed rule does not discuss § 208.19 dealing with the admission of the spouse and children of an alien granted asylum status. This topic was the subject of a separate proposed rule published July 9, 1996. *See* 61 FR 35,984 (1996). That separate rulemaking will be incorporated into the overall asylum regulations once it is finalized.

Credible Fear Determination and Claims of Asylum or Fear of Persecution by Alien Subject to Expedited Removal

Under the new section 235(b)(1)(A)(ii) of the Act, an alien subject to expedited removal who indicates an intention to apply for asylum or who expresses a fear of persecution will be referred to an asylum officer to determine if the alien has a credible fear of persecution. Credible fear of persecution is defined in section 302(a) of IIRIRA to mean that ''there is a significant possibility, taking into account the credibility of the statements made by the alien in support of the alien's claim and such other facts as are known to the officer, that the alien could establish eligibility for asylum under section 208.''

Interviews to determine whether an alien has a credible fear of persecution will be conducted by an asylum officer, either at the port-of-entry or at designated locations such as detention centers. For purposes of this credible fear interview, an asylum officer is defined in the Act as an immigration officer who has had professional training in country conditions, asylum law, and interview techniques comparable to that provided to full-time adjudicators of applications under section 208, and is supervised by an officer who meets the same criteria and who has had substantial experience adjudicating asylum applications. This definition may include officers other than full-time asylum officers, provided they have undergone the necessary training and have the requisite supervision, but the Service will generally attempt to assign full-time asylum officers to the task of determining credible fear. Prior to the interview, the alien may consult with a person or persons of his or her own choosing at no cost to the Government, provided it does not unreasonably delay the process.

The asylum officer will make a determination whether the alien has a credible fear of persecution. Service procedures will require that the determination be reviewed by a supervisory asylum officer. The supervisory asylum officer may direct the asylum officer to interview the applicant further, or to research country conditions or other matters relevant to the decision. If the supervisory asylum officer agrees that the alien has not demonstrated a credible fear of persecution, the alien will be ordered removed under the provisions of section 235(b)(1)(B)(iii)(I) of the Act. If the alien requests review of the determination that he or she has not demonstrated a credible fear of persecution, the credible fear determination will be promptly reviewed by an immigration judge. The alien will have the opportunity to be heard and questioned by the immigration judge. This review will be limited solely to the issue of credible fear, and may be conducted either in person or by telephonic or video connection. By statute, the review should be conducted as soon as possible following the credible fear determination, preferably within 24 hours, and no later than seven days after the date of determination. The alien will be detained during this review period, and if found by the immigration judge not to have a credible fear, will be promptly removed.

Section 235(b)(1)(B)(ii) of the Act provides that aliens who are determined by an asylum officer to have a credible fear of persecution will be detained for further consideration of the asylum claim. While the statute does not specify how or by whom this further consideration should be conducted, the proposed rule provides for such consideration by an immigration judge in removal proceedings conducted pursuant to section 240 of the Act. In the removal hearing, the immigration judge will make a determination whether alien is eligible for asylum under section 208 of the Act or for withholding of removal under section 241(b)(3) of the Act. The removal order will be subject to administrative review by the Board in accordance with section 240 of the Act and § 3.1(b)(3).

Credible fear determinations are also made in the case of stowaways. Although not entitled to removal proceedings under section 240 of the Act, a stowaway who has been determined by an asylum officer (or by an immigration judge upon review of a negative determination by an asylum officer) to have a credible fear of persecution may file an asylum application to be adjudicated by an immigration judge in asylum-only proceedings. There is no appeal from the decision of an immigration judge as to whether the stowaway has a credible fear of persecution. A stowaway who is found not to have a credible fear will be

expeditiously removed. However, a stowaway who meets the credible fear threshold and is allowed to present an asylum or withholding of removal application in a proceeding before an immigration judge may appeal the resulting decision to the BIA.

Proposed Changes Not Mandated by IIRIRA

The rulemaking also proposes to remove §§ 208.13(b)(2)(ii) and 208.16(b)(4) which require that adjudicators give ''due consideration to evidence that the government of the applicant's country of nationality or last habitual residence persecutes its nationals or residents if they leave the country without authorization or seek asylum in another country.'' The regulations accomplish little and are potentially misleading in their current form. The term ''due consideration'' provides little guidance. Moreover, the question of whether punishment for a migration-related offense is ''persecution'' hinges on an evaluation of the circumstances of each case. Under current law, prosecution for migration-related offenses does not ordinarily amount to persecution. Since the provision does not offer any assistance in adjudicating claims involving prosecution for unauthorized departure, we propose removing it from the regulations.

The rule provides a special regulation to govern the application of section 243(h)(3) of the Act, a provision added by section 413(f) of AEDPA that was eliminated by section 307 of IIRIRA. That section provided that, notwithstanding any other provision of law, the Attorney General could grant an alien withholding of deportation if she determined that it was necessary to do so to ensure compliance with the 1967 Protocol Relating to the Status of Refugees. In new section 241(b)(3)(B) of the Act, the only change Congress made to the existing bars to withholding of deportation was to require, in the case of an alien convicted of an aggravated felony (or felonies), that the alien receive an aggregate term of imprisonment of at least 5 years before such crime or crimes are automatically considered to be particularly serious. We understand this change to reflect Congress' conclusion that the bars to withholding of deportation or removal are consistent with the United States' obligations under the 1967 Protocol Relating to the Status of Refugees, except potentially in the case of an aggravated felon who receives less than a 5-year aggregate sentence. The Department proposes a regulatory interpretation of section 243(h)(3) that is consistent with this most recently expressed view of the Congress. Thus, the rule provides that an alien may attempt to obtain relief under section 243(h)(3) of the Act only if he or she is an aggravated felon who received an aggregate sentence of less than 5 years and can establish that the crime or crimes of which he or she has been convicted are not particularly serious. This will require a case-by-case determination whether the crime or crimes committed by the alien are particularly serious. Only if the crime is determined not to be particularly serious will the alien be entitled to have his or her withholding of deportation claim considered. Because section 243(h)(3) of the Act was eliminated by IIRIRA, this rule applies only to applications for withholding made in proceedings commenced prior to April 1, 1997, so long as a final action on any such withholding request was not taken prior to April 24, 1996, the date of AEDPA's passage.

Establishment of a Fee for Filing an Application for Asylum

This rulemaking does not propose to establish a fee for filing an application for asylum or to expand the situations under which fees may be charged for asylum-based applications for work authorization, despite the statutory permission to do so contained in section 208(d)(3) of the Act. Should the Department decide to do so at a later date, that action would be part of a separate rulemaking.

Employment Authorization for Asylum Applicants

The proposed regulations will continue to allow asylum applicants to apply for an employment authorization document (EAD) once the asylum application has been pending for 150 days, which is 30 days before the new statutorily-mandated time for granting such authorization contained in section 208(d)(2) of the Act.

Rules of Procedure for Executive Office for Immigration Review

Implementation of IIRIRA will impact the rules of procedure for proceedings before the Executive Office for Immigration Review. These proposed rules amend the regulations to expand the scope of the rules of procedure to include new removal proceedings in provisions regarding motions to reopen and reconsider, jurisdiction and commencement of proceedings, stipulated requests for orders, in absentia hearings, public access to hearings, and additional charges. The proposed rules also add provisions regarding the scheduling of removal cases, custody and bond in removal proceedings, and contents of the Notice of Appear form.

Subpoenas by Immigration Judges

Section 304 of IIRIRA bestows upon immigration judges the statutory authority to issue subpoenas for the attendance of witnesses and presentation of evidence in removal proceedings. This subpoena power had previously been granted to immigration judges by regulation only and the immigration judges had to enlist the district director to invoke the aid of the district court for failure to comply with the subpoena. The proposed rule amends the subpoena provisions to provide that an immigration judge directly invokes the aid of the district court for an order requiring the compliance with a subpoena instead of requiring the district director to take such action.

New Removal Proceedings

Section 240 of the Act as amended by section 304(a) of IIRIRA merges the separate proceedings of exclusion and deportation into one removal proceeding. In this single proceeding, the immigration judge will determine whether an alien is inadmissible under section 212 of the Act or deportable under section 237 (formerly section 241) of the Act. In light of these statutory changes, individuals in removal proceedings are referred to in the proposed rule as determined to be removable or ordered removed after being found to be either inadmissible or deportable (but no longer will be referred to as excludable or excluded). Removal proceedings will in nearly all respects resemble present day deportation or exclusion proceedings, with some minor differences outlined below and implemented by this proposed rule.

Although not as a result of any provision of IIRIRA, the Department is soliciting public comments on whether these regulations should include a provision for appointment of a guardian ad litem in a case where a minor or incompetent respondent in removal proceedings is otherwise unrepresented.

Applicability of New Removal Provisions

The IIRIRA provides that the newly created removal procedures and the new amended forms of relief available in removal proceedings which appear in title III–A of IIRIRA will apply to all individuals placed into removal proceedings on or after April 1, 1997, and will not affect individuals who

were in deportation or exclusion proceedings prior to April 1, 1997. *See* Section 309(a) of IIRIRA. For this reason, the proposed rule preserves the former regulations relating to deportation and exclusion proceedings for those individuals who will continue on in such proceedings after April 1, 1997. The proposed rule preserves such provisions by retaining current regulatory provisions previously contained in 8 CFR parts 236, 242, and 244 within separate new subparts of part 240. In addition, sections formerly contained in parts 237 and 243 have been retained in new subparts of part 241. A more detailed description of the entire reorganization of effected parts of title 8 is contained later in this supplementary information.

The Notice to Appear (Form I–862)

The charging document which commences removal proceedings under section 240 of the Act will be referred to as the Notice to Appear, Form I–862, replacing the Order to Show Cause, Form I–221, that was used to commence deportation proceedings and the Notice to Detained Applicant of Hearing Before an Immigration Judge, Form I–110. The Notice to Appear must contain nearly all of the information that was required to be in the Form I–221. The regulations reflect the fact that section 304 of IIRIRA did not retain the requirement that the Notice to Appear be provided in Spanish; that the mandatory period between service of a Notice to Appear and the date of an individual's first hearing is 10 days rather than the 14 days required for the Order to Show Cause; that service of the Notice to Appear by ordinary mail, rather than certified mail, is sufficient if there is proof of attempted delivery to the last address provided by the alien and noted in the Central Address File; and that no written notice need be provided if the alien has failed to provide his or her address as required under the amended Act.

In addition, the proposed rule implements the language of the amended Act indicating that the time and place of the hearing must be on the Notice to Appear. The Department will attempt to implement this requirement as fully as possible by April 1, 1997. Language has been used in this part of the proposed rule recognizing that such automated scheduling will not be possible in every situation (e.g., power outages, computer crashes/downtime.)

Burdens of Proof in Removal Proceedings

The proposed regulation restates the burden of proof language in section 240(c) of the Act as revised by section 304(a) of IIRIRA. In removal proceedings in which an alien is charged with deportability, the Service must establish deportability by clear and convincing evidence. This replaces the clear, convincing, and unequivocal standard set forth in *Woodby* v. *INS*, 385 U.S. 276 (1966). An applicant for admission to the United States must establish that he or she is clearly and beyond a doubt entitled to be admitted and is not inadmissible. In the case of an alien present in the United States without being admitted or paroled, once the Service establishes alienage, the alien must prove that he or she is clearly and beyond a doubt entitled to be admitted and is not inadmissible, unless the alien proves by clear and convincing evidence that he or she is lawfully present pursuant to a prior admission.

Cancellation of Removal

The proposed rule provides for the application by qualified individuals in removal proceedings for the new form of relief created by section 304(a) of IIRIRA: cancellation of removal. Cancellation of removal comes in two forms. The first form, available to lawful permanent residents, is similar to relief under section 212(c) of the pre-IIRIRA Act, except that only 5 years of the required 7 years of residence to statutorily qualify for this form of cancellation of removal need be fulfilled as a lawful permanent resident. This means that up to 2 years of the 7 years can be satisfied with temporary residence. This provision codifies the interpretation by a number of Federal circuit courts that a period of temporary residence counts toward the 7-year residency requirement for relief under section 212(c) of the pre-IIRIRA Act.

The second form of cancellation of removal resembles suspension of deportation under section 244 of the pre-IIRIRA Act, except that an applicant for the second form of cancellation of removal must demonstrate continuous physical presence for 10 years instead of 7 years, and must show ''exceptional and extremely unusual hardship'' instead of ''extreme hardship.'' Further, unlike suspension of deportation, this form of cancellation of removal is not available for aliens who can only show hardship to themselves. The proposed rule also implements the availability of this second form of cancellation of removal to a battered spouse or child who can demonstrate 3 years of continuous physical presence in the United States and who shows that removal would result in ''extreme hardship'' to the battered spouse, his or her child, or the battered child's parent.

Administrative Motions To Reopen and Reconsider Removal Proceedings

Section 304(a) of IIRIRA added a number of motions procedures to the Act regarding the reopening or reconsideration of a final order of removal. For the most part, these new statutory provisions encompass the new procedures implemented by EOIR's new motions and appeals regulation, which took effect on July 1, 1996. However, the statute does place the time and number restrictions for motions specifically on the alien. The proposed rule implements this change by adding a provision to indicate that in removal proceedings, the restrictions only apply to the alien and not to the Service. In addition, unlike the pre-IIRIRA regulations excepting motions to reopen exclusion or deportation orders rendered in absentia from both the 90-day and 1-motion restrictions, the statute only excepts motions to reopen removal orders rendered in absentia from the 90-day time period and not the numerical restriction. The proposed rule implements this change as well.

Proceedings To Review Asylum Claims by Certain Aliens Not Eligible for Section 240 Proceedings

This rule established a new Notice of Referral to Immigration Judge, Form I–863, to be used to institute limited proceedings before an immigration judge. This referral form will be used by immigration officers to initiate review by an immigration judge for asylum or withholding of removal claims by Visa Waiver Pilot Program (VWPP) refusal cases and VWPP status violators, crew members, aliens ordered removed pursuant to section 235(c) of the Act, aliens present pursuant to section 101(a)(15)(S) of the Act, and alien stowaways found to have a credible fear of persecution. This proceeding is limited solely to the asylum or withholding claim and no other forms of relief may be presented by the alien or considered by the immigration judge.

Asylum officers will also use the Notice of Referral for expedited removal cases where the alien seeks review of a ''no credible fear'' finding by the asylum officer in section 235(b)(1) proceedings or for stowaways, prior to the execution of the expedited removal order or removal of the stowaway.

In addition, the Notice of Referral will be used to institute an immigration judge review of expedited removal orders issued against aliens claiming to be lawful permanent residents, refugees or asylees. In such cases, the immigration judge will review the

expedited removal order, which may either be affirmed or canceled.

Existing regulations regarding deportable VWPP aliens who claim asylum state that the alien will be referred for a determination of deportability. The current regulations for VWPP applicants arriving at ports-of-entry are vague, stating only that the alien will be referred to an immigration judge for further inquiry. The proposed change will clarify that VWPP applicants and status violators are to be provided a hearing and appeal on the asylum and withholding claim only.

Existing regulations provide that a crewman, stowaway, or alien temporarily excluded under section 235(c) of the Act file an application for asylum with the district director and that the district director forward it to an asylum officer for adjudication. The Attorney General has determined that these claims should be adjudicated by an immigration judge. This determination to adjudicate the asylum claims for these classes of aliens in a proceeding before an immigration judge is in response to recent case law holding that stowaway asylum applicants must be afforded the same asylum procedures deemed necessary for other aliens. In *Marincas* v. *Lewis*, 92 F.3d 195, 200–201 (3rd Cir. 1996), the court held that the plain language of the Refugee Act left no room to construe the statue to permit differing asylum procedures for stowaways. Although the Department with that holding, the Attorney General has found that providing a proceeding before an immigration judge to hear the asylum claim will address the concerns raised in *Mirancas*, while remaining consistent with the statutory directives to limit due process for these classes of aliens. As required by IIRIRA, a stowaway will receive a credible fear determination by an asylum officer prior to the referral to an immigration judge.

Reorganization of Certain Regulatory Sections

The IIRIRA substantially revised sections of the Act relating to the arrest of aliens suspected of inadmissibility to or unlawful presence in the United States, detention of such aliens prior to and during removal proceedings, the conduct of removal proceedings, and ancillary issues such as voluntary departure and available forms of relief. The Service and EOIR have jointly undertaken a complete revision of the affected parts of title 8, to bring the relevant regulatory parts into alignment with the new sections of the Act. The newly revised sections are organized in the following manner: 8 CFR part 236, Subpart A—Detention of aliens prior to order of removal, Subpart B—Family Unity Program; 8 CFR part 238—Expeditious removal of aggravated felons; 8 CFR part 239—Initiation of removal proceedings; 8 CFR part 240, Subpart A—Removal proceedings, Subpart B—Cancellation of removal, Subpart C—Voluntary departure, Subpart D—Exclusion of aliens (for proceedings commenced prior to April 1, 1997); Subpart E—Proceedings to determine deportability of aliens in the United States: Hearing and Appeal (commenced prior to April 1, 1997); Subpart F—Suspension of deportation and voluntary departure (for proceedings commenced prior to April 1, 1997); Subpart G—Civil penalties for failure to depart; 8 CFR part 241, Subpart A—Post-hearing detention and removal, Subpart B—Deportation of Excluded Aliens (for hearings commenced prior to April 1, 1997), Subpart C—Deportation of Aliens in the United States (for hearings commenced prior to April 1, 1997); 8 CFR parts 237, 242, and 243 have been removed and reserved; 8 CFR part 244 will now contain regulations pertaining to the Temporary Protected Status program.

Sections of the old regulations which are still applicable to proceedings commenced prior to April 1, 1997, have been retained, but moved to new parts of the regulations as separate subparts according to topic. For example, the regulations relating to the conduct of proceedings, formerly contained in 8 CFR part 242, have been moved to 8 CFR part 240, which contains regulations for the conduct of removal proceedings.

Most sections of the regulations have not been retained in this manner. They have been totally revised, in conformity with the new statute. In some instances, these regulations distinguish between situations involving aliens ''grandfathered'' under former statutory authority and those encompassed by the provisions of IIRIRA. For example, new § 252.2(b) contains separate provisions for alien crewmen who arrived prior to April 1, 1997, and those who arrive after that date.

Because the Service and EOIR have concerns about the serious restructuring of these regulations, the public is invited to comment on the approach taken by this rulemaking. In particular, the Service wishes to solicit comments concerning any possible unintended consequences of the restructuring, such as the inclusion of new sections which encompass aliens entitled to consideration under ''old'' provisions.

Apprehension, Custody, and Detention of Aliens

This rule incorporates the changes made to section 242 of the Act by section 440(c) of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Public Law 104–132 as well as section 303(a) of the IIRIRA. By enactment of AEDPA, Congress altered the provisions created by section 504 of the Immigration Act of 1990 (IMMACT), Public Law 101–649, enacted November 29, 1990, relating to release of lawfully admitted aliens who had been convicted of aggravated felonies. The AEDPA directed the Attorney General to detain aliens convicted of aggravated felonies without bond and extended the mandatory detention provisions to aliens deportable for conviction of certain other felonies. The IIRIRA extended the mandatory detention provisions to additional classes of inadmissible and deportable aliens but provided an exception for certain witnesses. It also allowed the Attorney General the option of a transition period for implementation of mandatory detention. The INS exercised this discretion and implemented the transition period custody rules on October 9, 1996, effective for 1 year. The Act is very clear as to which aliens may be released. This rule proposes to amend the Service's regulations to comply with the amended Act by removing the release from custody provisions for aliens who may no longer be released. These amendments to the regulations will take effect upon the termination of the transition period. As for non-criminal aliens, the rule reflects the new $1,500 minimum bond amount specified by IIRIRA. Otherwise, the proposed rule essentially preserves the status quo for bond determination by the Service and bond redetermination proceedings before immigration judges. Despite being applicants for admission, aliens who are present without having been admitted (formerly referred to as aliens entering without inspection) will be eligible for bond and bond redetermination.

Expedited Deportation Procedures for Aliens Convicted of Aggravated Felonies Who Are Not Lawful Permanent Residents

This rule incorporates the changes made to section 242A(b) of the Act by section 442 of the AEDPA and section 304(c) of the IIRIRA. By enactment of the AEDPA, Congress made several changes to the expedited administrative deportation procedure authorized under section 130004 of the Violent Crime Control and Law Enforcement Act of

1994, Public Law 103–322. Some of these changes were modified by the IIRIRA and one was eliminated. This rule proposes to amend the Service's regulations to comply with the amended Act as follows: aliens who have lawful permanent residence on a conditional basis under section 216 of the Act are subject to expedited administrative deportation procedures and have been included in the regulation. Since section 238(b)(5) of the Act states that an alien subject to these proceedings is ineligible for any relief from removal, all references to prima facie eligibility for relief and to relief from deportation have been removed. This revision also eliminates references to release from custody, since aliens subject to these proceedings are now statutorily ineligible for release as a result of changes to other sections of the Act.

Voluntary Departure

The proposed rule outlines how voluntary departure will be handled at various stages of proceedings. Prior to the initiation of proceedings, the Service has sole jurisdiction to grant voluntary departure for a period not to exceed 120 days. The Service may impose any conditions it deems necessary to ensure the alien's timely departure from the Untied States, including the posting of a bond, continued detention pending departure and removal under safeguards. After proceedings have been commenced and at any time up to 30 days subsequent to the master calendar, the immigration judge may grant voluntary departure for a period not to exceed 120 days. In each instance, the alien will be required to present to the Service travel documents sufficient to assure lawful entry into the country to which the alien is departing, unless such document is not necessary for the alien's return.

An alien may be granted voluntary departure at the conclusion of proceedings if the immigration judge finds that the alien meets the conditions of section 240B(b) of the Act. The judge may impose such conditions as he or she deems necessary to ensure the alien's timely departure from the United States, but in all cases, the alien shall be required, within 5 days of the order, to post a voluntary departure bond of no less than $500. In order for the bond to be canceled, the alien must provide proof of departure to the district director. If the alien fails to depart, or to meet any of the conditions attached to the grant of voluntary departure, such order will vacate and the alternate order of deportation will stand.

Section 304(a) of IIRIRA makes significant changes to both the nature and duration of voluntary departure. Under the new law, voluntary departure is clearly meant to be granted to aliens illegally in the United States who are able and willing to depart in a relatively short period of time. It will no longer be available to those who are seeking to significantly extend their time in the United States for other reasons. If fact, the time periods which will be allowed for voluntary departure are such that they meet or exceed the normal processing time for applications for employment authorization. In light of these changes, the Department is eliminating the provisions currently contained in 8 CFR parts 242 and 274a which permit the granting of work authorization to aliens who have been given voluntary departure.

New section 240B of the Act and the corresponding regulations represent a significant departure from the predecessor provisions for voluntary departure. Public comments regarding the Department's approach to implementation of this provision will be particularly welcome.

Reinstatement of Removal Orders Against Aliens Illegally Reentering

Section 241(b)(5) of the Act requires the Attorney General to reinstate the removal order for an alien who illegally reenters the United States after having been removed or after having departed voluntarily under a removal order. Removal would be accomplished under the proposed rule without referral to an Immigration Court. Although the Act previously contained a provision for reinstatement of a final order of deportation, the accompanying regulation required the issuance of an order to show cause and a hearing before an immigration judge. This resulted in limited use of the provision. The proposed rule provides a procedure for a district director to reinstate a final order upon establishing identity and unlawful reentry of a previously deported or removed alien found in the United States. Once identity is affirmed, the original order will be executed.

Detention and Removal of Aliens Ordered Removed

This rule incorporates the changes made to section 241 of the Act by section 305(a) of IIRIRA. Section 241 of the Act now relates to the period for removal of aliens, post-order detention and removal of aliens, reinstatement of final orders, and detention and removal of stowaways.

This rule provides for the assumption of custody during the removal period, allows detention beyond the period, and provides condition for discretionary release and supervision of aliens who cannot be removed during the period. A district director may issue a warrant of removal based on a final administrative order of removal. The warrant of removal will authorize the Service to take an alien in the United States into custody during the removal period. The Service is required to assume custody of any alien within the United States once the 90-day removal period begins, as defined in section 241 of the Act, and detain the alien until removal or expiration of the removal period. At the expiration of the removal period, the Service has the discretion to release an alien. If the alien shows to the satisfaction of the district director that the alien is not a threat to the community and is likely to report for removal, the district director may release the alien on an order of supervision. As a condition or release, an authorized officer may require the posting of a bond, impose restrictions on conduct, and require periodic reporting to a designated officer. The district director may grant employment authorization as specified in the Act. The district director retains the authority to grant humanitarian stays of removal.

This rule restates the principle, previously found at § 243.5, that an alien who departs the United States while a final order is outstanding has executed the order.

Detention and Removal of Stowaways

The arrival of stowaways in the United States, particularly aboard cargo vessels, has long been a problem for both the transportation companies and the Service. Section 308(e) of IIRIRA has stricken former section 273(d) of the Act, which governed stowaways and section 305 of IIRIRA has clearly defined the responsibilities for stowaways and costs of detention in the new section 241 of the Act. All stowaways are deemed to be inadmissible under the Act and are not entitled to a hearing on admissibility. Those with a credible fear of persecution may seek asylum in accordance with 8 CFR part 208 in proceedings before an immigration judge.

Under the provisions of section 241 of the Act, the carrier (which includes the owner, agent, master, commanding officer, person in charge, purser, or consignee) is responsible for detaining the stowaways on board the vessel or aircraft (or at another approved location) until completion of the inspection, and may not permit the alien to leave the vessel or aircraft, unless authorized by the Service for either medical treatment,

detention by the Service, or removal of the stowaways. The Service may order that the stowaway be removed on the vessel or aircraft of arrival when that is the most practical manner of removal. With the mutual goal of removing stowaways by the most expeditious and secure means, the Service will generally favor any reasonable request to remove the stowaway on other than the vessel or aircraft of arrival. The carrier must make all travel arrangements, including obtaining any necessary travel documents.

Since asylum-seeking stowaways may not be removed pending a final decision on their asylum claim, which may sometimes extend for a lengthy period, the statute limits the detention liability of the owner of the vessel or aircraft. The owner is now responsible for a period of time needed to determine whether the stowaway has a credible fear of persecution, and a reasonable period, beginning when a credible fear is found to exist, during which the asylum application may be considered. The statute and regulations allow for up to 72 hours to arrange and conduct the credible fear interview, although the Service anticipates that this will occur as expeditiously as possible, depending on the location and circumstances of the stowaway's arrival. If the stowaway is allowed to pursue his or her asylum application, the statute provides 15 working days, excluding Saturdays, Sundays, and holidays, for the asylum claim to be heard, at the expense of the owner of the vessel or aircraft. Any detention required beyond that time period will be at the expense of the Service. The carrier remains liable for removal, including removal expenses, if the alien is denied asylum.

Adjustment of Status

Adjustment of status is granted in the discretion of the Attorney General. Consistent with Congress' intent that arriving aliens, as that term is defined in § 1.1(g), be removed in an expedited manner through the procedures provided in section 235(b)(1) of the Act, the Attorney General has determined that she will not favorably exercise her discretion to adjust the status of arriving aliens who are ordered removed pursuant to section 235(b)(1) of the Act or who are placed in removal proceedings under section 240 of the Act. Of course, any such alien who has been persecuted or has a reasonable fear of persecution may request asylum in expedited removal. Arriving aliens who are granted asylum may then adjust their status outside of the removal proceeding context. In all other instances, those apprehended after arriving illegally in the United States should have no other benefit available to them, and should not be permitted to delay their removal through an application for adjustment of status. Any other arriving alien who is eligible to receive an immigrant visa will be required to return to his or her country of residence and request it through the consular process available to all aliens outside of the United States. If the Service decides as a matter of prosecutorial discretion, not to initiate removal proceedings but to parole the arriving alien, the alien will be able to apply for adjustment of status before the district director.

Disposition of Cases of Aliens Arrested in the United States

The regulation proposes to amend § 287.3 to differentiate the actions that must be taken when an alien is apprehended entering or attempting to enter the United States in violation of the immigration laws, or is otherwise found in the United States in violation of those laws. Disposition of the case will vary depending on the circumstances of entry or attempted entry, or the specific violation with which the alien is charged. This section is amended to include those cases that may now be processed under the expedited removal provisions of section 235(b)(1) of the Act, if such provisions are invoked by the Commissioner.

Elimination of Mexican Border Visitor's Permit

The Mexican Border Visitor's Permit, Form I–444, is a record of entry issued by the Service at land border ports-of-entry along the United States/Mexico border to holders of Nonresident Alien Border Crossing Cards, Forms I–186 and I–586. The Nonresident Alien Border Crossing Card is issued in place of a nonimmigrant visa. Currently, Form I–444 is issued when the requested visit to the United States will be for more than 72 hours but less than 30 days in duration or when requested travel is more than 25 miles from the United States/Mexico border but within the five states of Arizona, California, Nevada, New Mexico, or Texas. The Service also issues Form I–444 to Mexican nationals who are in possession of valid Mexican passports and multiple-entry nonimmigrant visas requesting admission to the United States under the limitations described above.

The current Form I–444 has been in use since 1983 and the Service now issues over 200,000 of these forms per month. Due largely to its lack of security features and the absence of standardization between ports, Form I–444 is widely counterfeited. The Service has been unable to demonstrate that there is a connection between the limits on travel by persons issued Forms I–444 and immigration violations. These restrictions should be lifted and applicants for admission should be admitted as any other person in possession of a B–1 or B–2 visa is admitted.

This regulation proposes to remove references to the issuance of the form and the section requiring a fee for issuance of Form I–444. A provision is added requiring the issuance of Form I–94, and collection of the fee, for Mexican nationals seeking to enter for more than 72 hours and/or to travel further than 25 miles from the United States/Mexico border. The Form I–94 issued to a B–2 visitor for pleasure is normally valid for 6 months. The proposed rule provides in § 235.1(f) that a Form I–94 issued at a land border port-of-entry is valid for multiple entries unless otherwise indicated.

Streamlining and Updating of Regulations

The President has directed each agency to undertake a review of its regulations for the purpose of reducing the regulations or, when possible, rendering them more readable and comprehensible. *See* E.O. 12866, 58 FR 51,735 (1993). The Service is engaging in a thorough line-by-line review of all regulations in Title 8 of the Code of Federal Regulations.

Updated Sections

References to the former section 212(a)(17) of the Act dealing with the Attorney General's consent to apply for readmission have been removed from § 217.2(b) and replaced with the current citation. References throughout 8 CFR part 235 to special inquiry officers have been replaced with the title ''immigration judge.'' References to regional commissioners have been replaced with references to regional directors. The regulatory language contained in §§ 238.1, 238.2, 238.3, and 238.5 has been moved to 8 CFR part 233, to conform with redesignation of those statutory sections by the IIRIRA. Lists of carriers signatory to agreements with the Service for carriage to transit passengers and preinspection have been removed form the regulations and will be maintained by the Headquarters Office of Inspections.

Terminated Programs

References to initial (not replacement) application procedures in § 235.12 for Form I–777, Northern Mariana Card, have been removed as the application

period for that form expired in July 1990. Section 235.9, dealing with refugee admissions, has been removed as that procedure is no longer followed and its subject is now governed by section 207 of the Act. Provisions in § 211.2 dealing with waivers of passport requirements for third-preference immigrants have been removed as that category of immigrant no longer exists. Terms which were appropriate in referring to exclusion and deportation procedures have been changed to reflect the single removal process.

Removal of Purely Procedural Matters Involving Only Internal Service Processes

The discussion of internal Service procedures regarding the admission of immigrant children formerly found in § 211.4 has been removed. Language in § 211.5 relating to admission procedures for alien commuters has been removed in favor of placing such information into Service Field Manuals. Examples dealing with alien crewmen, as well as Canadian nationals, have been removed from § 235.1. Part 232 of 8 CFR dealing with the procedures for notification of the master or agent of an arriving vessel when arriving aliens were placed in detention for mental or physical examination has been removed since it is addressed in Service manuals. Language dealing with procedures for completion of entry documents for nonimmigrant aliens, Mexican border crossers, bearers of Mexican diplomatic passports, and paroled aliens in 8 CFR part 235 has been removed. Language in § 235.2 relating to deferred inspection procedures for incapacitated or incompetent aliens has also been removed. Section 235.4 dealing solely with Service procedures for endorsing documents evidencing admission has been revised to address the withdrawal of an application for admission. The former § 251.1(d), dealing with the notations to be made on Service forms when inspecting crewmen, has been incorporated into Service manuals.

Elimination of Duplication

Duplicative references have been removed. Language in § 217.2, relating to eligibility for the Visa Waiver Pilot Program, has been removed as it merely restates the eligibility requirements contained in the Act. Language in § 217.3 and throughout relating to Visa Waiver Pilot Program participants' eligibility for other immigration benefits and readmission after departure to contiguous territory has been removed as it merely restates the Act and is covered by other regulations in this part.

Streamlining

Section 211.1. has been restructured in its entirety to make it easier to comprehend. The provisions relating to admission of children of lawful permanent residents formerly contained in § 211.2 have been consolidated into the general waiver provisions of section § 211.1. Language formerly in § 211.2(b) which referred to other code sections by description has been replaced by a simple citation. Sections 211.3, 211.4, and 235.9 have been removed and reserved as their contents are addressed in other sections of this part. The 8 CFR part 251, relating to alien crewmen, longshore work, and vessels has been restructured and clarified.

Unnecessary recitals of the law have been removed in the following: § 211.5(b), relating to forfeiture of an I–551 upon loss of resident status by a commuter alien; and § 217.1, which merely restates statutory language regarding eligibility for admission under the Visa Waiver Pilot Program. The 8 CFR part 217 has been streamlined by consolidating various definitions throughout that part into one section. Confusing language in § 217.3 has been streamlined with regard to readmission under the Visa Waiver Pilot Program of an alien who has departed to contiguous territory or an adjacent island has been streamlined.

Other Changes

In addition, conforming and purely editorial or grammatical revisions have been made, as appropriate.

Regulatory Flexibility Act

The Attorney General, in accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)), has reviewed this regulation and, by approving it, certifies that the rule will not have a significant adverse economic impact on a substantial number of small entities because of the following factors. This rule affects only Federal government operations by codifying statutory amendments to the Immigration and Nationality Act primarily regarding the examination, detention, and removal of aliens from the United States. It affects only individuals and does not impose any reporting or compliance requirements on small entities.

Executive Order 12866

This rule is considered by the Department of Justice to be a ''significant regulatory action'' under Executive Order 12866, section 3(f), because it will have a significant economic impact on the Federal government in excess of $100,000,000. No economic impact is anticipated for state and local governments. The Service projects significant increases in detention-related costs due to the provisions of IIRIRA which mandate the custody of criminal aliens who have committed two or more crimes involving moral turpitude, aliens convicted of firearms offenses, and aliens who have been convicted of an aggravated felony. The type of crime that will qualify as an ''aggravated felony'' has been greatly expanded under IIRIRA. In addition, all aliens, even non-criminal aliens, who are subject to a final administrative order of removal must be held in custody until the alien can be removed from the United States. If the person is not removed within 90 days he or she may be released from custody.

The Commissioner has notified Congress pursuant to section 303(b) of IIRIRA that the Service lacks sufficient space to immediately implement the mandatory custody provisions. This notification will delay for 1 year full implementation of the new mandatory custody provisions. Section 303(b) also provides for an additional 1-year delay in implementation of the mandatory custody provisions upon a second certification that space and personnel are inadequate to comply with the requirement. The Service estimates that the cost to enforce the requirement to detain all criminal aliens will be at least $205,000,000. Of that total, personnel costs account for $65,284,000 which include detention and deportation officers ($32,873,000), investigators ($25,501,000), legal proceedings personnel ($4,968,000), and administrative support ($1,942,000). Non-personnel requirements are projected to be at least $139,732,000 which includes increases in bedspace and related alien custody requirements ($82,782,000—funds 3,600 beds @ $63.00 per day), increases in alien travel expenses ($36,000,000–3,600 removals @ $1,000 each), and detention vehicle expenses ($20,950,000). The Service is currently in the process of projecting the cost of the IIRIRA requirements that we detain all aliens with administratively final orders of deportation pending their removal.

In addition to these detention related costs, the Service estimates that the expenses for training employees on the provisions of the new law and the regulations will be $2,977,500. The cost to the Service related to additional forms or changes needed to current forms is estimated to be $2,000,000 (until the final list of form requirements is completed it is not possible to more accurately assess this cost). Finally, the Department believes there may be some

increases needed for immigration judges to review credible fear determinations made under section 235(b) of the INA.

The EOIR estimates increases in its costs related to IIRIRA-mandated immigration judge review of credible fear determinations (which must be made under stringent time frames) and the prompt immigration judge review which IIRIRA requires of certain expedited removal orders entered against aliens claiming to be lawful permanent residents, asylees or refugees. Further, EOIR projects costs associated with the need for an Immigration Court presence in nearly ever port-of-entry, which will result from the above-mentioned credible fear review and expedited removal review process. Also, there will be costs related to the overall need for an increased Immigration Court presence at existing Service detention centers to support the processing of the additional detainees that will result from the implementation of this rule. Similarly, EOIR anticipates a need for construction of new Immigration Courts at new detention facilities the Service may open as a result of this rule's implementation.

Although there are still a number of unknown variables which could affect the total costs to EOIR to implement its part of the new expedited removal process and to respond to the increased number of detained individuals in proceedings under this rule, EOIR estimates that the total annual cost for EOIR could be as high as $25,000,000. Of that total, the cost for hiring new immigration judges and legal support staff is projected to be $21,300,000. The cost for new video and audio teleconfering equipment is estimated at $3,000,000. Training costs are expected to be approximately $400,000. Finally, forms and other support requirements are estimated to cost $300,000.

Small Business Regulatory Enforcement Act of 1996

At this time the Department considers this rule a ''major rule'' as defined in 5 U.S.C. § 804(2).

Executive Order 12612

The regulations proposed 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 rule does not have sufficient Federalism implications to warrant the preparation of a Federalism Assessment.

Executive Order 12988

This proposed rule meets the applicable standards set forth in section 3(a) and 3(b)(2) of Executive Order 12988.

Paperwork Reduction Act

The information collection requirements contained in this rule have been forwarded to the Office of Management and Budget under the Paper Reduction Act. The OMB control numbers for these collections are contained in 8 CFR 299.5, Display of control numbers.

List of Subjects

8 CFR Part 1

Administrative practice and procedure, Immigration.

8 CFR Part 3

Administrative practice and procedure, Immigration, Organization and functions (Government agencies).

8 CFR Part 103

Administrative practice and procedure, Authority delegations (Government agencies), Reporting and recordkeeping requirements.

8 CFR Part 204

Administrative practice and procedure, Immigration, Reporting and recordkeeping requirements.

8 CFR Part 207

Administrative practice and procedure, Refugees, Reporting and recordkeeping requirements.

8 CFR Part 208

Administrative practice and procedure, Aliens, Immigration, Reporting and recordkeeping requirements.

8 CFR Part 209

Aliens, Immigration, Refugees.

8 CFR Part 211

Immigration, Passports and visas, Reporting and recordkeeping requirements.

8 CFR Part 212

Administrative practice and procedure, Aliens, Immigration, Passports and visas, Reporting and recordkeeping requirements.

8 CFR Part 213

Immigration, Surety bonds.

8 CFR Part 214

Administrative practice and procedure, Aliens.

8 CFR Part 216

Administrative practice and procedure, Aliens.

8 CFR Part 217

Air carriers, Aliens, Maritime carriers, Passports and visas.

8 CFR Part 221

Aliens, Surety bonds.

8 CFR Part 223

Aliens, Reporting and recordkeeping requirements.

8 CFR Part 232

Aliens, Public health.

8 CFR Part 233

Administrative practice and procedure, Air carriers, Government contracts, Travel.

8 CFR Part 234

Air carriers, Aircraft, Airports, Aliens.

8 CFR Part 235

Administrative practice and procedure, Aliens, Immigration, Reporting and recordkeeping requirements.

8 CFR Part 236

Administrative practice and procedure, Aliens, Immigration.

8 CFR Part 237

Aliens.

8 CFR Part 238

Administrative practice and procedure, Aliens.

8 CFR Part 239

Administrative practice and procedure, Aliens, Immigration, Reporting and recordkeeping requirements.

8 CFR Part 240

Administrative practice and procedure, Aliens, Immigration.

8 CFR Part 241

Administrative practice and procedure, Aliens, Immigration.

8 CFR Part 242

Administrative practice and procedure, Aliens, Immigration.

8 CFR Part 243

Administrative practice and procedure, Aliens.

8 CFR Part 244

Administrative practice and procedure, Aliens.

8 CFR Part 245

Aliens, Immigration, Reporting and recordkeeping requirements.

8 CFR Part 246

Administrative practice and procedure, Aliens, Immigration.

8 CFR Part 248

Aliens, Immigration, Reporting and recordkeeping requirements.

8 CFR Part 249

Aliens, Immigration, Reporting and recordkeeping requirements.

8 CFR Part 251

Air carriers, Aliens, Maritime carriers, Reporting and recordkeeping requirements, Crewmen.

8 CFR Part 252

Air carriers, Airmen, Aliens, Maritime carriers, Reporting and recordkeeping requirements, Crewmen.

8 CFR Part 253

Air carriers, Airmen, Aliens, Maritime carriers, Reporting and recordkeeping requirements, Seamen.

8 CFR Part 274a

Administrative practice and procedure, Aliens, Employment, Penalties, Reporting and recordkeeping requirements.

8 CFR Part 286

Air carriers, Immigration, Reporting and recordkeeping requirements.

8 CFR Part 287

Immigration, Law enforcement officers.

8 CFR Part 299

Immigration, Reporting and recordkeeping requirements.

8 CFR Part 316

Citizenship and naturalization, Reporting and recordkeeping requirements.

8 CFR Part 318

Citizenship and naturalization.

8 CFR Part 329

Citizenship and naturalization, Military personnel, Veterans.

Accordingly, chapter I of title 8 of the Code of Federal Regulations is proposed to be amended as follows:

PART 1—DEFINITIONS

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

Authority: 8 U.S.C. 1101.

2. Section 1.1 is amended by revising paragraph (l), and by adding new paragraphs (q) and (r) to read as follows:

§ 1.1 Definitions.

* * * * *

(l) The term *immigration judge* means an attorney whom the Attorney General appoints as an administrative judge within the Executive Office for Immigration Review, qualified to conduct specified classes of proceedings, including a hearing under section 240 of the Act. An immigration judge shall be subject to such supervision and shall perform such duties as the Attorney General shall prescribe, but shall not be employed by the Immigration and Naturalization Service.

* * * * *

(q) The term *arriving alien* means an alien who seeks admission to or transit through the United States, as provided in 8 CFR part 235, at a port-of-entry, or an alien who is interdicted in international or United States waters and brought into the United States by any means, whether or not to a designated port-of-entry, and regardless of the means of transport. An arriving alien remains such even if paroled pursuant to section 212(d)(5) of the Act.

(r) the term *respondent* means a person named in a Notice to Appear issued in accordance with section 239(a) of the Act, or in an Order to Show Cause issued in accordance with § 242.1 of this chapter as it existed prior to April 1, 1997.

PART 3—EXECUTIVE OFFICE FOR IMMIGRATION REVIEW

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

Authority: 5 U.S.C. 301; 8 U.S.C. 1103, 1252 note, 1252b, 1324b, 1362; 28 U.S.C. 509, 510, 1746; sec. 2, Reorg. Plan No. 2 of 1950; 3 CFR, 1949–1953 Comp., p. 1002.

4. Section 3.1 is amended by revising paragraphs (b)(1), (b)(2), (b)(3), (b)(7), (b)(9), and (b)(10) to read as follows:

§ 3.1 General authorities.

* * * * *

(b) * * *

(1) Decisions of Immigration Judges in exclusion cases, as provided in 8 CFR part 236, Subpart D.

(2) Decisions of Immigration Judges in deportation cases, as provided in 8 CFR part 240, Subpart E, except that no appeal shall lie from an order of an Immigration Judge under 8 CFR part 240, Subpart F, granting voluntary departure within a period of at least 30 days, if the sole ground of appeal is that a greater period of departure time should have been fixed.

(3) Decisions of Immigration Judges in removal proceedings, as provided in 8 CFR part 240.

* * * * *

(7) Determinations relating to bond, parole, or detention of an alien as provided in 8 CFR part 236, Subpart A and 8 CFR part 240, Subpart E.

* * * * *

(9) Decisions of Immigration Judges in asylum proceedings pursuant to § 208.2(b) of this chapter.

(10) Decisions of Immigration Judges relating to Temporary Protected Status as provided in 8 CFR part 244.

* * * * *

5. Section 3.2 is amended by:

a. Revising the section heading;

b. Revising paragraph (b)(2);

c. Revising paragraph (c)(2) and (c)(3), and by

d. Revising paragraphs (d) through (f), to read as follows:

§ 3.2 Reopening or reconsideration before the Board of Immigration Appeals.

* * * * *

(b) * * *

(2) A motion to reconsider a decision must be filed with the Board within 30 days after the mailing of the Board decision or on or before July 31, 1996, whichever is later. A party may file only one motion to reconsider any given decision and may not seek reconsideration of a decision denying a previous motion to reconsider. In removal proceedings pursuant to section 240 of the Act, an alien may file only one motion to reconsider a decision that the alien is removable from the United States.

(c) * * *

(2) Except as provided in paragraph (c)(3) of this section, a party may file only one motion to reopen deportation or exclusion proceedings (whether before the Board or the Immigration Judge) and that motion must be filed no later than 90 days after the date on which the final administrative decision was rendered in the proceeding sought to be reopened. Except as provided in paragraph (c)(3) of this section, an alien may file only one motion to reopen removal proceedings (whether before the Board or the Immigration Judge) and that motion must be filed no later than 90 days after the date on which the final administrative decision was rendered in the proceeding sought to be reopened.

(3) In removal proceedings pursuant to section 240 of the Act, the time limitation set forth in paragraph (c)(2) of this section shall not apply to a motion to reopen filed pursuant to the

provisions of § 3.23(b)(4)(ii). The time and numerical limitations set forth in paragraph (c)(2) of this section shall not apply to a motion to reopen proceedings:

(i) Filed pursuant to the provisions of § 3.23(b)(4)(iii)(A)(*1*) or § 3.23(b)(4)(iii)(A)(*2*);

(ii) To apply or reapply for asylum or withholding of deportation based on changed circumstances arising in the country of nationality or in the country to which deportation has been ordered, if such evidence is material and was not available and could not have been discovered or presented at the previous hearing;

(iii) Agreed upon by all parties and jointly filed. Notwithstanding such agreement, the parties may contest the issues in a reopened proceeding; or

(iv) Filed by the Service in exclusion or deportation proceedings when the basis of the motion is fraud in the original proceeding or a crime that would support termination of asylum in accordance with § 208.22(f) of this chapter.

* * * * *

(d) *Departure, deportation, or removal.* A motion to reopen or a motion to reconsider shall not be made by or on behalf of a person who is the subject of exclusion, deportation, or removal proceedings subsequent to his or her departure from the United States.

(e) *Judicial proceedings.* Motions to reopen or reconsider shall state whether the validity of the exclusion, deportation, or removal order has been or is the subject of any judicial proceeding and, if so, the nature and date thereof, the court in which such proceeding took place or is pending, and its result or status. In any case in which an exclusion, deportation, or removal order is in effect, any motion to reopen or reconsider such order shall include a statement by or on behalf of the moving party declaring whether the subject of the order is also the subject of any pending criminal proceeding under the Act, and, if so, the current status of the proceeding. If a motion to reopen or reconsider seeks discretionary relief, the motion shall include a statement by or on behalf of the moving party declaring whether the alien for whose relief the motion is being filed is subject to any pending criminal prosecution and, if so, the nature and current status of that prosecution.

(f) *Stay of deportation.* Except where a motion is filed pursuant to the provisions of §§ 3.23(b)(4)(ii) and 3.23(b)(4)(iii)(A), the filing of a motion to reopen or a motion to reconsider shall not stay the execution of any decision made in the case. Execution of such decision shall proceed unless a stay of execution is specifically granted by the Board, the Immigration Judge, or an authorized officer of the Service.

* * * * *

Subpart B—Immigration Court

b. In Part 3, the heading of Subpart B is revised as set forth above.

7. Section 3.9 is revised to read as follows:

§ 3.9 Chief Immigration Judge.

The Chief Immigration Judge shall be responsible for the general supervision, direction, and scheduling of the Immigration Judges in the conduct of the various programs assigned to them. The Chief Immigration Judge shall be assisted by Deputy Chief Immigration Judges and Assistant Chief Immigration Judges in the performance of his or her duties. These shall include, but are not limited to:

(a) Establishment of operational policies; and

(b) Evaluation of the performance of Immigration Courts, making appropriate reports and inspections, and taking corrective action where indicated.

8. Section 3.10 is revised to read as follows:

§ 3.10 Immigration Judges.

Immigration Judges, as defined in 8 CFR part 1, shall exercise the powers and duties in this chapter regarding the conduct of exclusion, deportation, removal, and asylum proceedings and such other proceedings which the Attorney General may assign them to conduct.

9. Section 3.11 is revised to read as follows:

§ 3.11 Administrative control Immigration Courts.

An administrative control Immigration Court is one that creates and maintains Records of Proceedings for Immigration Courts within an assigned geographical area. All documents and correspondence pertaining to a Record of Proceeding shall be filed with the Immigration Court having administrative control over that Record of Proceeding and shall not be filed with any other Immigration Court. A list of the administrative control Immigration Courts with their assigned geographical areas will be made available to the public at any Immigration Court.

Subpart C—Immigration Court—Rules of Procedure

10. In part 3, the heading of Subpart C is revised as set forth above.

11. Section 3.12 is amended by revising the last sentence, and adding a new sentence at the end of the section, to read as follows:

§ 3.12 Scope of rules.

* * * Except where specifically stated, these rules apply to matters before Immigration Judges, including, but not limited to, deportation, exclusion, removal, bond, rescission, departure control, and asylum proceedings. The sole procedures for review of credible fear determinations by Immigration Judges are provided for in § 3.42.

12. Section 3.13 is revised to read as follows:

§ 3.13 Definitions.

As used in this subpart:

Administrative control means custodial responsibility for the Record of Proceeding as specified in § 3.11.

Charging document means the written instrument which initiates a proceeding before an Immigration Judge. For proceedings initiated prior to April 1, 1997, these documents include an Order to Show Cause, a Notice to Applicant for Admission Detained for Hearing before Immigration Judge, and a Notice of Intention to Rescind and Request for Hearing by Alien. For proceedings initiated after April 1, 1997, these documents include a Notice to Appear, a Notice of Referral to Immigration Judge, and a Notice of Intention to Rescind and Request for Hearing by Alien.

Filing means the actual receipt of a document by the appropriate Immigration Court.

Service means physically presenting or mailing a document to the appropriate party or parties; except that an Order to Show Cause or Notice of Deportation Hearing shall be served in person to the alien, or by certified mail to the alien or the alien's attorney and a Notice to Appear or Notice of Removal Hearing shall be served to the alien in person, or if personal service is not practicable, shall be served by regular mail to the alien or the alien's attorney of record.

13. Section § 3.14 is amended by:

a. Revising paragraph (a), and by

b. Adding a new paragraph (c) to read as follows:

§ 3.14 Jurisdiction and commencement of proceedings.

(a) Jurisdiction vests, and proceedings before an Immigration Judge commence, when a charging document is filed with the Immigration Court by the Service. The charging document must include a certificate showing service on the

opposing party pursuant to § 3.32 which indicates the Immigration Court in which the charging document is filed. However, no charging document is required to be filed with the Immigration Court to commence bond proceedings pursuant to §§ 3.19, 236.1(d) and 240.2(b) of this chapter or credible fear determinations pursuant to § 208.30 of this chapter.

* * * * *

(c) Immigration Judges have jurisdiction to administer the oath of allegiance in administrative naturalization ceremonies conducted by the Service in accordance with § 337.2(b) of this chapter.

14. Section 3.15 is amended by:

a. Revising the section heading;

b. Amending paragraph (b) introductory text and paragraph (b)(6), by adding the phrase ''and Notice to Appear'' immediately after the phrase ''Order to Show Cause'';

c. Redesignating paragraph (c) as (d);

d. Adding a new paragraph (c); and by

e. Revising newly redesignated paragraph (d), to read as follows:

§ 3.15 Contents of the order to show cause and notice to appear and notification of change of address.

* * * * *

(c) *Contents of the Notice to Appear for Removal Proceedings.* In the Notice to Appear for removal proceedings, the Service shall provide the following administrative information to the Immigration Court. Failure to provide any of these items shall not be construed as affording the alien any substantive or procedural rights.

(1) The alien's names and any known aliases;

(2) The alien's address;

(3) The alien's registration number, with any lead alien registration number with which the alien is associated;

(4) The alien's alleged nationality and citizenship; and

(5) The language that the alien understands.

(d) *Address and telephone number.* (1) If the alien's address is not provided on the Order to Show Cause or Notice to Appear, of if the address on the Order to Show Cause or Notice to Appear is incorrect, the alien must provide to the Immigration Court where the charging document has been filed, within five days of service of that document, a written notice of an address and telephone number at which the alien can be contacted. The alien may satisfy this requirement by completing and filing Form EOIR–33.

(2) Within five days of any change of address, the alien must provide written notice of the change of address on Form EOIR–33 to the Immigration Court where the charging document has been filed, or if venue has been changed, to the Immigration Court to which venue has been changed.

§ 3.16 [Amended]

15. Section 3.16(b) is amended by revising the term ''respondent/applicant'' to read ''alien''.

§ 3.17 [Amended]

16. Section 3.17(a) is amended in the first sentence by revising the term ''respondent/applicant'' to read ''alien'', and by revising the phrase ''the appropriate EOIR form'' to read ''Form EOIR–28''.

17. Section 3.18 is revised to read as follows:

§ 3.18 Scheduling of cases.

(a) The Immigration Court shall be responsible for scheduling cases and providing notice to the government and the alien of the time, place, and date of hearings.

(b) In removal proceedings pursuant to section 240 of the Act, the Service shall provide in the Notice to Appear, the time, place and date of the initial removal hearing, where practicable. If that information is not contained in the Notice to Appear, the Immigration Court shall be responsible for scheduling the initial removal hearing and providing notice to the government and the alien of the time, place, and date of hearing. In the case of any change or postponement in the time and place of such proceeding, the Immigration Court shall provide written notice to the alien specifying the new time and place of the proceeding and the consequences under section 240(b)(5) of the Act of failing, except under exceptional circumstances as defined in section 240(e)(1) of the Act, to attend such proceeding. No such notice shall be required for an alien not in detention if the alien has failed to provide the address required in section 239(a)(1)(F) of the Act.

§ 3.19 [Amended]

18. Section 3.19(a) is amended by revising the reference to ''part 242 of this chapter'' to read ''8 CFR part 236'' wherever it appears in the paragraph.

19. Section 3.19(d) is amended in the first sentence by adding the term ''or removal'' immediately after the word ''deportation''.

20. Section 3.19 is amended by removing paragraph (h).

21. In § 3.20, paragraph (a) is revised to read as follows:

§ 3.20 Change of venue.

(a) Venue shall lie at the Immigration Court where jurisdiction vests pursuant to § 3.14.

* * * * *

22. Section 3.23 is amended by revising the section heading and paragraph (b) to read as follows:

§ 3.23 Reopening or Reconsideration before the Immigration Court.

* * * * *

(b) *Before the Immigration Court.* (1) *In general.* An Immigration Judge may upon his or her own motion at any time, or upon motion of the Service or the alien, reopen or reconsider any case in which he or she has made a decision, unless jurisdiction is vested with the Board of Immigration Appeals. Subject to the exceptions in this paragraph and paragraph (b)(4) of this section, a party may file only one motion to reconsider and one motion to reopen proceedings. A motion to reconsider must be filed within 30 days of the date of entry of a final administrative order of removal, deportation, or exclusion. A motion to reopen must be filed within 90 days of the date of entry of a final administrative order of removal, deportation, or exclusion. A motion to reopen or to reconsider shall not be made by or on behalf of a person who is the subject of removal, deportation, or exclusion proceedings subsequent to his or her departure from the United States. The time and numerical limitations set forth in this paragraph do not apply to motions by the Service in removal proceedings pursuant to section 240 of the Act, or to motions by the Service in exclusion or deportation proceedings, when the basis of the motion is fraud in the original proceeding or a crime that would support termination of asylum in accordance with § 208.22(f) of this chapter.

(i) *Form and contents of the motion.* The motion shall be in writing and signed by the affected party or the attorney or representative of record, if any. The motion and any submission made in conjunction with it must be in English or accompanied by a certified English translation. Motions to reopen or reconsider shall state whether the validity of the exclusion, deportation, or removal order has been or is the subject of any judicial proceeding and, if so, the nature and date thereof, the court in which such proceeding took place or is pending, and its result or status. In any case in which an exclusion, deportation, or removal order is in effect, any motion to reopen or reconsider such order shall include a statement by or on behalf of the moving party declaring whether the subject of the order is also the subject

of any pending criminal proceeding under the Act, and, if so, the current status of that proceeding.

(ii) *Filing.* Motions to reopen or reconsider a decision of an Immigration Judge must be filed with the Immigration Court having administrative control over the Record of Proceeding. A motion to reopen or a motion to reconsider shall include a certificate showing service on the opposing party of the motion and all attachments. If the moving party, other than the Service, is represented, a Form EOIR–28, Notice of Appearance as Attorney or Representative Before an Immigration Judge must be filed with the motion. The motion must be filed in duplicate with the Immigration Court, accompanied by a fee receipt.

(iii) *Assignment to an Immigration Judge.* If the Immigration Judge is unavailable or unable to adjudicate the motion to reopen or reconsider, the Chief Immigration Judge or his or her delegate shall reassign such motion to another Immigration Judge.

(iv) *Replies to motions; decision.* The Immigration Judge may set and extend time limits for replies to motions to reopen or reconsider. A motion shall be deemed unopposed unless timely response is made. The decision to grant or deny a motion to reopen or a motion to reconsider is within the discretion of the Immigration Judge.

(v) *Stays.* Except in cases involving in absentia orders, the filing of a motion to reopen or a motion to reconsider shall not stay the execution of any decision made in the case. Execution of such decision shall proceed unless a stay of execution is specifically granted by the Immigration Judge, the Board, or an authorized officer of the Service.

(2) *Motion to reconsider.* A motion to reconsider shall state the reasons for the motion by specifying the errors of fact or law in the Immigration Judge's prior decision and shall be supported by pertinent authority. Such motion may not seek reconsideration of a decision denying previous motion to reconsider.

(3) *Motion to reopen.* A motion to reopen proceedings shall state the new facts that will be proven at a hearing to be held if the motion is granted and shall be supported by affidavits and other evidentiary material. Any motion to reopen for the purpose of acting on an application for relief must be accompanied by the appropriate application for relief and all supporting documents. A motion to reopen will not be granted unless the Immigration Judge is satisfied that evidence sought to be offered is material and was not available and could not have been discovered or presented at the former hearing. A motion to reopen for the purpose of providing the alien an opportunity to apply for any form of discretionary relief will not be granted if it appears that the alien's right to apply for such relief was fully explained to him or her by the Immigration Judge and an opportunity to apply therefore was afforded at the hearing, unless the relief is sought on the basis of circumstances that have arisen subsequent to the hearing. Pursuant to section 240A(d)(1) of the Act, a motion to reopen proceedings for consideration or further consideration of an application for relief under section 240A(a) (cancellation of removal for certain permanent residents) or 240A(b) (cancellation of removal and adjustment of status for certain nonpermanent residents) may be granted only if the alien demonstrates that he or she was statutorily eligible for such relief prior to the service of a notice top appear, or prior to the commission of an offense referred to in section 212(a)(2) of the Act that renders the alien inadmissible or removable under sections 237(a)(2) of the Act or (a)(4), whichever is earliest. The Immigration Judge has discretion to deny a motion to reopen even if the moving party has established a prima facie case for relief.

(4) *Exceptions to filing deadlines.*

(i) *Asylum.* The time and numerical limitations set forth in paragraph (b)(1) of this section shall not apply if the basis of the motion is to apply for relief under section 208 or 241(b)(3) of the Act and is based on changed country conditions arising in the country of nationality or the country to which removal has been ordered, if such evidence is material and was not available and would not have been discovered or presented at the previous proceeding. The filing of a motion to reopen under this section shall not automatically stay the removal of the alien. However, the alien many request a stay and, if granted by the Immigration Judge, the alien shall not be removed pending disposition of the motion by the Immigration Judge. If the original asylum application was denied based upon a finding that it was frivolous, then the alien is ineligible to file either a motion to reopen or reconsider, or for a stay of removal.

(ii) *Order entered in absentia in removal proceedings.* An order of removal entered in absentia pursuant to section 240(b)(5) of the Act may be rescinded only upon a motion to reopen filed within 180 days after the date of the order of removal, if the alien demonstrates that the failure to appear was because of ''exceptional circumstances'' as defined in section 240(e)(1) of the Act. An order entered in absentia pursuant to section 240(b)(5) may be rescinded upon a motion to reopen filed at any time if the alien demonstrates that he or she did not receive notice in accordance with sections 239(a) (1) or (2) of the Act, or the alien demonstrates that he or she was in Federal or state custody and the failure to appear was through no fault of the alien. However, in accordance with section 240(b)(5)(B) of the Act, no written notice of a change in time or place of proceeding small be required if the alien has failed to provide the address required under section 239(a)(1)(F) of the Act. The filing of a motion to reopen under this section shall stay the removal of the alien pending disposition of the motion by the Immigration Judge. An alien may file only one motion pursuant to this paragraph.

(iii) *Order entered in absentia in deportation or exclusion proceedings.* (A) An order entered in absentia in deportation proceedings may be rescinded only a motion to reopen filed:

(*1*) Within 180 days after the date of the order of deportation if the alien demonstrates that the failure to appear was because of ''exceptional circumstances'' beyond the control of the alien (e.g., serious illness of the alien or serious illness or death of an immediate relative of the alien, but not including less compelling circumstances); or

(*2*) At any time if the alien demonstrates that he or she did not receive notice or if the alien demonstrates that he or she was in federal or state custody and the failure to appear was through no fault of the alien.

(B) A motion to reopen exclusion hearings on the basis that the Immigration Judge improperly entered an order of exclusion in absentia must be supported by evidence that the alien had reasonable cause for his failure to appear.

(C) The filing of a motion to reopen under paragraph (b)(4)(iii)(A) of this section shall stay the deportation of the alien pending decision on the motion and the adjudication of any properly filed administrative appeal.

(D) The time and numerical limitations set forth in paragraph (b)(1) of this section shall not apply to a motion to reopen filed pursuant to the provisions of paragraphs (b)(4)(iii)(A)(*1*) of this section.

(iv) *Jointly filed motions.* The time and numerical limitations set forth in subsection (b)(1) of this section shall not apply to a motion to reopen agreed upon by all parties and jointly filed.

23. Section 3.25 is revised to read as follows:

§ 3.25 Form of the proceeding.

(a) *Waiver of presence of the parties.* The Immigration Judge may, for good cause, and consistent with section 240(b) of the Act, waive the presence of the alien at a hearing when the alien is represented or when the alien is a minor child at least one of whose parents or whose legal guardian is present. When it is impracticable by reason of an alien's mental incompetency for the alien to be present, the presence of the alien may be waived provided that the alien is represented at the hearing by an attorney or legal representative, a near relative, legal guardian, or friend.

(b) *Stipulated request for order, wavier of hearing.* An Immigration Judge may enter an order of deportation, exclusion or removal stipulated to by the alien (or the alien's representative) and the Service. The Immigration Judge may enter such an order without a hearing and in the absence of the parties based on a review of the charging document, the written stipulation, and supporting documents, if any. If the alien is unrepresented, the Immigration Judge must determine that the alien's waiver is voluntary, knowing, and intelligent. The stipulated request and required waivers shall be signed on behalf of the government and by the alien and his or her attorney or representative, if any. The attorney or representative shall file a Notice of Appearance in accordance with § 3.16(b). A stipulated order shall constitute a conclusive determination of the alien's deportability or removability from the United States. The stipulation shall include:

(1) An admission that all factual allegations contained in the charging document are true and correct as written;

(2) A concession of deportability or inadmissibility as charged;

(3) A statement that the alien makes no application for relief under the Act;

(4) A designation of a country for deportation or removal under section 241(b)(2)(A)(i) of the Act;

(5) A concession to the introduction of the written stipulation of the alien as an exhibit to the Record of Proceeding;

(6) A statement that the alien understands the consequences of the stipulated request and that the alien enters the request voluntarily, knowingly, and intelligently;

(7) A statement that the alien will accept a written order for his or her deportation, exclusion or removal as a final disposition of the proceedings; and

(8) A waiver of appeal of the written order of deportation or removal.

(c) *Telephonic or video hearings.* An Immigration Judge may conduct hearings through video conference to the same extent as he or she may conduct hearings in person. An Immigration Judge may also conduct a hearing through a telephone conference, but an evidentiary hearing on the merits may only be conducted through a telephone conference with the consent of the alien involved after the alien has been advised of the right to proceed in person or, where available, through a video conference, except that credible fear determinations may be reviewed by the Immigration Judge through a telephone conference without the consent of the alien.

24. Section 3.26 is amended by revising paragraph (c) and adding a new paragraph (d) to read as follows:

§ 3.26 In absentia hearings.

* * * * *

(c) In any removal proceeding before an Immigration Judge in which the alien fails to appear, the Immigration Judge shall order the alien removed *in absentia* if:

(1) The Service establishes by clear, unequivocal, and convincing evidence that the alien is removable; and

(2) The Service establishes by clear, unequivocal, and convincing evidence that written notice of the time and place of proceedings and written notice of the consequences of failure to appear were provided to the alien.

(d) Written notice to the alien shall be considered sufficient for purposes of this section if it was provided at the most recent address provided by the alien. If the respondent fails to provide his or her address as required under § 3.15(d), no written notice shall be required for an Immigration Judge to proceed with an *in absentia* hearing. This paragraph shall not apply in the event that the Immigration Judge waives the appearance of an alien under § 3.25.

25. Section 3.27 is amended by revising paragraph (c) to read as follows:

§ 3.27 Public access to hearings.

* * * * *

(c) In any proceeding before an Immigration Judge concerning an abused alien spouse, the hearing and the Record of Proceeding shall be closed to the public unless the abused spouse agrees that the hearing and the Record of Proceeding shall be open to the public. In any proceeding before an Immigration Judge concerning an abused alien child, the hearing and the Record of Proceeding shall be closed to the public.

26. Section 3.30 is revised to read as follows:

§ 3.30 Additional charges in deportation or removal hearings.

At any time during deportation or removal proceedings, additional or substituted charges of deportability and/or factual allegations may be lodged by the Service in writing. The alien shall be served with a copy of these additional charges and/or allegations and the Immigration Judge shall read them to the alien. The Immigration Judge shall advise the alien, if he or she is not represented by counsel, that the alien may be so represented. The alien may be given a reasonable continuance to respond to the additional factual allegations and charges. Thereafter, the provision of § 240.10(b) of this chapter relating to pleading shall apply to the additional factual allegations and charges.

27. Section 3.35 is revised to read as follows:

§ 3.35 Depositions and Subpoenas.

(a) *Depositions.* If an Immigration Judge is satisfied that a witness is not reasonably available at the place of hearing and that said witness' testimony or other evidence is essential, the Immigration Judge may order the taking of deposition either at his or her own instance or upon application of a party. Such order shall designate the official by whom the deposition shall be taken, may prescribe and limit the content, scope, or manner of taking the deposition, and may direct the production of documentary evidence.

(b) *Subpoenas issued subsequent to commencement of proceedings.* (1) *General.* In any proceeding before an Immigration Judge, other than under 8 CFR part 335, the Immigration Judge shall have exclusive jurisdiction to issue subpoenas requiring the attendance of witnesses or for the production of books, papers and other documentary evidence, or both. An Immigration Judge may issue a subpoena upon his or her own volition or upon application of the Service or the alien.

(2) *Application for subpoena.* A party applying for a subpoena shall be required, as a condition precedent to its issuance, to state in writing or at the proceeding, what he or she expects to prove by such witnesses or documentary evidence, and to show affirmatively that he or she has made diligent effort, without success, to produce the same.

(3) *Issuance of subpoena.* Upon being satisfied that a witness will not appear and testify or produce documentary evidence and that the witness' evidence

is essential, the Immigration Judge shall issue a subpoena. The subpoena shall state the title of the proceeding and shall command the person to whom it is directed to attend and to give testimony at a time and place specified. The subpoena may also command the person to whom it is directed to produce the books, papers, or documents specified in the subpoena.

(4) *Appearance of witness.* If the witness is at a distance of more than 100 miles from the place of the proceeding, the subpoena shall provide for the witness' appearance at the Immigration Court nearest to the witness to respond to oral or written interrogatories, unless there is no objection by any party to the witness' appearance at the proceeding.

(5) *Service.* A subpoena issued under this section may be served by any person over 18 years of age not a party to the case.

(6) *Invoking aid of court.* If a witness neglects or refuses to appear and testify as directed by the subpoena served upon him or her in accordance with the provisions of this section, the Immigration Judge issuing the subpoena shall request the United States Attorney for the district in which the subpoena was issued to report such neglect or refusal to the United States District Court and to request such court to issue an order requiring the witness to appear and testify and to produce the books, papers or documents designated in the subpoena.

28. In Subpart C, a new § 3.42 is added to read as follows:

§ 3.42 Review of credible fear determination.

(a) *Referral.* Jurisdiction for an Immigration Judge to review an adverse credible fear finding by an asylum officer pursuant to section 235(b)(1)(B) of the Act shall commence with the filing by the Service to Form I–863, Notice of Referral to Immigration Judge. The Service shall also file with the notice of referral a copy of the written record of determination as defined in section 235(b)(1)(B)(iii)(II) of the Act, including a copy of the alien's written request for review, if any.

(b) *Record of proceeding.* The Immigration Court shall create a Record of Proceeding for a review of an adverse credible fear determination. This record shall be merged with any later proceeding pursuant to section 240 of the Act involving the same alien.

(c) *Procedures and evidence.* The Immigration Judge may receive into evidence any oral or written statement which is material and relevant to any issue in the review. The testimony of the alien shall be under oath or affirmation administered by the Immigration Judge. If an interpreter is necessary, one will be provided by the Immigration Court. The Immigration Judge shall determine whether the review shall be in person, or through telephonic or video connection (where available). The alien may consult with a person or persons of the alien's choosing prior to the review.

(d) *Standard of review.* The Immigration Judge shall make a de novo determination as to whether there is a significant possibility, taking into account the credibility of the statements made by the alien in support of the alien's claim and such other facts as are known to the Immigration Judge, that the alien could establish eligibility for asylum under section 208 of the Act.

(e) *Timing.* The Immigration Judge shall conclude the review to the maximum extent practicable within 24 hours, but in no case later than 7 days after the determination of the asylum officer.

(f) *Decision.* If an Immigration Judge determines that an alien has a credible fear of persecution, the Immigration Judge shall vacate the order entered pursuant to section 235(b)(1)(B)(iii)(I) of the Act. Subsequent to the order being vacated, the Service shall issue and file Form I–862, Notice to Appear, with the Immigration Court to commence removal proceedings. The alien shall have the opportunity to apply for asylum in the course of removal proceedings pursuant to section 240 of the Act. If an Immigration Judge determines that an alien does not have a credible fear of persecution, the Immigration Judge shall affirm the asylum officer's determination and remand the case to the Service for execution of the removal order entered pursuant to section 235(b)(1)(B)(iii)(I) of the Act. No appeal shall lie from a review of an adverse credible fear determination made by an Immigration Judge.

(g) *Custody.* An Immigration Judge shall have no authority to review an alien's custody status in the course of a review of an adverse credible fear determination made by the Service.

PART 103—POWERS AND DUTIES OF SERVICE OFFICERS; AVAILABILITY OF SERVICE RECORDS

29. The authority citation for part 103 continues to read as follows:

Authority: 5 U.S.C. 552, 552(a); 8 U.S.C. 1101, 1103, 1201, 1252 note, 1252b, 1304, 1356; 31 U.S.C. 9701; E.O. 12356; 47 FR. 14874, 15557; 3 CFR, 1982 Comp. p. 166; 8 CFR part 2.

30. In § 1301, paragraph (g)(3)(ii) is revised to read as follows:

§ 103.1 Delegations of authority.

* * * * *

(g) * * *

(3) * * *

(ii) *Asylum Officers.* Asylum officers constitute a professional corps of officers who serve under the supervision and direction of the Director of International Affairs and shall be specially trained as required in § 208.1(b) of this chapter. Asylum officers are delegated the authority to hear and adjudicate credible fear of persecution determinations under section 235(b)(1)(B) of the Act and applications for asylum and for withholding of removal, as provided under 8 CFR part 208.

* * * * *

§ 103.5 [Amended]

31. Section 103.5 is amended by:

a. Removing paragraphs (a)(1)(iii)(B);

b. Redesignating paragraphs (a)(1)(iii)(C) through (F) as paragraphs (a)(1)(iii)(B) through (E), respectively; and

c. Removing paragraph (a)(5)(iii).

32. In § 103.5a, paragraph (c)(1) is revised to read as follows:

§ 103.5a Service of notification, decisions, and other papers by the Service.

* * * * *

(c) * * *

(1) *Generally.* In any proceeding which is initiated by the Service, with proposed adverse effect, service of the initiating notice and of notice of any decision by a Service officer shall be accomplished by personal service, except as provided in section 239 of the Act.

* * * * *

33. In § 103.6, paragraph (a) is revised to read as follows:

§ 103.6 Surety bonds.

(a) *Posting of surety bonds.*—(1) *Extension agreements; consent of surety; collateral security.* All surety bonds posted in immigration cases shall be executed on Form I–352, Immigration Bond, a copy of which, and any rider attached thereto, shall be furnished the obligor. A district director is authorized to approve a bond, a formal agreement to extension of liability of surety, a request for delivery of collateral security to a duly appointed and undischarged administrator or executor of the estate of a deceased depositor, and a power of attorney executed on Form I–312, Designation of Attorney in Fact. All other matters relating to bonds, including a power of attorney not

executed on Form I–312 and a request for delivery of collateral security to other than the depositor or his or her approved attorney in fact, shall be forwarded to the regional director for approval.

(2) *Bond riders.*—(i) *General.* Bond riders shall be prepared on Form I–351, Bond Riders, and attached to Form I–352. If a condition to be included in a bond is not on Form I–351, a rider containing the condition shall be executed.

* * * * *

§ 103.7 [Amended]

34. Section 103.7(b)(1) is amended by removing the entry to ''Form I–444''.

PART 204—IMMIGRANT PETITIONS

35. The authority citation for part 204 continues to read as follows:

Authority: 8 U.S.C. 1101, 1103, 1151, 1153, 1154, 1182, 1186a, 1255; 8 CFR part 2.

36. Section 204.2 is amended by:

a. Revising paragraph (a)(1)(iii) introductory text;

b. Removing paragraphs (a)(1)(iii) (A) through (C); and

c. Redesignating paragraphs (a)(1)(iii) (D) through (I) as paragraphs (a)(1)(iii) (A) through (F) respectively, to read as follows:

§ 204.2 Petitions for relatives, widows, and widowers, and abused spouses and children.

* * * * *

(a) * * *

(1) * * *

(iii) *Marriage during proceedings—general prohibition against approval of visa petition.* A visa petition filed on behalf of an alien by a United States citizen or a lawful permanent resident spouse shall not be approved if the marriage creating the relationship occurred on or after November 10, 1986, and while the alien was in exclusion, deportation, or removal proceedings, or judicial proceedings relating thereto. Determination of commencement and termination of proceedings and exemptions shall be in accordance with § 245.1(c)(8) of this chapter.

* * * * *

PART 207—ADMISSION OF REFUGEES

37. The authority citation for part 207 is revised to read as follows:

Authority: 8 U.S.C. 1101, 1103, 1151, 1157, 1159, 1182; 8 CFR part 2.

38. Section 207.1 is amended by removing paragraph (e), and by revising paragraph (a) to read as follows:

§ 207.1 Eligibility.

(a) *Filing jurisdiction.* Any alien who believes he or she is a refugee as defined in section 101(a)(42) of the Act, and is included in a refugee group identified in section 207(a) of the Act, may apply for admission to the United States by filing an application in accordance with § 207.2 with the Service office having jurisdiction over the area where the applicant is located. In those areas too distant from a Service office, the application may be filed at a designated United States consular office.

* * * * *

39. Section 207.3 is revised to read as follows:

§ 207.3 Waivers of inadmissibility.

(a) *Authority.* Section 207(c)(3) of the Act sets forth grounds of inadmissibility under section 212(a) of the Act which are not applicable and those which may be waived in the case of an otherwise qualified refugee and the conditions under which such waivers may be approved. Officers in charge of overseas offices are delegated authority to initiate the necessary investigations to establish the facts in each waiver application pending before them and to approve or deny such waivers.

(b) *Filing requirements.* The applicant for a waiver must submit Form I–602, Application by Refugee for Waiver of Grounds of Inadmissibility, with the Service office processing his or her case. The burden is on the applicant to show that the waiver should be granted based upon humanitarian grounds, family unity, or the public interest. The applicant shall be notified in writing of the decision, including the reasons for denial, if the application is denied. There is no appeal from such decision.

§ 207.8 [Amended]

40. Section 207.8 is amended in the last sentence by revising the reference to ''sections 235, 236, and 237'' to read ''sections 235, 240, and 241''.

41. Part 208 is revised to read as follows:

PART 208—PROCEDURES FOR ASYLUM AND WITHHOLDING OF REMOVAL

Subpart A—Asylum and Withholding of Removal

Sec.

208.1 General.
208.2 Jurisdiction.
208.3 Form of application.
208.4 Filing the application.
208.5 Special duties toward aliens in custody of the Service.
208.6 Disclosure to third parties.
208.7 Employment authorization.
208.8 Limitations on travel outside the United States.
208.9 Procedure for interview before an asylum officer.
208.10 Failure to appear at an interview before an asylum officer.
208.11 Comments from the Department of State.
208.12 Reliance on information compiled by other sources.
208.13 Establishing asylum eligibility.
208.14 Approval, denial, or referral of application.
208.15 Definition of ''firm resettlement.''
208.16 Withholding of removal.
208.17 Decisions.
208.18 Determining if an asylum application is frivolous.
208.19 [Reserved]
208.20 Effect on exclusion, deportation, and removal proceedings.
208.21 Restoration of status.
208.22 Termination of asylum or withholding or removal or deportation.
208.23–29 [Reserved]

Subpart B—Credible Fear of Persecution

208.30 Credible fear determinations involving stowaways and applicants for admission found inadmissible pursuant to section 212(a)(6)(C) or 212(a)(7) of the Act.

Authority: 8 U.S.C. 1103, 1158, 1226, 1252, 1282; 8 CFR part 2.

Subpart A—Asylum and Withholding of Removal

§ 208.1 General.

(a) *Applicability.* Unless otherwise provided herein, this subpart shall apply to all applications for asylum under section 208 of the Act or for withholding of deportation or withholding of removal under section 241(b)(3) of the Act, whether before an asylum officer or an immigration judge, regardless of the date of filing. For purposes of this chapter, withholding of removal shall also mean withholding of deportation under section 243(h) of the Act, as it appeared prior to April 1, 1997, except as provided in § 208.16(c) of this chapter. Such applications are hereinafter referred to generically as asylum applications. The provisions of this part shall not affect the finality or validity of any decision made by a district director, an immigration judge, or the Board of Immigration Appeals in any such case prior to April 1, 1997. No asylum application that was filed with a district director, asylum officer or immigration judge prior to April 1, 1997, may be reopened or otherwise reconsidered under the provisions of this part except by motion granted in the exercise of discretion by the Board of Immigration Appeals, an immigration judge, or an asylum officer for proper cause shown. Motions to reopen or reconsider must meet the requirements of sections 240(c)(5) and (c)(6) of the Act, and 8 CFR parts 3 and 103, where

applicable. The provisions of this part relating to a person convicted of an aggravated felony, as defined in section 101(a)(43) of the Act, shall apply to asylum applications that are filed on or after November 29, 1990.

(b) *Training of asylum officers.* The Director of International Affairs shall ensure that asylum officers receive special training in international human rights law, nonadversarial interview techniques, and other relevant national and international refugee laws and principles. The Director of International Affairs shall also, in cooperation with the Department of State and other appropriate sources, compile and disseminate to asylum officers information concerning the persecution of persons in other countries on account of race, religion, nationality, membership in a particular social group, or political opinion, as well as other information relevant to asylum determinations, and shall maintain a documentation center with information on human rights conditions.

§ 208.2 Jurisdiction.

(a) *Office of International Affairs.* Except as provided in paragraph (b) of this section, the Office of International Affairs shall have initial jurisdiction over an asylum application filed by, or a credible fear determination pertaining to, an alien physically present in the United States or seeking admission at a port-of-entry. An application that is complete within the meaning of § 208.3(c)(3) shall be either adjudicated or referred by asylum officers under this part in accordance with § 208.14. An application that is incomplete within the meaning of § 208.3(c)(3) shall be returned to the applicant. Except as provided in § 208.16(a), an asylum officer shall not decide whether an alien is entitled to withholding of removal under section 241(b)(3) of the Act.

(b) *Immigration Court.* (1) *Certain aliens not entitled to proceedings under section 240 of the Act.* After Form I–863, Notice of Referral to Immigration Judge, has been filed with the Immigration Court, an immigration judge shall have exclusive jurisdiction over any asylum application filed on or after April 1, 1997, by:

(i) An alien crewman who:

(A) Is an applicant for a landing permit;

(B) Has been refused permission to land under section 252 of the Act; or

(C) Has been granted permission to land under section 252 of the Act, regardless of whether the alien has remained in the United States longer than authorized;

(ii) An alien stowaway who has been found to have a credible fear of persecution pursuant to the procedure set forth in Subpart B of this part;

(iii) An alien who is an applicant for admission pursuant to the Visa Waiver Pilot Program under section 217 of the Act;

(iv) An alien who was admitted to the United States pursuant to the Visa Waiver Pilot Program under section 217 of the Act and has remained longer than authorized or has otherwise violated his or her immigration status;

(v) An alien who has been ordered removed under section 235(c) of the Act; or

(vi) An alien who is an applicant for admission, or has been admitted, as an alien classified under section 101(a)(15)(S) of the Act.

(2) *Rules of procedure.* Proceeding falling under the jurisdiction of the immigration judge pursuant to paragraph (b)(1) of this section shall be conducted in accordance with the same rules of procedure as proceedings conducted under 8 CFR part 240, except the scope of review shall be limited to a determination of whether the alien is eligible for asylum or withholding of removal and whether asylum shall be granted in the exercise of discretion. During such proceeding all parties are prohibited from raising or considering any other issues, including but not limited to issues of admissibility, removability, eligibility for waivers, and eligibility for any form of relief other than asylum or withholding of removal.

(3) *other aliens.* Immigration judges shall have exclusive jurisdiction over asylum applications filed by an alien who has been served Form I–221, Order to Show Cause; Form I–122, Notice to Applicant for Admission Detained for a Hearing before an Immigration Judge; or Form I–862, Notice to Appear, after a copy of the charging document has been filed with the Immigration Court. Immigration judges shall also have jurisdiction over any asylum applications filed prior to April 1, 1997, by alien crew members who have remained in the United States longer than authorized, by applicants for admission under the Visa Waiver Pilot Program, and by aliens who have been admitted to the United States under the Visa Waiver Pilot Program.

§ 208.3 Form of application.

(a) An asylum applicant must file, in triplicate, Form I–589 together with any additional supporting material. The applicant's spouse and children shall be listed on the application and may be included in the request for asylum if they are in the United States. One additional copy of the principal applicant's Form I–589 must be submitted for each dependent included in the principal's application. An application shall be accompanied by one completed fingerprint card, Form FD–258, for every individual included in the application who is 14 years of age or older. The application also shall be accompanied by two photographs of the applicant and of each dependent included in the application.

(b) An asylum application shall be deemed to constitute at the same time an application for withholding of removal, unless adjudicated in deportation or exclusion proceedings commenced prior to April 1, 1997. In such instances, the asylum application shall be deemed to constitute an application for withholding of deportation under section 243(h) of the Act, as that section existed prior to its amendment by Pub. L. 104–208.

(c) Form I–589 shall be filed under the following conditions and shall have the following consequences:

(1) Information provided on the application may be used as a basis for the institution of or as evidence in removal proceedings, and in deportation and exclusion proceedings where the application has been filed on or after January 4, 1995, as well as to satisfy the Service's burden of proof in such proceedings;

(2) The applicant and anyone other than a spouse, parent, son, or daughter of the applicant who assists the applicant in preparing the application must sign the application under penalty of perjury. The applicant's signature is evidence that the applicant is a aware of the contents of the application. A person other than a relative specified in this paragraph who assists the applicant in preparing the application also must provide his or her full mailing address;

(3) An asylum application that does not include a response to each of the questions contained in the Form I–589, is unsigned, or is unaccompanied by the required materials specified in paragraph (a) of this section is incomplete. The filling of an incomplete application shall not commence the 150-day period after which the applicant may file an application for employment authorization in accordance with § 208.7. An application that is incomplete shall be retuned by mail to the applicant within 30 days of the receipt of the application by the Service. If the Service has not mailed the incomplete application back to the applicant within 30 days, it shall be deemed complete;

(4) Knowing placement of false information on the application may

subject the person placing that information on the application to criminal penalties under title 18 of the United States Code and to civil penalties under section 274C of the Act; and

(5) Knowing filing of a frivolous application on or after April 1, 1997, so long as the applicant has received the notice required by section 208(d)(4) of the Act, shall render the applicant permanently ineligible for any benefits under the Act pursuant to § 208.18.

§ 208.4 Filing the application.

Except as prohibited in paragraph (a) of this section, asylum applications shall be filed in accordance with paragraph (b) of this section.

(a) *Prohibitions on filing.* Section 208(a)(2) of the Act prohibits certain aliens from filing for asylum on or after April 1, 1997, unless the alien can demonstrate that the exceptions in section 208(a)(2)(D) of the Act apply. For the purpose of making determinations under section 208(a)(2) of the Act, the following rules shall apply:

(1) For the purpose of section 208(a)(2)(C) of the Act, an asylum application has not been denied unless denied by an immigration judge or the Board of Immigration Appeals;

(2) The term ''changed circumstances'' in section 208(a)(2)(D) of the Act shall refer to circumstances materially affecting the applicant's eligibility for asylum that have arisen:

(i) For the purpose of section 208(a)(2)(C) of the Act, since the denial of the last asylum application by the alien. Changed circumstances arising after the denial of the application but before the alien's departure or removal from the United States shall only be considered as part of a motion to reopen under section 240(c)(6) of the Act and §§ 3.2, 3.23 and 103.5 of this chapter; or

(ii) For the purpose of section 208(a)(2)(B) of the Act, since the 1-year period has expired; and

(3) The term ''extraordinary circumstances'' in section 208(a)(2)(D) of the Act shall refer to events or factors beyond the alien's control that caused the failure to meet the 1-year deadline. Such circumstances shall excuse the failure to file within the 1-year period so long as the alien filed the application as soon after the deadline as practicable given those circumstances.

(b) *Filing location.* (1) *With the service center by mail.* Except as provided in paragraphs (b)(2), (b)(3), (b)(4) and (b)(5) of this section, asylum applications shall be filed directly by mail with the service center servicing the asylum office with jurisdiction over the place of the applicant's residence or, in the case of an alien without a United States residence, the applicant's current lodging or the land border port-of-entry through which the alien seeks admission to the United States.

(2) *With the asylum office.* Asylum applications shall be filed directly with the asylum office having jurisdiction over the matter in the case of an alien who has received the express consent of the Director of Asylum to do so.

(3) *With the immigration judge.* Aslyum applications shall be filed directly with the Immigration Court having jurisdiction over the case in the following circumstances:

(i) During exclusion, deportation, or removal proceedings, with the Immigration Court having jurisdiction over the port, district office, or sector after service and filing of the appropriate charging document.

(ii) After completion of exclusion, deportation, or removal proceedings, and in conjunction with a motion to reopen pursuant to 8 CFR part 3 where applicable, with the Immigration Court having jurisdiction over the prior proceeding. Any such motion must reasonably explain the failure to request asylum prior to the completion of the proceedings

(iii) In asylum proceedings pursuant to § 208.2(b)(1) and after the Notice of Referral to Immigration Judge has been served on the alien and filed with the Immigration Court having jurisdiction over the case.

(4) *With the Board of Immigration Appeals.* In conjunction with a motion to remand or reopen pursuant to §§ 3.2 and 3.8 of this chapter where applicable, an initial asylum application shall be filed with the Board of Immigration Appeals if jurisdiction over the proceedings is vested in the Board of Immigration Appeals under 8 CFR part 3. Any such motion must reasonably explain the failure to request asylum prior to the completion of the proceedings.

(5) *With the district director.* In the case of any alien described in § 208.2(b)(1) and prior to the service on the alien of Form I–863, any asylum application shall be submitted to the district director having jurisdiction pursuant to 8 CFR part 103. The district director shall forward such asylum application to the appropriate Immigration Court with the Form I–863 being filed with that Immigration Court.

(c) *Amending an application after filing.* Upon request of the alien and as a matter of discretion, the asylum officer or immigration judge having jurisdiction may permit an asylum applicant to amend or supplement the application, but any delay caused by such request shall extend the period within which the application may not apply for employment authorization in accordance with § 208.7(a).

§ 208.5 Special duties toward aliens in custody of the Service.

(a) *General.* When an alien in the custody of the Service requests asylum or withholding of removal or expresses a fear of persecution or harm upon return to his or her country of origin or to agents thereof, the Service shall make available the appropriate application forms and shall provide the applicant with the information required by section 208(d)(4) of the Act, except in the case of an alien who is in custody pending a credible fear of persecution determination under section 235(b)(1)(B) of the Act. Where possible, expedited consideration shall be given to applications of detained aliens. Except as provided in paragraph (c) of this section, such alien shall not be excluded, deported, or removed before a decision is rendered on his or her asylum application.

(b) *Certain aliens aboard vessels.* (1) If an alien crewman or alien stowaway on board a vessel or other conveyance alleges, claims, or otherwise makes known to an immigration inspector or other official making an examination on the conveyance that he or she is unable or unwilling to return to his or her country of nationality or last habitual residence (if not a national of any country) because of persecution or a fear of persecution in that country on account of race, religion, nationality, membership in a particular social group, or political opinion, the alien shall be promptly removed from the conveyance. If the alien makes such fear known to an official while off such conveyance, the alien shall not be returned to the conveyance but shall be retained in or transferred to the custody of the Service.

(i) An alien stowaway will be referred to an asylum officer for a credible fear determination under § 208.30.

(ii) An alien crewman shall be provided the appropriate applications forms and information required by section 208(d)(4) of the Act and may then have 10 days within which to submit an asylum application to the district director having jurisdiction over the port of entry. The district director, pursuant to § 208.4(b), shall serve Form I–863 on the alien and immediately forward any such application to the appropriate Immigration Court with a copy of the Form I–863 being filed with that court.

(2) Pending adjudication of the application, and, in the case of a

stowaway the credible fear determination and any review thereof, the alien may be detained by the Service or otherwise paroled in accordance with § 212.5 of this chapter. However, pending the credible fear determination, parole of an alien stowaway may be permitted only when the Attorney General determines, in the exercise of discretion, that parole is required to meet a medical emergency or is necessary for a legitimate law enforcement objective.

(c) *Exception to prohibition on removal.* A motion to reopen or an order to remand accompanied by an asylum application pursuant to § 208.4(b)(3)(iii) shall not stay execution of a final exclusion, deportation, or removal order unless such stay is specifically granted by the Board of Immigration Appeals or the immigration judge having jurisdiction over the motion.

§ 208.6 Disclosure to third parties.

(a) Information contained in or pertaining to any asylum application shall not be disclosed without the written consent of the applicant, except as permitted by this section or at the discretion of the Attorney General.

(b) The confidentiality of other records kept by the Service that indicate that a specific alien has applied for asylum shall also be protected from disclosure. The Service will coordinate with the Department of State to ensure that the confidentially of these records is maintained if they are transmitted to Department of State offices in other countries.

(c) This section shall not apply to any disclosure to:

(1) Any United States Government official or contractor having a need to examine information in connection with:

(i) The adjudication of asylum applications;

(ii) The defense of any legal action arising from the adjudication of or failure to adjudicate the asylum application;

(iii) The defense of any legal action of which the asylum application is a part; or

(iv) Any United States Government investigation concerning any criminal or civil matter; or

(2) Any Federal, state, or local court in the United States considering any legal action:

(i) Arising from the adjudication of or failure to adjudicate the asylum application; or

(ii) Arising from the proceedings of which the asylum application is a part.

§ 208.7 Employment authorization.

(a) *Application and approval.* (1) Subject to the restrictions contained in sections 236(a) and 208(d) of the Act, an applicant for asylum who is not an aggravated felon shall be eligible pursuant to §§ 274a.12(c)(8) and 274a.13(a) of this chapter to submit a Form I–765, Application for Employment Authorization. The application shall be submitted no earlier than 150 days after the date on which a complete asylum application submitted in accordance with §§ 208.3 and 208.4 has been received. If an asylum application has been returned as incomplete in accordance with § 208.3(c)(3), the 150-day period will commence upon receipt by the Service of a complete asylum application. An applicant whose asylum application has been denied by an asylum officer or by an immigration judge within the 150-day period shall not be eligible to apply for employment authorization. If an asylum application is denied prior to a decision on the application for employment authorization, the application for employment authorization shall be denied. If the asylum application is not so denied, the Service shall have 30 days from the date of filing of the Form I–765 to grant or deny that application, except that no employment authorization shall be issued to an asylum applicant prior to the expiration of the 180-day period following the filing of the asylum application filed on or after April 1, 1997.

(2) Employment authorization pursuant to § 274a.12(c)(8) of this chapter may not be granted to an alien who fails to appear for a scheduled interview before an asylum officer or a hearing before an immigration judge, unless the applicant demonstrates that the failure to appear was the result of exceptional circumstances.

(3) The time periods within which the alien may not apply for employment authorization and within which the Service must respond to any such application and within which the asylum application must be adjudicated pursuant to section 208(d)(5)(A)(iii) of the Act shall begin when the alien has filed a complete asylum application in accordance with §§ 208.3 and 208.4. Any delay requested or caused by the applicant shall not be counted as part of these time periods. Such time periods also shall be extended by the equivalent of the time between issuance of a request for evidence under § 103.2(b)(8) of this chapter and the receipt of the applicant's response to such request.

(4) The provisions of paragraphs (a)(1) through (3) of this section apply to applications for asylum filed on or after January 4, 1995.

(b) *Renewal and termination.* Employment authorization shall be renewable, in increments to be determined by the Commissioner, for the continuous period of time necessary for the asylum officer or immigration judge to decide the asylum application and, if necessary, for completion of any administrative or judicial review.

(1) If the asylum application is denied by the asylum officer, the employment authorization shall terminate at the expiration of the employment authorization document or 60 days after the denial of asylum, whichever is longer.

(2) If the application is denied by the immigration judge, the Board of Immigration Appeals, or a Federal court, the employment authorization terminates upon the expiration of the employment authorization document, unless the applicant has filed an appropriate request for administrative or judicial review.

(c) *Supporting evidence for renewal of employment authorization.* In order for employment authorization to be renewed under this section, the alien must provide the Service (in accordance with the instructions on or attached to the employment authorization application) with a Form I–765, the required fee (unless waived in accordance with § 103.7(c) of this chapter), and (if applicable) proof that he or she has continued to pursue his or her asylum application before an immigration judge or sought administrative or judicial review. For purposes of employment authorization, pursuit of an asylum application is established by presenting to the Service one of the following, depending on the stage of the alien's immigration proceedings:

(1) If the alien's case is pending in proceedings before the immigration judge, and the alien wishes to continue to pursue his or her asylum application, a copy of any asylum denial, referral notice, or charging document placing the alien in such proceedings;

(2) If the immigration judge has denied asylum, a copy of the document issued by the Board of Immigration Appeals to show that a timely appeal has been filed from a denial of the asylum application by the immigration judge; or

(3) If the Board of Immigration Appeals has dismissed the alien's appeal of a denial of asylum, or sustained an appeal by the Service of a grant of asylum, a copy of the petition for judicial review or for habeas corpus

pursuant to section 242 of the Act, date stamped by the appropriate court.

(d) In order for employment authorization to be renewed before its expiration, the application for renewal must be received by the Service 90 days prior to expiration of the employment authorization.

§ 208.8 Limitations on travel outside the United States.

(a) An applicant who leaves the United States without first obtaining advance parole under § 212.5(e) of this chapter shall be presumed to have abandoned his or her application under this section.

(b) An applicant who leaves the United States pursuant to advance parole under § 212.5(e) of this chapter and returns to the country of claimed persecution shall be presumed to have abandoned his or her application, unless the applicant is able to establish compelling reasons for such return.

§ 208.9 Procedure for interview before an asylum officer.

(a) The Service shall adjudicate the claim of each asylum applicant whose application is complete within the meaning of § 208.3(c)(3) and is within the jurisdiction of the Service.

(b) The asylum officer shall conduct the interview in a nonadversarial manner and, except at the request of the applicant, separate and apart from the general public. The purpose of the interview shall be to elicit all relevant and useful information bearing on the applicant's eligibility for asylum. At the time of the interview, the applicant must provide complete information regarding his or her identity, including name, date and place of birth, and nationality, and may be required to register this identity electronically or through any other means designated by the Attorney General. The applicant may have counsel or a representative present, may present witnesses, and may submit affidavits of witnesses and other evidence.

(c) The asylum officer shall have authority to administer oaths, verify the identity of the applicant (including through the use of electronic means), verify the identity of any interpreter, present and receive evidence, and question the applicant and any witnesses.

(d) Upon completion of the interview, the applicant or the applicant's representative shall have an opportunity to make a statement or comment on the evidence presented. The asylum officer may, in his or her discretion, limit the length of such statement or comment and may require their submission in writing. Upon completion of the interview, the applicant shall be informed that he or she must appear in person to receive and to acknowledge receipt of the decision of the asylum officer and any other accompanying material at a time and place designated by the asylum officer, except as otherwise provided by the asylum officer. An applicant's failure to appear to receive and acknowledge receipt of the decision shall be treated as delay caused by the applicant for purposes of § 208.7(a)(3) and shall extend the period within which the applicant may not apply for employment authorization by the number of days until the applicant does appear to receive and acknowledge receipt of the decision or until the applicant appears before an immigration judge in response to the issuance of a charging document under § 208.14(b).

(e) The asylum officer shall consider evidence submitted by the applicant together with his or her asylum application, as well as any evidence submitted by the applicant before or at the interview. As a matter of discretion, the asylum officer may grant the applicant a brief extension of time following an interview during which the applicant may submit additional evidence. Any such extension shall extend by an equivalent time the periods specified by § 208.7 for the filing and adjudication of any employment authorization application.

(f) The asylum application, all supporting information provided by the applicant, any comments submitted by the Department of State or by the Service, and any other information specific to the applicant's case and considered by the asylum officer shall comprise the record.

(g) An applicant unable to proceed with the interview in English must provide, at no expense to the Service, a competent interpreter fluent in both English and the applicant's native language. The interpreter must be at least 18 years of age. Neither the applicant's attorney or representative of record, a witness testifying on the applicant's behalf, nor a representative or employee of the applicant's country of nationality, or if stateless, country of last habitual residence, may serve as the applicant's interpreter. Failure without good cause to comply with this paragraph may be considered a failure without good cause to appear for the interview for purposes of § 208.10.

§ 208.10 Failure to appear at an interview before an asylum officer.

Failure to appear for a scheduled interview without prior authorization may result in dismissal of the application, waiver of the right to an interview, or denial of any application for an employment authorization document. Failure to appear shall be excused if the notice of the interview was not mailed to the applicant's current address and such address had been provided to the Office of International Affairs by the applicant prior to the date of mailing in accordance with section 265 of the Act and regulations promulgated thereunder, unless the asylum officer determines that the applicant received reasonable notice of the interview. Failure to appear will be excused if the applicant demonstrates that such failure was the result of exceptional circumstances.

§ 208.11 Comments from the Department of State.

(a) The Service shall forward to the Department of State a copy of each completed application it receives. At its option, the Department of State may provide detailed country conditions information relevant to eligibility for asylum or withholding of removal.

(b) At its option, the Department of State may also provide:

(1) An assessment of the accuracy of the applicant's assertions about conditions in his or her country of nationality or habitual residence and his or her particular situation;

(2) Information about whether persons who are similarly situated to the applicant are persecuted in his or her country of nationality or habitual residence and the frequency of such persecution; or

(3) Such other information as it deems relevant.

(c) Asylum officers and immigration judges may request specific comments from the Department of State regarding individual cases or types of claims under consideration, or such other information as they deem appropriate.

(d) Any such comments received pursuant to paragraphs (b) and (c) of this section shall be made part of the record. Unless the comments are classified under the applicable Executive Order, the applicant shall be provided an opportunity to review and respond to such comments prior to the issuance of any decision to deny the application.

§ 208.12 Reliance on information compiled by other sources.

(a) In deciding an asylum application, or whether the alien has a credible fear of persecution pursuant to section 235(b)(1)(B) of the Act, the asylum officer may rely on material provided by the Department of State, the Office of

International Affairs, other Service offices, or other credible sources, such as international organizations, private voluntary agencies, news organizations, or academic institutions.

(b) Nothing in this part shall be construed to entitle the applicant to conduct discovery directed toward the records, officers, agents, or employees of the Service, the Department of Justice, or the Department of State.

§ 208.13 Establishing asylum eligibility.

(a) *Burden of proof.* The burden of proof is on the applicant for asylum to establish that he or she is a refugee as defined in section 101(a)(42) of the Act. The testimony of the applicant, if credible, may be sufficient to sustain the burden of proof without corroboration. The fact that the applicant previously established a credible fear of persecution for purposes of section 235(b)(1)(B) of the Act does not relieve the alien of the additional burden of establishing eligibility for asylum.

(b) *Persecution.* The applicant may qualify as a refugee either because he or she has suffered actual past persecution or because he or she has a well-founded fear of future persecution.

(1) *Past persecution.* An applicant shall be found to be a refugee on the basis of past persecution if he or she can establish that he or she has suffered persecution in the past in his or her country of nationality or last habitual residence on account of race, religion, nationality, membership in a particular social group, or political opinion, and that he or she is unable or unwilling to return to or avail himself or herself of the protection of that country owing to such persecution.

(i) If it is determined that the applicant has established past persecution, he or she shall be presumed also to have a well-founded fear of persecution unless a preponderance of the evidence establishes that since the time the persecution occurred conditions in the applicant's country of nationality or last habitual residence have changed to such an extent that the applicant no longer has a well-founded fear of being persecuted if he or she were to return.

(ii) An application for asylum shall be denied if the applicant establishes past persecution under this paragraph but it is also determined that he or she does not have a well-founded fear of future persecution under paragraph (b)(2) of this section, unless it is determined that the applicant has demonstrated compelling reasons for being unwilling to return to his or her country of nationality or last habitual residence arising out of the severity of the past persecution. If the applicant demonstrates such compelling reasons, he or she may be granted asylum unless such a grant is barred by paragraph (c) of this section.

(2) *Well-founded fear of persecution.* An applicant shall be found to have a well-founded fear of persecution if he or she can establish first, that he or she has a fear of persecution in his or her country of nationality or last habitual residence on account of race, religion, nationality, membership in a particular social group, or political opinion; second, that there is a reasonable possibility of actually suffering such persecution if he or she were to return to that country; and third, that he or she is unable or unwilling to return to or avail himself or herself of the protection of that country because of such fear. In evaluating whether the applicant has sustained his or her burden of proving that he or she has a well-founded fear of persecution, the asylum officer or immigration judge shall not require the applicant to provide evidence that he or she would be singled out individually for persecution if:

(i) The applicant establishes that there is a pattern or practice in his or her country of nationality or last habitual residence of persecution of a group of persons similarly situated to the applicant on account of race, religion, nationality, membership in a particular social group, or political opinion; and

(ii) The applicant establishes his or her own inclusion in and identification with such group of persons such that his or her fear of persecution upon return is reasonable.

(c) *Mandatory denials.* (1) *Applications filed on or after April 1, 1997.* For applications filed on or after April 1, 1997, an applicant shall not qualify for asylum if section 208(a)(2) or 208(b)(2) of the Act applies to the applicant. If the evidence indicates that the applicant may be ineligible under section 208(a)(2) of the Act to apply for asylum, or under section 208(b)(2) of the Act to be granted asylum, the applicant shall have the burden of proving by a preponderance of the evidence, or in the case of an alien described in section 208(a)(2)(B) of the Act by clear and convincing evidence, that he or she is eligible.

(2) *Applications filed before April 1, 1997.* An immigration judge or asylum officer shall not grant asylum to any applicant who filed his or her application before April 1, 1997, if the alien:

(i) Having been convicted by a final judgment of a particularly serious crime in the United States, constitutes a danger to the community;

(ii) Has been firmly resettled within the meaning of § 208.15;

(iii) Can reasonably be regarded as a danger to the security of the United States;

(iv) Has been convicted of an aggravated felony, as defined in section 101(a)(43) of the Act; or

(v) Ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion. If the evidence indicates that one of the above grounds apply to the applicant, he or she shall have the burden of proving by a preponderance of the evidence that he or she did not so act.

(d) *Discretionary denial.* An asylum application may be denied in the discretion of the Attorney General if the alien can be removed to a third country which has offered resettlement and in which the alien would not face harm or persecution.

§ 208.14 Approval, denial, or referral of application.

(a) *By an immigration judge.* Unless otherwise prohibited in § 208.13(c), an immigration judge may grant or deny asylum in the exercise of discretion to an applicant who qualifies as a refugee under section 101(a)(42) of the Act.

(b) *By an asylum officer.* Unless otherwise prohibited in § 208.13(c):

(1) An asylum officer may grant asylum in the exercise of discretion to an applicant who qualifies as a refugee under section 101(a)(42) of the Act.

(2) If the alien appears to be deportable, excludable or removable under section 240 of the Act, the asylum officer shall either grant asylum or refer the application to an immigration judge for adjudication in deportation, exclusion, or removal proceedings. An asylum officer may refer such an application after an interview conducted in accordance with § 208.9 or if, in accordance with § 208.10, the applicant is deemed to have waived his or her right to an interview.

(3) If the applicant is maintaining valid nonimmigrant status at the time the application is decided, the asylum officer may grant or deny asylum, except in the case of an applicant described in § 208.2(b)(1).

(c) *Applicability of § 103.2(b) of this chapter.* No application for asylum or withholding of deportation shall be subject to denial pursuant to § 103.2(b) of this chapter.

(d) *Duration.* If the alien's asylum application is granted, the grant will be effective for an indefinite period, subject to termination as provided in § 208.22.

§ 208.15 Definition of ''firm resettlement.''

An alien is considered to be firmly resettled if, prior to arrival in the United States, he entered into another nation with, or while in that nation received, an offer of permanent resident status, citizenship, or some other type of permanent resettlement unless he establishes:

(a) That his entry into that nation was a necessary consequence of his flight from persecution, that he remained in that nation only as long as was necessary to arrange onward travel, and that he did not establish significant ties in that nation; or

(b) That the conditions of his residence in that nation were so substantially and consciously restricted by the authority of the country of refuge that he was not in fact resettled. In making his determination, the Asylum Officer or Immigration Judge shall consider the conditions under which other residents of the country live, the type of housing made available to the refugee, whether permanent or temporary, the types and extent of employment available to the refugee, and the extent to which the refugee received permission to hold property and to enjoy other rights and privileges, such as travel documentation including a right of entry or reentry, education, public relief, or naturalization, ordinarily available to others resident in the country.

§ 208.16 Withholding of removal.

(a) *Consideration of application for withholding of removal.* An asylum officer shall not decide whether the exclusion, deportation, or removal of an alien to a country where the alien's life or freedom would be threatened must be withheld, except in the case of an alien who is otherwise eligible for asylum but is precluded from being granted such status due solely to section 207(a)(5) of the Act. In exclusion, deportation, or removal proceedings, an immigration judge may adjudicate both an asylum claim and a request for withholding of removal whether or not asylum is granted.

(b) *Eligibility for withholding of removal; burden of proof.* The burden of proof is on the applicant for withholding of removal to establish that his or her life or freedom would be threatened in the proposed country of removal on account of race, religion, nationality, membership in a particular social group, or political opinion. The testimony of the applicant, if credible, may be sufficient to sustain the burden of proof without corroboration. The evidence shall be evaluated as follows:

(1) The applicant's life or freedom shall be found to be threatened if it is more likely than not that he or she would be persecuted on account of race, religion, nationality, membership in a particular social group, or political opinion.

(2) If the applicant is determined to have suffered persecution in the past such that his or her life or freedom was threatened in the proposed country of removal on account of race, religion, nationality, membership in a particular social group, or political opinion, it shall be presumed that his or her life or freedom would be threatened on return to that country unless a preponderance of the evidence establishes that conditions in the country have changed to such an extent that it is no longer more likely than not that the applicant would be so persecuted there.

(3) In evaluating whether the applicant has sustained the burden of proving that his or her life or freedom would be threatened in a particular country on account of race, religion, nationality, membership in a particular social group, or political opinion, the asylum officer or immigration judge shall not require the applicant to provide evidence that he or she would be singled out individually for such persecution if:

(i) The applicant establishes that there is a pattern or practice in the country of proposed removal of persecution of a group of persons similarly situated to the applicant on account of race, religion, nationality, membership in a particular social group, or political opinion; and

(ii) The applicant establishes his or her own inclusion in and identification with such group of persons such that it is more likely than not that his or her life or freedom would be threatened upon return.

(c) *Approval or denial of application.* (1) *General.* Subject to paragraphs (c)(2) and (c)(3) of this section, an application for withholding of deportation or removal to a country of proposed removal shall be granted if the applicant's eligibility for withholding is established pursuant to paragraph (b) of this section.

(2) *Mandatory denials.* Except as provided in paragraph (c)(3) of this section, an application for withholding of removal shall be denied if the applicant falls within section 241(b)(3)(B) of the Act or, for applications for withholding of deportation adjudicated in proceedings commenced prior to April 1, 1997, within section 243(h)(2) of the Act as it appeared prior to that date. For purposes of section 241(b)(3)(B)(ii) of the Act, or section 243(h)(2)(B) of the Act as it appeared prior to April 1, 1997, an alien who has been convicted of a particularly serious crime shall be considered to constitute a danger to the community. If the evidence indicates the applicability of one or more of the grounds for denial enumerated in the Act, the applicant shall have the burden of proving by a preponderance of the evidence that such grounds do not apply.

(3) *Exception to the prohibition on withholding of deportation in certain cases.* Section 243(h)(3) of the Act, as added by section 413 of Pub. L. 104–132, shall apply only to applications adjudicated in proceedings commenced before April 1, 1997, and in which final action had not been taken before April 24, 1996. The discretion permitted by that section to override section 243(h)(2) shall be exercised only in the case of an applicant convicted of an aggravated felony (or felonies) where he or she was sentenced to an aggregate term of imprisonment of less than 5 years and the immigration judge determines on an individual basis that the crime (or crimes) of which the applicant was convicted does not constitute a particularly serious crime. Except in the cases specified in this paragraph, the grounds for denial of withholding of deportation in section 243(h)(2) of the Act as it appeared prior to April 1, 1997, shall be deemed to comply with the 1967 Protocol Relating to the Status of Refugees.

(d) *Reconsideration of discretionary denial of asylum.* In the event that an applicant is denied asylum solely in the exercise of discretion, and the applicant is subsequently granted withholding of deportation or removal under this section, thereby effectively precluding admission of the applicant's spouse or minor children following to join him or her, the denial of asylum shall be reconsidered. Factors to be considered will include the reasons for the denial and reasonable alternatives available to the applicant such as reunification with his or her spouse or minor children in a third country.

§ 208.17 Decisions.

The decision of an asylum officer to grant or to deny asylum or withholding of removal, or to refer an asylum application in accordance with § 208.14(b), shall be communicated in writing to the applicant. Notices of decisions to grant or deny asylum by asylum officers shall generally be served in person unless, in the discretion of the asylum office director, routine service by mail is appropriate. A letter communicating denial of the

application shall state the basis for denial of the asylum application. The letter also shall contain an assessment of the applicant's credibility, unless the denial is the result of the applicant's conviction of an aggravated felony. Pursuant to § 208.9(d), an applicant must appear in person to receive and to acknowledge receipt of the decision.

§ 208.18 Determining if an asylum application is frivolous.

For applications filed on or after April 1, 1997, an applicant is subject to the provisions of section 208(d)(6) of the Act only if a final order by an immigration judge or the Board of Immigration Appeals specifically finds that the alien knowingly filed a frivolous asylum application. An asylum application is frivolous if it is fabricated or is brought for an improper purpose. Such finding shall only be made if the immigration judge or the Board is satisfied that the applicant, during the course of the proceedings, has had sufficient opportunity to account for any discrepancies or implausible aspects of the claim.

§ 208.19 [Reserved]

§ 208.20 Effect on exclusion, deportation and removal proceedings.

(a) An alien who has been granted asylum may not be deported or removed unless his or her asylum status is terminated pursuant to § 208.22. An alien in exclusion, deportation, or removal proceedings who is granted withholding of removal or deportation may not be deported or removed to the country to which his or her deportation or removal is ordered withheld unless the withholding order is terminated pursuant to § 208.22.

(b) When an alien's asylum status or withholding of removal or deportation is terminated under this chapter, the Service shall initiate removal proceedings under section 235 or 240 of the Act, as appropriate, if the alien is not already in exclusion, deportation, or removal proceedings. Removal proceedings may also be in conjunction with a termination hearing scheduled under § 208.22(e).

§ 208.21 Restoration of status.

An alien who was maintaining his or her nonimmigrant status at the time of filing an asylum application and has such application denied may continue in or be restored to that status, if it has not expired.

§ 208.22 Termination of asylum or withholding of removal or deportation.

(a) *Termination of asylum by the Service.* Except as provided in paragraph (e) of this section, an asylum officer may terminate a grant of asylum made under the jurisdiction of an asylum officer or a district director if following an interview, the asylum officer determines that:

(1) There is a showing of fraud in the alien's application such that he or she was not eligible for asylum at the time it was granted;

(2) As to the applications filed on or after April 1, 1997, one or more of the conditions described in section 208(c)(2) of the Act exist; or

(3) As to applications filed before April 1, 1997, the alien no longer has a well-founded fear of persecution upon return due to a change of country conditions in the alien's country of nationality or habitual residence or the alien has committed any act that would have been grounds for denial of asylum under § 208.14(e)(2).

(b) *Termination of withholding of deportation or removal by the Service.* Except as provided in paragraph (e) of this section, an asylum officer may terminate a grant of withholding of deportation or removal made under the jurisdiction of an asylum officer or a district director if the asylum officer determines, following an interview, that:

(1) The alien is no longer entitled to withholding of deportation or removal due to a change of conditions in the country to which removal was withheld;

(2) There is a showing of fraud in the alien's application such that the alien was not eligible for withholding of removal at the time it was granted;

(3) The alien has committed any other act that would have been grounds for denial of withholding of removal under section 241(b)(3)(B) of the Act had it occurred prior to the grant of withholding of removal; or

(4) For applications filed in proceedings commenced before April 1, 1997, the alien has committed any act that would have been grounds for denial of withholding of deportation under section 243(h)(2) of the Act.

(c) *Procedure.* Prior to the termination of a grant of asylum or withholding of deportation or removal, the alien shall be given notice of intent to terminate, with the reasons therefor, at least 30 days prior to the interview specified in paragraph (a) of this section before an asylum officer. The alien shall be provided the opportunity to present evidence showing that he or she is still eligible for asylum or withholding of deportation or removal. If the asylum officer determines that the alien is no longer eligible for asylum or withholding of deportation or removal, the alien shall be given written notice that asylum status or withholding of deportation or removal and any employment authorization issued pursuant thereto, are terminated.

(d) *Termination of derivative status.* The termination of asylum status for a person who was the principal applicant shall result in termination of the asylum status of a spouse or child whose status was based on the asylum application of the principal. Such termination shall not preclude the spouse or child of such alien from separately asserting an asylum or withholding of deportation or removal claim.

(e) *Termination of asylum or withholding of deportation or removal by the Executive Office for Immigration Review.* An immigration judge or the Board of Immigration Appeals may reopen a case pursuant to § 3.2 or § 3.23 of this chapter for the purpose of terminating a grant of asylum or withholding of deportation or removal made under the jurisdiction of an immigration judge. In such a reopened proceeding, the Service must establish, by a preponderance of evidence, one or more of the grounds set forth in paragraphs (a) or (b) of this section. In addition, an immigration judge may terminate a grant of asylum or withholding of deportation or removal made under the jurisdiction of the Service at any time after the alien has been provided a notice of intent to terminate by the Service. Any termination under this paragraph may occur in conjunction with an exclusion, deportation or removal proceeding.

(f) *Termination of asylum for arriving aliens.* If the Service determines that an applicant for admission who had previously been granted asylum in the United States falls within conditions set forth in section 208(c)(2) of the Act and is inadmissible, the Service shall issue a notice of intent to terminate asylum and initiate removal proceedings under section 240 of the Act. The alien shall present his or her response to the intent to terminate during proceedings before the immigration judge.

§§ 208.23–208.29 [Reserved]

Subpart B—Credible Fear of Persecution

§ 208.30 Credible fear determinations involving stowaways and applicants for admission found inadmissible pursuant to section 212(a)(6)(C) or 212(a)(7) of the Act.

(a) *Jurisdiction.* The provisions of this subpart apply to aliens subject to sections 235(a)(2) and 235(b)(1) of the Act. Pursuant to section 235(b)(1)(B) of the Act, the Service has exclusive jurisdiction to make credible fear determinations, and the Executive

Office for Immigration Review has exclusive jurisdiction to review such determinations. Except as otherwise provided in this subpart, paragraphs (b) through (e) of this section are the exclusive procedures applicable to credible fear interviews, determinations, and review under section 235(b)(1)(B) of the Act.

(b) *Interview and procedure.* The asylum officer, as defined in section 235(b)(1)(E) of the Act, will conduct the interview in a nonadversarial manner and separate and apart from the general public. At the time of the interview, the alien may be required to register his or her identity electronically or through any other means designated by the Attorney General. The alien may consult with a person or persons of the alien's choosing prior to the interview or any review thereof, and may present other evidence when available. Such consultation shall be at no expense to the Government and shall not unreasonably delay the process. Any person or persons with whom the alien chooses to consult may be present at the interview and may be permitted, in the discretion of the asylum officer, to present a brief statement at the end of the interview. The asylum officer, in his or her discretion, may place reasonable limits on the number of such persons who may be present at the interview and on the length of statement or statements made. If the alien is unable to proceed in English, and if the asylum officer is unable to proceed competently in a language chosen by the alien, the asylum officer shall arrange for the assistance of an interpreter in conducting the interview. The interpreter may not be a representative or employee of the applicant's country of nationality or, if the applicant is stateless, the applicant's country of last habitual residence.

(c) *Authority.* Asylum officers conducting credible fear interviews shall have the authorities described in § 208.9(c).

(d) *Referral for an asylum hearing.* If an alien, other than an alien stowaway, is found to have a credible fear of persecution, the asylum officer will so inform the alien, arrange for his or her detention, and issue a Form I–862, Notice to Appear, for full consideration of the asylum claim in proceedings under section 240 of the Act. Parole of the alien may only be considered in accordance with section 212(d)(5) of the Act and § 212.5 of this chapter. If an alien stowaway is found to have a credible fear of persecution, the asylum officer will so inform the alien, arrange for his or her detention, and issue a Form I–863, Notice to Referral to Immigration Judge, for full consideration of the asylum claim in proceedings under § 208.2(b)(1).

(e) *Removal of aliens with no credible fear of persecution.* If an alien, other than an alien stowaway, is found not to have a credible fear of persecution, the asylum officer shall order the alien removed and issue a Form I–860, Notice and Order of Expedited Removal. If an alien stowaway is found not to have a credible fear of persecution, the asylum officer shall order the alien removed from the United States in accordance with section 235(a)(2) of the Act. The asylum officer shall also advise the alien of his or her right to request that an immigration judge review the negative decision.

(f) *Review by immigration judge.* The asylum officer's negative decision regarding credible fear shall be subject to review by an immigration judge upon the applicant's verbal or written request, in accordance with section 235(b)(1)(B)(iii)(III) of the Act. If the alien requests such review, the asylum officer shall arrange for the detention of the alien and serve him or her with a Form I–863, Notice of Referral to Immigration Judge. Copies of the Form I–863, the asylum officer's notes, and other materials upon which the determination was based shall be provided to the immigration judge with the negative determination. Upon review of the asylum officer's negative credible fear determination:

(1) If the immigration judge concurs with the determination of the asylum officer that the alien does not have a credible fear of persecution, the case shall be returned to the Service for removal of the alien.

(2) If the immigration judge finds that the alien, other than an alien stowaway, possesses a credible fear of persecution, the immigration judge shall vacate the order of the asylum officer issued on Form I–860 and the Service may commence removal proceedings under section 240 of the Act, during which time the alien may file an asylum application in accordance with § 208.4(b)(3)(i).

(3) If the immigration judge finds that an alien stowaway possesses a credible fear of persecution, the alien shall be allowed to file an asylum application before the immigration judge in accordance with § 208.4(b)(3)(iii). The immigration judge shall decide the asylum application as provided in that section. Such decision may be appealed by either the stowaway or the Service to the Board of Immigration Appeals. If and when a denial of the asylum application becomes final, the alien shall be removed from the United States in accordance with section 235(a)(2) of the Act. If and when an approval of the asylum application becomes final, the Service shall terminate removal proceedings under section 235(a)(2) of the Act.

PART 209—ADJUSTMENT OF STATUS OF REFUGEES AND ALIENS GRANTED ASYLUM

42. The authority citation for part 209 is revised to read as follows:

Authority: 8 U.S.C. 1101, 1103, 1157, 1158, 1159, 1228, 1252, 1282; 8 CFR part 2.

§ 209.1 [Amended]

43. In § 209.1, paragraph (a)(1) is amended in the first sentence by revising the reference to ‘‘, 236, and 237’’ to read ‘‘and 240’’.

44. In § 209.2, the last sentence of paragraph (c) is revised to read as follows:

§ 209.2 Adjustment of status of alien granted asylum.

* * * * *

(c) *Application.* * * * If an alien has been placed in deportation, exclusion, or removal proceedings under any section of this Act (as effective on the date such proceedings commenced), the application can be filed and considered only in those proceedings.

* * * * *

PART 211—DOCUMENTARY REQUIREMENTS; IMMIGRANTS; WAIVERS

45. The authority citation for part 211 is revised to read as follows:

Authority: 8 U.S.C. 1101, 1103, 1181, 1182, 1203, 1225, 1257; 8 CFR part 2.

46. Part 211 is revised to read as follows:

Sec.
211.1 Visas.
211.2 Passports.
211.3 Expiration of immigrant visas, reentry permits, refugee travel documents, and Forms I–551.
211.4 Waiver of documents for returning residents.
211.5 Alien commuters.

§ 211.1 Visas.

(a) *General.* Except as provided in paragraph (b) of this section, each arriving alien applying for admission (or boarding the vessel or aircraft on which he or she arrives) into the United States for lawful permanent residence, or as a returning lawful permanent resident, shall present one of the following:

(1) A valid, unexpired immigrant visa;

(2) A valid, unexpired Form I–551, Alien Registration Receipt Card, if seeking readmission after a temporary

absence of less than one year, or in the case of a crewmember regularly serving on board a vessel or aircraft of United States registry seeking readmission after any job-connected absence;

(3) A valid, unexpired Form I–327, Permit to Reenter the United States;

(4) A valid, unexpired Form I–571, Refugee Travel Document, properly endorsed to reflect admission as a lawful permanent resident;

(5) An expired Form I–551, Alien Registration Receipt Card, accompanied by a filing receipt issued within the previous six months for either a Form I–751, Petition to Remove the Conditions on Residence, or Form I–829, Petition by Entrepreneur to Remove Conditions, if seeking admission or readmission after a temporary absence of less than one year;

(6) A Form I–551, whether or not expired, presented by a civilian or military employee of the United States Government, who was outside the United States pursuant to official orders, or the spouse or child of such employee who is preceding, accompanying or following to join within four months the employee, returning to the United States; or

(7) Form I–551, whether or not expired, or a transportation letter issued by an American consular officer, presented by an employee of the American University of Beirut, returning temporarily to the United States before resuming employment with the American University of Beirut, or resuming permanent residence in the United States.

(b) *Waivers.* (1) A waiver of the visa required in paragraph (a) of this section shall be granted without fee by the district director, upon presentation of the child's birth certificate, to a child born subsequent to the issuance of an immigrant visa to his or her accompanying parent who applies for admission during the validity of such a visa; or a child born during the temporary visit abroad of a mother who is a lawful permanent resident alien, or a national, of the United States, provided that the child's application for admission to the United States is made within two years of birth, the child is accompanied by the parent who is applying for readmission as a permanent resident upon the first return of the parent to the United States after the birth of the child, and the accompanying parent is found to be admissible to the United States.

(2) For an alien described in paragraph (b)(1) of this section, recordation of the child's entry shall be on Form I–181, Memorandum of Creation of Record of Admission for Lawful Permanent Residence. The carrier of such alien shall not be liable for a fine pursuant to section 273 of the Act.

(3) If an immigrant alien returning to an unrelinquished lawful permanent residence in the United States after a temporary absence abroad believes that good cause exists for his or her failure to present an immigrant visa, Form I–551, or reentry permit, the alien may file an application for a waiver of this requirement with the district director in charge of the port-of-entry. To apply for this waiver, the alien must file Form I–193, Application for Waiver of Passport and/or Visa, with the fee prescribed in § 103.7(b)(1) of this chapter, *except* that if the alien's Form I–551 was lost or stolen, the alien shall instead file Form I–90, Application to Replace Alien Registration Receipt Card, with the fee prescribed in § 103.7(b)(1) of this chapter. In the exercise of discretion, the district director in charge of the port-of-entry may waive the alien's lack of an immigrant visa, Form I–551, or reentry permit and admit the alien as a returning resident, if the district director is satisfied that the alien has established good cause for the alien's failure to present an immigrant visa, Form I–551, or reentry permit.

(c) *Immigrants having occupational status defined in section 101(a)(15) (A), (E), or (G) of the Act.* An immigrant visa, reentry permit, or Form I–551 shall be invalid when presented by an alien who has an occupational status under section 101(a)(15) (A), (E), or (G) of the Act, unless he or she has previously submitted, or submits at the time he or she applies for admission to the United States, the written waiver required by section 247(b) of the Act and 8 CFR part 247.

(d) *Returning temporary residents.* (1) Form I–688, Temporary Resident Card, may be presented in lieu of an immigrant visa by an alien whose status has been adjusted to that of a temporary resident under the provisions of § 210.1 of this chapter, such status not having changed, and who is returning to an unrelinquished residence within one year after a temporary absence abroad.

(2) Form I–688 may be presented in lieu of an immigrant visa by an alien whose status has been adjusted to that of a temporary resident under the provisions of § 245a.2 of this chapter, such status not having changed, and who is returning to an unrelinquished residence within 30 days after a temporary absence abroad, provided that the aggregate of all such absences abroad during the temporary residence period has not exceeded 90 days.

§ 211.2 Passports.

(a) A passport valid for the bearer's entry into a foreign country at least 60 days beyond the expiration date of his or her immigrant visa shall be presented by each immigrant except an immigrant who:

(1) Is the parent, spouse, or unmarried son or daughter of a United States citizen or of an alien lawful permanent resident of the United States,

(2) Is entering under the provisions of § 211.1(a)(2) through (a)(7), or § 211.1(b)(1),

(3) Is a stateless person or a person who because of his or her opposition to Communism is unwilling or unable to obtain a passport from the country of his or her nationality, or is the accompanying spouse or unmarried son or daughter of such immigrant,

(4) Is a member of the Armed Forces of the United States,

(b) If an alien seeking admission as an immigrant with an immigrant visa believes that good cause exists for his or her failure to present a passport, the alien may file an application for a waiver of this requirement with the district director in charge of the port-of-entry. To apply for this waiver, the alien must file Form I–193, Application for Waiver of Passport and/or Visa, with the fee prescribed in § 103.7(b)(1) of this chapter. In the exercise of discretion, the district director in charge of the port-of-entry may waive the alien's lack of passport and admit the alien as an immigrant, if the district director is satisfied that the alien has established good cause for the alien's failure to present a passport.

§ 211.3 Expiration of immigrant visas, reentry permits, refugee travel document, and Form I–551.

An immigrant visa, reentry permit, refugee travel document, or Form I–551 shall be regarded as unexpired if the rightful holder embarked or enplaned before the expiration of his immigrant visa, reentry permit, or refugee travel document, or, with respect to Form I–551, before the first anniversary of the date on which he departed from the United States: provided, that the vessel or aircraft on which he so embarked or enplaned arrives in the United States or foreign contiguous territory on a continuous voyage. The continuity of the voyage shall not be deemed to have been interrupted by scheduled or emergency stops of the vessel or aircraft en route to the United States or foreign contiguous territory, or by a layover in foreign contiguous territory necessitated solely for the purpose of effecting a transportation connection to the United States.

§ 211.4 Waiver of documents for returning residents.

(a) Pursuant to the authority contained in section 211(b) of the Act, an alien previously lawfully admitted to the United States for permanent residence who, upon return from a temporary absence was inadmissible because of failure to have or to present a valid passport, immigrant visa, reentry permit, border crossing card, or other document required at the time of entry, may be granted a waiver of such requirement in the discretion of the district director if the district director determines that such alien:

(1) Was not otherwise inadmissible at the time of entry, or

(2) Having been otherwise inadmissible at the time of entry is with respect thereto qualified for an exemption from deportability under section 237(a)(1)(H) of the Act, and

(3) Is not otherwise subject to removal.

(b) Denial of a waiver by the district director is not appealable but shall be without prejudice to renewal of an application and reconsideration in proceedings before the immigration judge.

§ 211.5 Alien commuters.

(a) *General.* An alien lawfully admitted for permanent residence or a special agricultural worker lawfully admitted for temporary residence under section 210 of the Act may commence or continue to reside in foreign contiguous territory and commute as a special immigrant defined in section 101(a)(27)(A) of the Act to his or her place of employment in the United States. An alien commuter engaged in seasonal work will be presumed to have taken up residence in the United States if he or she is present in this country for more than six months, in the aggregate, during any continuous 12-month period. An alien commuter's address report under section 265 of the Act must show his or her actual residence address even though it is not in the United States.

(b) *Loss of residence status.* An alien commuter who has been out of regular employment in the United States for a continuous period of six months shall be deemed to have lost residence status, notwithstanding temporary entries in the interim for other than employment purposes. An exception applies when employment in the United States was interrupted for reasons beyond the individual's control other than lack of a job opportunity or the commuter can demonstrate that he or she has worked 90 days in the United States in the aggregate during the 12-month period preceding the application for admission into the United States.

(c) *Eligibility for benefits under the immigration and nationality laws.* Until he or she has taken up residence in the United States, an alien commuter cannot satisfy the residence requirements of the naturalization laws and cannot qualify for any benefits under the immigration laws on his or her own behalf or on behalf or his or her relatives other than as specified in paragraph (a) of this section. When an alien commuter takes up residence in the United States, he or she shall no longer be regarded as a commuter. He or she may facilitate proof of having taken up such residence by notifying the Service as soon as possible, preferably at the time of his or her first reentry for that purpose. Application for issuance of a new alien registration receipt card to show that he or she has taken up residence in the United States shall be made on Form I–90.

PART 212—DOCUMENTARY REQUIREMENTS: NONIMMIGRANTS; WAIVERS; ADMISSION OF CERTAIN INADMISSIBLE ALIENS; PAROLE

47. The authority citation for part 212 continues to read as follows:

Authority: 8 U.S.C. 1101, 1102, 1103, 1182, 1184, 1187, 1225, 1226, 1227, 1228, 1252; 8 CFR part 2.

48. Section 212.5 is amended by:

a. Revising paragraph (a) and (b);

b. Revising introductory text in paragraph (c);

c. Revising paragraph (c)(1); and by

d. Revising paragraph (d)(2)(i), to read as follows:

§ 212.5 Parole of aliens into the United States.

(a) The parole of aliens within the following groups who have been or are detained in accordance with § 235.3 (b) or (c) of this chapter would generally be justified for ''urgent humanitarian reasons'' or ''significant public benefit,'' provided the aliens present neither a security risk nor a risk of absconding:

(1) Aliens who have serious medical conditions in which continued detention would not be appropriate;

(2) Women who have been medically certified as pregnant;

(3) Aliens who are defined as juveniles in § 236.3(a) of this chapter. The district director or chief patrol agent shall follow the guidelines set forth in § 236.3(a) of this chapter in determining under what conditions a juvenile should be paroled from detention;

(i) Juveniles may be released to a relative (brother, sister, aunt, uncle) not in Service detention who is willing to sponsor a minor and the minor may be released to that relative notwithstanding that the juvenile has a relative who is in detention.

(ii) If a relative who is not in detention cannot be located to sponsor the minor, the minor may be released with an accompany relative who is in detention.

(iii) If the Service cannot locate a relative in or out of detention to sponsor the minor, but the minor has identified a nonrelative in detention who accompanied him on arrival, the question of releasing the minor and the accompanying nonrelative adult shall be addressed on a case-by-case basis.

(4) Aliens who will be witnesses in proceedings being, or to be, conducted by judicial, administrative, or legislative bodies in the United States; or

(5) Aliens whose continued detention is not in the public interest as determined by the district director or chief patrol agent.

(b) In the case of all other arriving aliens, except those detained under § 235.3 (b) or (c) of this chapter and paragraph (a) of this section, the district director or chief patrol agent may, after review of the individual case, parole into the United States temporarily in accordance with section 212(d)(5)(A) of the Act, any alien applicant for admission, under such terms and conditions, including those set forth in paragraph (c) of this section, as he or she may deem appropriate. An alien who arrives at a port-of-entry and applies for parole into the United States for the sole purpose of seeking adjustment of status under section 245A of the Act, without benefit of advance authorization as described in paragraph (e) of this section shall be denied parole and detained for removal in accordance with the provisions of § 235.3 (b) or (c) of this chapter. An alien seeking to enter the United States for the sole purpose of applying for adjustment of status under section 210 of the Act shall be denied parole and detained for removal under § 235.3 (b) or (c) of this chapter, unless the alien has been recommended for approval of such application for adjustment by a consular officer at an Overseas Processing Office.

(c) *Conditions.* In any case where an alien is paroled under paragraph (a) or (b) of this section, the district director or chief patrol agent may require reasonable assurances that the alien will appear at all hearings and/or depart the United States when required to do so. Not all factors listed need be present for parole to be exercised. The district director or chief patrol agent should apply reasonable discretion. The

consideration of all relevant factors includes:

(1) The giving of an undertaking by the applicant, counsel, or a sponsor to ensure appearances or departure, and a bond may be required on Form I–352 in such amount as the district director or chief patrol agent may deem appropriate;

* * * * *

(d) * * *

(2)(i) *On notice.* In cases not covered by paragraph (d)(1) of this section, upon accomplishment of the purpose for which parole was authorized or when in the opinion of the district director or chief patrol agent in charge of the area in which the alien is located, neither humanitarian reasons nor public benefit warrants the continued presence of the alien in the United States, parole shall be terminated upon written notice to the alien and he or she shall be restored to the status that he or she had at the time of parole. When a charging document is served on the alien, the charging document will constitute written notice of termination of parole, unless otherwise specified. Any further inspection or hearing shall be conducted under section 235 or 250 of the Act and this chapter, or any order of exclusion, deportation, or removal previously entered shall be executed. If the exclusion, deportation, or removal order cannot be executed by removal within a reasonable time, the alien shall again be released on parole unless in the opinion of the district director or the chief patrol agent the public interest requires that the alien be continued in custody.

* * * * *

49. In § 212.6 paragraph (a)(2) is revised to read as follows:

§ 212.6 Nonresident alien border crossing cards.

(a) * * *

(2) *Mexican border crossing card, Form I–186 or I–586.* The rightful holder of a nonresident alien Mexican border crossing card, Form I–186 or I–586, may be admitted under § 235.1(f) of this chapter if found otherwise admissible. However, any alien seeking entry as a visitor for business or pleasure must also present a valid passport and shall be issued Form I–94 if the alien is applying for admission from:

(i) A country other than Mexico or Canada, or

(ii) Canada if the alien has been in a country other than the United States or Canada since leaving Mexico.

* * * * *

PART 213—ADMISSION OF ALIENS ON GIVING BOND OR CASH DEPOSIT

50. The authority citation for part 213 is revised to read as follows:

Authority: 8 U.S.C. 1103; 8 CFR part 2.

§ 213.1 [Amended]

51. Section 213.1 is amended in the last sentence by revising the term ''part 103'' to read ''§ 103.6''.

PART 214—NONIMMIGRANT CLASSES

52. The authority citation for part 214 continues to read as follows:

Authority: 8 U.S.C. 1101, 1103, 1182, 1184, 1186a, 1187, 1221, 1281, 1282; 8 CFR part 2.

53. Section 214.1 is amended by revising paragraph (c)(4)(iv) to read as follows:

§ 214.1 Requirements for admission, extension, and maintenance of status.

* * * * *

(c) * * *

(4) * * *

(iv) The alien is not the subject of deportation proceedings under section 242 of the Act (prior to April 1, 1997) or removal proceedings under section 240 of the Act.

* * * * *

PART 215—[REMOVED]

54. Part 215 is removed.

PART 216—CONDITIONAL BASIS OF LAWFUL PERMANENT RESIDENCE STATUS

55. The authority citation for part 216 continues to read as follows:

Authority: 8 U.S.C. 1101, 1103, 1154, 1184, 1186a, 1186b, and 8 CFR part 2.

Section 216.3 is revised to read as follows:

§ 216.3 Termination of conditional resident status.

(a) *During the two-year conditional period.* The director shall send a formal written notice to the conditional permanent resident of the termination of the alien's conditional permanent resident status if the director determines that any of the conditions set forth in section 216(b)(1) or 216A(b)(1) of the Act, whichever is applicable, are true, or it becomes known to the government that an alien entrepreneur who was admitted pursuant to section 203(b)(5) of the Act obtained his or her investment capital through other than legal means (such as through the sale of illegal drugs). If the Service issues a notice of intent to terminate an alien's conditional resident status, the director shall not adjudicate Form I–751 or Form I–829 until it has been determined that the alien's status will not be terminated. During this time, the alien shall continue to be a lawful conditional permanent resident with all the rights, privileges, and responsibilities provided to persons possessing such status. Prior to issuing the notice of termination, the director shall provide the alien with an opportunity to review and rebut the evidence upon which the decision is to be based, in accordance with § 103.2(b)(2) of this chapter. The termination of status, and all of the rights and privileges concomitant thereto (including authorization to accept or continue in employment in this country), shall take effect as of the date of such determination by the director, although the alien may request a review of such determination in removal proceedings. In addition to the notice of termination, the director shall issue a notice to appear in accordance with 8 CFR part 239. During the ensuing removal proceedings, the alien may submit evidence to rebut the determination of the director. The burden of proof shall be on the Service to establish, by a preponderance of the evidence, that one or more of the conditions in section 216(b)(1) or 216A(b)(1) of the Act, whichever is applicable, are true, or that an alien entrepreneur who was admitted pursuant to section 203(b)(5) of the Act obtained his or her investment capital through other than legal means (such as through the sale of illegal drugs).

(b) *Determination of fraud after two years.* If, subsequent to the removal of the conditional basis of an alien's permanent resident status, the director determines that an alien spouse obtained permanent resident status through a marriage which was entered into for the purpose of evading the immigration laws or an alien entrepreneur obtained permanent resident status through a commercial enterprise which was improper under section 216A(b)(1) of the Act, the director may institute rescission proceedings pursuant to section 246 of the Act (if otherwise appropriate) or removal proceedings under section 240 of the Act.

57. Section 216.4 is amended by:

a. Revising paragraphs (a)(6) and (b)(3);

b. Revising paragraph (c)(4);

c. Removing the unnumbered paragraph immediately after paragraph (c)(4); and by

d. Revising paragraph (d)(2) to read as follows:

§ 216.4 Joint petition to remove conditional basis of lawful permanent resident status for alien spouse.

(a) * * *

(6) *Termination of status for failure to file petition.* Failure to properly file Form I–751 within the 90-day period immediately preceding the second anniversary of the date on which the alien obtained lawful permanent residence on a conditional basis shall result in the automatic termination of the alien's permanent residence status and the initiation of proceedings to remove the alien from the United States. In such proceedings the burden shall be on the alien to establish that he or she complied with the requirement to file the joint petition within the designated period. Form I–751 may be filed after the expiration of the 90-day period only if the alien establishes to the satisfaction of the director, in writing, that there was good cause for the failure to file Form I–751 within the required time period. If the joint petition is filed prior to the jurisdiction vesting with the immigration judge in removal proceedings and the director excuses the late filing and approves the petition, he or she shall restore the alien's permanent residence status, remove the conditional basis of such status and cancel any outstanding notice to appear in accordance with § 239.2 of this chapter. If the joint petition is not filed until after jurisdiction vests with the immigration judge, the immigration judge may terminate the matter upon joint motion by the alien and the service.

(b) * * *

(3) *Termination of status for failure to appear for interview.* If the conditional resident alien and/or the petitioning spouse fail to appear for an interview in connection with the joint petition required by section 216(c) of the Act, the alien's permanent residence status will be automatically terminated as of the second anniversary of the date on which the alien obtained permanent residence. The alien shall be provided with written notification of the termination and the reasons therefor, and a notice to appear shall be issued placing the alien under removal proceedings. The alien may seek review of the decision to terminate his or her status in such proceedings, but the burden shall be on the alien to establish compliance with the interview requirements. If the alien submits a written request that the interview be rescheduled or that the interview be waived, and the director determines that there is good cause for granting the request, the interview may be rescheduled or waived, as appropriate. If the interview is rescheduled at the request of the petitioners, the Service shall not be required to conduct the interview within the 90-day period following the filing of the petition.

(c) * * *

(4) A fee or other consideration was given (other than a fee or other consideration to an attorney for assistance in preparation of a lawful petition) in connection with the filing of the petition through which the alien obtained conditional permanent residence. If derogatory information is determined regarding any of these issues, the director shall offer the petitioners the opportunity to rebut such information. If the petitioners fail to overcome such derogatory information the director may deny the joint petition, terminate the alien's permanent residence, and issue a notice to appear to initiate removal proceedings. If derogatory information not relating to any of these issues is determined during the course of the interview, such information shall be forwarded to the investigations unit for appropriate action. If no unresolved derogatory information is determined relating to these issues, the petition shall be approved and the conditional basis of the alien's permanent residence status removed, regardless of any action taken or contemplated regarding other possible grounds for removal.

(d) * * *

(2) *Denial.* If the director denies the joint petition, he or she shall provide written notice to the alien of the decision and the reason(s) therefor and shall issue a notice to appear under section 239 of the Act and 8 CFR part 239. The alien's lawful permanent residence status shall be terminated as of the date of the director's written decision. The alien shall also be instructed to surrender any Alien Registration Receipt Card previously issued by the Service. No appeal shall lie from the decision of the director; however, the alien may seek review of the decision in removal proceedings. In such proceedings the burden of proof shall be on the Service to establish, by a preponderance of the evidence, that the facts and information set forth by the petitioners are not true or that the petition was properly denied.

58. Section 216.5 is amended by revising paragraphs (a)(1), (d), (e)(1), (e)(3)(ii), and (f) to read as follows:

§ 216.5 Waiver of requirement to file joint petition to remove conditions by alien spouse.

(a) * * *

(1) Removal from the United States would result in extreme hardship;

* * * * *

(d) *Interview.* The service center director may refer the application to the appropriate local office and require that the alien appear for an interview in connection with the application for a waiver. The director shall deny the application and initiate removal proceedings if the alien fails to appear for the interview as required, unless the alien establishes good cause for such failure and the interview is rescheduled.

(e) *Adjudication of waiver application.* (1) *Application based on claim of hardship.* In considering an application for a waiver based upon an alien's claim that extreme hardship would result from the alien's removal from the United States, the director shall take into account only those factors that arose subsequent to the alien's entry as a conditional permanent resident. The director shall bear in mind that any removal from the United States is likely to result in a certain degree of hardship, and that only in those cases where the hardship is extreme should the application for a waiver be granted. The burden of establishing that extreme hardship exists rests solely with the applicant.

* * * * *

(3) * * *

(ii) A conditional resident or former conditional resident who has not departed the United States after termination of resident status may apply for the waiver. A conditional resident who is in exclusion, deportation, or removal proceedings may apply for the waiver only until such time as there is a final order of deportation or removal. The conditional resident may apply for the waiver regardless of his or her present marital status. The conditional resident may still be residing with the citizen or permanent resident spouse, or may be divorced or separated.

* * * * *

(f) *Decision.* The director shall provide the alien with written notice of the decision on the application for waiver. If the decision is adverse, the director shall advise the alien of the reasons therefore, notify the alien of the termination of his or her permanent residence status, instruct the alien to surrender any Alien Registration Receipt Card issued by the Service and issue a notice to appear placing the alien in removal proceedings. No appeal shall lie from the decision of the director, however, the alien may seek review of such decision in removal proceedings.

PART 217—VISA WAIVER PILOT PROGRAM

59. The authority citation for part 217 continues to read as follows:

Authority: 8 U.S.C. 1103, 1187; 8 CFR part 2.

60. Section 217.1 is revised to read as follows:

§ 217.1 Scope.

The Visa Waiver Pilot Program (VWPP) described in this section is established pursuant to the provisions of section 217 of the Act.

61. Section 217.2 is revised to read as follows:

§ 217.2 Eligibility.

(a) *Defintions.* As used in this part, the term:

Carrier refers to the owner, charterer, lessee, or authorized agent of any commercial vessel or commercial aircraft engaged in transporting passengers to the United States from a foreign place.

Designated country refers to Andorra, Argentina, Australia, Belgium, Brunei, Denmark, Finland, France, Germany, Iceland, Italy, Japan, Liechtenstein, Luxembourg, Monaco, the Netherlands, New Zealand, Norway, San Marino, Spain, Sweden, Switzerland, and the United Kingdom. The United Kingdom refers only to British citizens who have the unrestricted right of permanent abode in the United Kingdom (England, Scotland, Wales, Northern Ireland, the Channel Islands and the Isle of Man); it does not refer to British overseas citizens, British dependent territories' citizens, or citizens of British Commonwealth countries. Effective April 1, 1995, until September 30, 1998, or the expiration of the Visa Waiver Pilot Program, whichever comes first, Ireland has been designated as a Visa Waiver Pilot Program country with Probationary Status in accordance with section 217(g) of the Act.

Return trip ticket means any return trip transportation ticket presented by an arriving Visa Waiver Pilot Program applicant on a participating carrier valid for at least 1 year, airline employee passes indicating return passage, individual vouchers for return passage, group vouchers for return passage for charter flights, and military travel orders which include military dependents for return to duty stations outside the United States on U.S. military flights. A period of validity of 1 year need not be reflected on the ticket itself, provided that the carrier agrees that it will honor the return portion of the ticket at any time, as provided in § 217.6(b)(2)(v).

(b) *Special program requirements.* (1) *General.* In addition to meeting all of the requirements for the Visa Waiver Pilot Program specified in section 217 of the Act, each applicant must posses a valid, unexpired passport issued by a designated country and present a completed, signed Form I–94W, Nonimmigrant Visa Waiver Arrival/Departure Form.

(2) *Persons previously removed.* Aliens who have been deported or removed from the United States, after having been determined deportable, require the consent of the Attorney General to apply for admission to the United States pursuant to section 212(a)(9)(A)(ii) of the Act. Such persons may not be admitted to the United States under the provisions of this part notwithstanding the fact that the required consent of the Attorney General may have been secured. Such aliens must secure a visa in order to be admitted to the United States as nonimmigrants, unless otherwise exempt.

(c) *Restrictions on manner of arrival.* (1) *Applicants arriving by air and sea.* Applicants must arrive on a carrier signatory to an agreement specified in § 217.6 and at the time of arrival must be in possession of a return trip ticket that will transport the traveler out of the United States to any other foreign port or place as long as the trip does not terminate in contiguous territory or an adjacent island; except that the return trip ticket may transport the traveler to contiguous territory or an adjacent island, if the traveler is a resident of the country of destination.

(2) *Applicants arriving at land border ports-of-entry.* Any Visa Waiver Pilot Program applicant arriving at a land border port-of-entry must provide evidence to the immigration officer of financial solvency and a domicile abroad to which the applicant intends to return. An applicant arriving at a land-border port-of-entry will be charged a fee as prescribed in § 103.7(b)(1) of this chapter for issuance of Form I–94W, Nonimmigrant Visa Waiver Arrival/Departure Form. A round-trip transportation ticket is not required of applicants at land border ports-of-entry.

(d) *Aliens in transit.* An alien who is in transit through the United States is eligible to apply for admission under the Visa Waiver Pilot Program, provided the applicant meets all other program requirements.

62. Section 217.3 is revised to read as follows:

§ 217.3 Maintenance of status.

(a) *Satisfactory departure.* If an emergency prevents an alien admitted under this part from departing from the United States within his or her period of authorized stay, the district director having jurisdiction over the place of the alien's temporary stay may, in his or her discretion, grant a period of satisfactory departure not to exceed 30 days. If departure is accomplished during that period, the alien is to be regarded as having satisfactorily accomplished the visit without overstaying the allotted time.

(b) *Readmission after departure to contiguous territory or adjacent island.* An alien admitted to the United States under this part may be readmitted to the United States for the balance of his or her Visa Waiver Pilot Program admission period if he or she is otherwise admissible.

63. Section 217.4 is amended by:

a. Revising the section heading:

b. Removing paragraph (a);

c. Redesignating paragraphs (b), (c), and (d) as paragraphs (a), (b), and (c) respectively;

d. Revising newly redesignated paragraph (a)(1);

e. Adding a new paragraph (a)(3);

f. Revising newly redesignated paragraph (b); and by

g. Revising newly redesignated paragraph (c) to read as follows:

§ 217.4 Inadmissibility and deportability.

(a) *Determinations of inadmissibility.* (1) An alien who applies for admission under the provisions of section 217 of the Act, who is determined by an immigration officer not to be eligible for admission under that section or to be inadmissible to the United States under one or more of the grounds of inadmissibility listed in section 212 of the Act (other than for lack of a visa), or who is in possession of and presents fraudulent or counterfeit travel documents, will be refused admission into the United States and removed. Such refusal and removal shall be made at the level of the port director or officer-in-charge, or an officer acting in that capacity, and shall be effected without referral of the alien to an immigration judge for further inquiry, examination, or hearing, except that an alien who presents himself or herself as an applicant for admission under section 217 of the Act, who applies for asylum in the United States must be issued a Notice of Referral to Immigration Judge for a proceeding in accordance with § 208.2(b)(1) of this chapter.

* * * * *

(3) Refusal under paragraph (a)(1) of this section shall not constitute removal for purposes of section 212(a)(9)(A) of the Act.

(b) *Determination of deportability.* (1) An alien who has been admitted to the United States under the provisions of section 217 of the Act and of this part who is determined by an immigration officer to be deportable from the United States under one or more of the grounds of deportability listed in section 237 of the Act shall be removed from the United States to his or her country of nationality or last residence. Such removal shall be determined by the district director who has jurisdiction over the place where the alien is found, and shall be effected without referral of the alien to an immigration judge for a determination of deportability, except that an alien admitted as a Visa Waiver Pilot Program visitor who applies for asylum in the United States must be issued a Notice of Referral to Immigration Judge for a proceeding in accordance with § 208.2(b)(1) of this chapter.

(2) Removal under paragraph (b)(1) is equivalent in all respects and has the same consequences as removal after proceedings conducted under section 240 of the Act.

(c)(1) *Removal of inadmissible aliens who arrived by air or sea.* Removal of an alien from the United States under this section may be effected using the return portion of the round trip passage presented by the alien at the time of entry to the United States as required by section 217(a)(7) of the Act. Such removal shall be on the first available means of transportation to the alien's point of embarkation to the United States. Nothing in this part absolves the carrier of the responsibility to remove any inadmissible or deportable alien at carrier expense, as provided in § 217.6(b).

(2) *Removal of inadmissible and deportable aliens who arrived at land border ports-of-entry.* Removal under this section will be by the first available means of transportation deemed appropriate by the district director.

§ 217.5 [Removed and reserved]

64. Section 217.5 is removed and reserved.

65. Section 217.6 is revised to read as follows:

§ 217.6 Carrier agreements.

(a) *General.* The carrier agreements referred to in section 217(e) of the Act shall be made by the Commissioner on behalf of the Attorney General and shall be on Form I–775, Visa Waiver Pilot Program Agreement.

(b) *Agreement provisions.* (1) To be authorized to transport an alien to the United States pursuant to section 217 of the Act and this part, a carrier must enter into an agreement on Form I–775 to transport as an applicant for admission under section 217 of the Act and this chapter, only an alien who:

(i) Is a national of and in possession of a valid passport issued by a country listed in § 217.2;

(ii) Is in possession of a completed and signed Form I–94W, Nonimmigrant Visa Waiver Arrival/Departure Form, prior to inspection;

(iii) Seeks admission into the United States for 90 days or less;

(iv) Is in possession of a round trip ticket; and

(v) Appears otherwise admissible.

(2) The carrier further agrees to:

(i) Submit to the Immigration and Naturalization Service the Form I–94 was required by 8 CFR part 231 and section 217(e)(1)(B) of the Act;

(ii) Remove from the United States any alien transported by the carrier to the United States for admission under the Visa Waiver Pilot Program, in the event that the alien is determined by an immigration officer at the port-of-entry to be inadmissible or is determined to have remained unlawfully beyond the 90-day period of admission under the program;

(iii) Reimburse within 30 days of notice (not pay as a penalty) the Service for any and all expenses incurred in the transportation (from the point of arrival in the United States to the place of removal) of any alien found inadmissible or deportable under this program;

(iv) Retain the responsibilities and obligations enumerated in this part should the alien under the Visa Waiver Pilot Program depart temporarily for a visit to foreign contiguous territory during the period of authorized stay in the United States and be readmitted pursuant to § 217.3(b);

(v) Transport an alien found inadmissible to the United States or deportable from the United States after admission under the Visa Waiver Pilot Program, by accepting as full payment for return passage the return portion of the transportation ticket as required in paragraph (b)(1)(iv) of this section from the original port of arrival in the United States to point of embarkation or to the country of nationality or last residence.

(c) *Termination of agreements.* The Commissioner, on behalf of the Attorney General, may terminate any carrier agreement under this part, with 5 days notice to a carrier, for the carrier's failure to meet the terms of such agreement. As a matter of discretion, the Commissioner may notify a carrier of the existence of a basis for termination of a carrier agreement under this part and allow the carrier a period not to exceed 15 days within which the carrier may bring itself into compliance with the terms of the carrier agreement. The agreement shall be subject to cancellation by either party for any reason upon 15 days' written notice to the other party.

PART 221—ADMISSION OF VISITORS OR STUDENTS

66. The authority citation for part 221 is revised to read as follows:

Authority: 8 U.S.C. 1101, 1103, 1201; 8 CFR part 2.

§ 221.1 [Amended]

67. Section 221.1 is amended in the last sentence by revising the term ''part 103'' to read ''§ 103.6''.

PART 223—REENTRY PERMITS, REFUGEE TRAVEL DOCUMENTS, AND ADVANCE PAROLE DOCUMENTS

68. The authority citation for part 223 is revised to read as follows:

Authority: 8 U.S.C. 1103, 1181, 1182, 1186a, 1203, 1225, 1226, 1227, 1251; Protocol Relating to the Status of Refugees, November 1, 1968, 19 U.S.T. 6223 (TIAS) 6577; 8 CFR part 2.

69. In § 223.1, paragraph (b) is revised to read as follows:

§ 223.1 Purpose of documents.

* * * * *

(b) *Refugee travel document.* A refugee travel document is issued pursuant to this part and article 28 of the United Nations Convention of July 29, 1951, for the purpose of travel. Except as provided in § 223.3(d)(2)(i), a person who holds refugee status pursuant to section 207 of the Act, or asylum status pursuant to section 208 of the Act, must have a refugee travel document to return to the United States after temporary travel abroad unless he or she is in possession of a valid advance parole document.

70. In § 223.2, paragraph (b)(2) is revised to read as follows:

§ 223.2 Processing.

* * * * *

(b) * * *

(2) *Refugee travel document.* (i) *General.* Except as otherwise provided in this section, an application may be approved if filed by a person who is in the United States at the time of application, and either holds valid refugee status under section 207 of the Act, valid asylum status under section 208 of the Act, or is a permanent resident and received such status as a direct result of his or her asylum or refugee status.

(ii) *Discretionary authority to accept an application from an alien not within the United States.* As a matter of discretion, a district having jurisdiction over a port-of-entry or a preinspection station where an alien is an applicant for admission, or an overseas district director having jurisdiction over the place where an alien is physically present, may accept and adjudicate an application for a refugee travel document from an alien who previously had been admitted to the United States as a refugee, or who previously had been granted asylum status in the United States, and who had departed from the United States without having applied for such refugee travel document, provided:

(A) The alien submits a Form I–131, Application for Travel Document, with the fee required under § 103.7(b)(1) of this chapter.

(B) The district director is satisfied that the alien did not intend to abandon his or her refugee status at the time of departure from the United States;

(C) The alien did not engage in any activities while outside the United States that would be inconsistent with continued refugee or asylum status; and

(D) The alien has been outside the United States for less than 1 year since his or her last departure.

* * * * *

71. In § 223.3, paragraph (d)(2) is revised to read as follows:

§ 223.3 Validity and effect on admissibility.

* * * * *

(d) * * *

(2) *Refugee travel document.* (i) *Inspection and immigration status.* Upon arrival in the United States, an alien who presents a valid unexpired refugee travel document, or who has been allowed to file an application for a refugee travel document and this application has been approved under the procedure set forth in § 223.2(b)(2)(ii), shall be examined as to his or her admissibility under the Act. An alien shall be accorded the immigration status endorsed in his or her refugee travel document, or (in the case of an alien discussed in § 223.2(b)(2)(ii)) which will be endorsed in such document, unless he or she is no longer eligible therefor, or he or she applies for and is found eligible for some other immigration status.

(ii) *Inadmissibility.* If an alien who presents a valid unexpired refugee travel document appears to the examining immigration officer to be inadmissible, he or she shall be referred for proceedings under section 240 of the Act. Section 235(c) of the Act shall not be applicable.

PART 232—DETENTION OF ALIENS FOR PHYSICAL AND MENTAL EXAMINATION

72. The heading for part 232 is revised to read as set forth above.

73. The authority citation for part 232 is revised to read as follows:

Authority: 8 U.S.C. 1103, 1222, 1224, 1252; 8 CFR part 2.

§ 232.1 Redesignated as 232.3 and revised]

74. Section 232.1 is redesignated as $232.3, and is revised to read as follows:

§ 232.3 Arriving aliens.

When a district director has reasonable grounds for believing that persons arriving in the United States should be detained for reasons specified in section 232 of the Act, he or she shall, after consultation with the United States Public Health Service at the port-of-entry, notify the master or agent of the arriving vessel or aircraft of his or her intention to effect such detention by serving on the master or agent Form I–259 in accordance with § 235.3(a) of this chapter.

§ 234.1 and § 234.2 [Redesignated as §§ 232.1 and 232.2 respectively]

75. Sections 234.1 and 234.2 are redesignated as §§ 232.1 and 232.2 respectively.

PART 234—[REMOVED]

76. Part 234 is removed.

77. The following parts are redesignated as set forth in the table below:

Old part	New part
Part 238	Part 233.
Part 239	Part 234.

PART 233—CONTRACTS WITH TRANSPORTATION LINES

78. The authority citation for newly redesignated part 233 continues to read as follows:

Authority: 8 U.S.C. 1103, 1228; 8 CFR part 2.

79. Newly redesignated § 233.1 is revised to read as follows:

§ 233.1 Contracts.

The contracts with transportation lines referred to in section 233(c) of the Act may be entered into by the Executive Associate Commissioner for Programs, or by an immigration officer designated by the Executive Associate Commissioner for Programs on behalf of the government and shall be documented on Form I–420. The contracts with transportation lines referred to in section 233(a) of the Act shall be made by the Commissioner on behalf of the government and shall be documented on Form I–426. The contracts with transportation lines desiring their passengers to be preinspected at places outside the United States shall be made by the Commissioner on behalf of the government and shall be documented on Form I–425; except that contracts for irregularly operated charter flights may be entered into by the Associate Commissioner for Examinations or an immigration officer designated by the Executive Associate Commissioner for Programs and having jurisdiction over the location where the inspection will take place.

80. In newly redesignated § 233.3, paragraph (b) is revised to read as follows:

§ 233.3 Aliens in immediate and continuous transit.

* * * * *

(b) *Signatory lines.* A list of currently effective Form I–426 agreements is maintained by the Service's Headquarters Office of Inspections and is available upon written request.

81. Newly redesignated § 233.4 is revised to read as follows:

§ 233.4 Preinspection outside the United States.

(a) *Form I–425 agreements.* A transportation line bringing applicants for admission to the United States through preinspection sites outside the United States shall enter into an agreement on Form I–425. Such an agreement shall be negotiated directly by the Service's Headquarters Office of Inspections and the head office of the transportation line.

(b) *Signatory lines.* A list of transportation lines with currently valid transportation agreements on Form I–425 is maintained by the Service's Headquarters Office of Inspections and is available upon written request.

82. Newly redesignated § 233.5 is revised to read as follows:

§ 233.5 Aliens entering Guam pursuant to section 14 of Public Law 99–396, ''Omnibus Territories Act.''

A transportation line bringing aliens to Guam under the visa waiver provisions of § 212.1(e) of this chapter shall enter into an agreement on Form I–760. Such agreements shall be negotiated directly by the Service's Headquarters and head offices of the transportation lines.

PART 234—DESIGNATION OF PORTS OF ENTRY FOR ALIENS ARRIVING BY CIVIL AIRCRAFT

83. The heading for newly redesignated part 234 is revised as set forth above.

84. The authority citation for newly redesignated part 234 is revised to read as follows:

Authority: 8 U.S.C. 1103, 1221, 1229; 8 CFR part 2.

§ 234.3 [Amended]

85. Newly redesignated § 234.3 is amended by removing the last sentence.

PART 235—INSPECTION OF PERSONS APPLYING FOR ADMISSION

86. The authority citation for part 235 is revised to read as follows:

Authority: 8 U.S.C. 1101, 1103, 1182, 1183, 1201, 1224, 1225, 1226, 1227, 1228, 1252; 8 CFR part 2.

87. Section 235.1 is revised to read as follows:

§ 235.1 Scope of examination.

(a) *General.* Application to lawfully enter the United States shall be made in person to an immigration officer at a U.S. port-of-entry when the port is open for inspection, or as otherwise designated in this section.

(b) *U.S. citizens.* A person claiming U.S. citizenship must establish that fact to the examining officer's satisfaction and must present a U.S. passport if such passport is required under the provisions of 22 CFR part 53. If such applicant for admission fails to satisfy the examining immigration officer that he or she is a U.S. citizen, he or she shall thereafter be inspected as an alien.

(c) *Alien members of United States Armed Forces and members of a force of a NATO country.* Any alien member of the United States Armed Forces who is in the uniform of, or bears documents identifying him or her as a member of, such Armed Forces, and who is coming to or departing from the United States under official orders or permit of such Armed Forces is not subject to the removal provisions of the Act. A member of the force of a NATO country signatory to Article III of the Status of Forces Agreement seeking to enter the United States under official orders is exempt from the control provision of the Act. Any alien who is a member of either of the foregoing classes may, upon request, be inspected and his or her entry as an alien may be recorded. If the alien does not appear to the examining immigration officer to be clearly and beyond a doubt entitled to enter the United States under the provisions of the Act, the alien shall be so informed and his or her entry shall not be recorded.

(d) *Alien applicants for admission.* (1) Each alien seeking admission at a United States port-of-entry shall present whatever documents are required and shall establish to the satisfaction of the immigration officer that he or she is not subject to removal under the immigration laws, Executive Orders, or Presidential Proclamations and is entitled under all of the applicable provisions of the immigration laws and this chapter to enter the United States. A person claiming to have been lawfully admitted for permanent residence must establish that fact to the satisfaction of the inspecting immigration officer and must present proper documents in accordance with § 211.1 of this chapter.

(2) An alien present in the United States who has not been admitted or paroled or an alien who seeks entry at other than an open, designated port-of-entry, except as otherwise permitted in this section, is subject to the provisions of section 212(a) of the Act and to removal under section 235(b) or 240 of the Act.

(3) An alien who is brought to the United States, whether or not to a designated port-of-entry and regardless of the means of transportation, after having been interdicted in international or United States waters, is considered an applicant for admission and shall be examined under section 235(b) of the Act.

(4) An alien stowaway is not an applicant for admission and may not be admitted to the United States. A stowaway shall be removed from the United States under section 235(a)(2) of the Act. The provisions of section 240 of the Act are not applicable to stowaways, nor is the stowaway entitled to further hearing or review of the removal, except that an alien stowaway who indicates an intention to apply for asylum shall be referred to an asylum officer for a determination of credible fear of persecution in accordance with section 235(b)(1)(B) of the Act and § 208.30 of this chapter. An alien stowaway who is determined to have a credible fear of persecution shall have his or her asylum application adjudicated in accordance with § 208.2(b)(2) of this chapter. Nothing in this section shall be construed to require expedited removal proceedings in accordance with section 235(b)(1) of the Act. A stowaway who absconds either prior to inspection by an immigration officer or after being ordered removed as a stowaway pursuant to section 235(a)(2) of the Act is not entitled to removal proceedings under section 240 of the Act and shall be removed under section 235(a)(2) of the Act as if encountered upon arrival. A stowaway who has been removed pursuant to section 235(a)(2) of the Act and this section shall be considered to have been formally removed from the United States for all purposes under the Act.

(e) *U.S. citizens, lawful permanent residents of the United States, Canadian nationals, and other residents of Canada having a common nationality with Canadians, entering the United States by small craft.* Upon being inspected by an immigration officer and found eligible for admission as a citizen of the United States, or found eligible for admission as a lawful permanent resident of the United States, or in the case of a Canadian national or other resident of Canada having a common nationality with Canadians being found eligible for admission as a temporary visitor for pleasure, a person who desires to enter the United States from Canada in a small pleasure craft of less than 5 net tons without merchandise may be issued, upon application and payment of a fee prescribed under § 103.7(b)(1) of this chapter, Form I–68, Canadian Border Boat Landing Card, and may thereafter enter the United States along with the immediate shore area of the United States on the body of water designated on the Form I–68 from time to time for the duration of that navigation season without further inspection. In the case of a Canadian national or other resident of Canada having a common nationality with Canadians, the Form I–68 shall be valid only for the purpose of visits not to exceed 72 hours and only if the alien will remain in nearby shopping areas, nearby residential neighborhoods, or other similar areas adjacent to the immediate shore area of the United States. If the bearer of Form I–68 seeks to enter the United States by means other than small craft of less than 5 net tons without merchandise, or if he or she seeks to enter the United States for other purposes, or if he or she is an alien, other than a lawful permanent resident alien of the United States, and intends to proceed beyond an area adjacent to the immediate shore area of the United States, or remains in the United States longer than 72 hours, he or she must apply for admission at a United States port of entry.

(f) *Form I–94, Arrival Departure Record.* (1) Unless otherwise exempted, each arriving nonimmigrant who is admitted to the United States shall be issued, upon payment of a fee prescribed in § 103.7(b)(1) of this chapter for land border admissions, a Form I–94 as evidence of the terms of

admission. A Form I–94 issued at a land border port-of-entry shall be considered issued for multiple entries unless specifically annotated for a limited number of entries. A Form I–94 issued at other than a land border port-of-entry, unless issued for multiple entries, must be surrendered upon departure from the United States in accordance with the instructions on the form. Form I–94 is not required by:

(i) Any nonimmigrant alien described in § 212.1(a) of this chapter and 22 CFR 41.33 who is admitted as a visitor for business or pleasure or admitted to proceed in direct transit through the United States;

(ii) Any nonimmigrant alien residing in the British Virgin Islands who was admitted only to the U.S. Virgin Islands as a visitor for business or pleasure under § 212.1(b) of this chapter;

(iii) Any Mexican national in possession of a valid nonresident alien Mexican border crossing card, or a valid Mexican passport and a multiple-entry nonimmigrant visa issued under section 101(a)(15)(B) of the Act, who is admitted as a nonimmigrant visitor at a Mexican border port of entry for a period not to exceed 72 hours to visit within 25 miles of the border;

(iv) Bearers of Mexican diplomatic or official passports described in § 212.1(c–1) of this chapter.

(2) *Paroled aliens.* Any alien paroled into the United States under section 212(d)(5) of the Act, including any alien crewmember, shall be issued a completely executed Form I–94, endorsed with the parole stamp.

88. Section 235.2 is revised to read as follows:

§ 235.2 Deferred inspection.

(a) A district director may, in his or her discretion, defer the inspection of any vessel or aircraft, or of any alien, to another Service office or port-of-entry. Any alien coming to a United States port from a foreign port, from an outlying possession of the United States, from Guam, Puerto Rico, or the Virgin Islands of the United States, or from another port of the United States at which examination under this part was deferred, shall be regarded as an applicant for admission at that onward port.

(b) An examining immigration officer may defer further examination and refer the alien's case to the district director having jurisdiction over the place where the alien is seeking admission, or over the place of the alien's residence or destination in the United States, if the examining immigration officer has reason to believe that the alien can overcome a finding of inadmissibility by:

(1) Posting a bond under section 213 of the Act;

(2) Seeking and obtaining a waiver under section 211 or 212(d)(3) or (4) of the Act; or

(3) Presenting additional evidence of admissibility not available at the time and place of the initial examination.

(c) Such deferral shall be accomplished pursuant to the provisions of section 212(d)(5) of the Act for the period of time necessary to complete the deferred inspection.

(d) Refusal of a district director to authorize admission under section 213 of the Act, or to grant an application for the benefits of section 211 or section 212(d)(3) or (4) of the Act, shall be without prejudice to the renewal of such application or the authorizing of such admission by the immigration judge without additional fee.

(e) Whenever an alien on arrival is found or believed to be suffering from a disability that renders it impractical to proceed with the examination under the Act, the examination of such alien, members of his or her family concerning whose admissibility it is necessary to have such alien testify, and any accompanying aliens whose protection or guardianship will be required should such alien be found inadmissible shall be deferred for such time and under such conditions as the district director in whose district the port is located imposes.

89. Section 235.3 is revised to read as follows:

§ 235.3 Inadmissible aliens and expedited removal.

(a) *Detention prior to inspection.* All persons arriving at a port-of-entry in the United States by vessel or aircraft shall be detained aboard the vessel or at the airport of arrival by the owner, agent, master, commanding officer, person in charge, purser, or consignee of such vessel or aircraft until admitted or otherwise permitted to land by an officer of the Service. Notice or order to detain shall not be required. The owner, agent, master, commanding officer, person in charge, purser, or consignee of such vessel or aircraft shall deliver every alien requiring examination to an immigration officer for inspection or to a medical officer for examination. The Service will not be liable for any expenses related to such detention or presentation or for any expenses of a passenger who has not been presented for inspection and for whom a determination has not been made concerning admissibility by a Service officer.

(b) *Expedited removal.* (1) *Determination of inadmissibility.* An alien who is arriving in the United States or other alien as designated pursuant to paragraph (b)(2)(ii) of this section who is determined to be inadmissible under section 212(a)(6)(C) or 212(a)(7) of the Act (except an alien for whom documentary requirements are waived under § 211.1(b)(3) or § 212.1 of this chapter), shall be ordered removed from the United States in accordance with section 235(b)(1) of the Act. The examining immigration officer shall serve the alien with Form I–860, Notice and Order of Expedited Removal. Except as otherwise provided in this section, such alien is not entitled to a hearing before an immigration judge in proceedings conducted pursuant to section 240 of the Act, or to an appeal of the expedited removal order by the Board of Immigration appeals. An alien whose inadmissibility is being considered under this section or who has been ordered removed pursuant to this section shall be detained pending determination and removal, except that parole of such alien, in accordance with section 212(d)(5) of the Act, may be permitted only when the Attorney General determines, in the exercise of discretion, that parole is required to meet a medical emergency or is necessary for a legitimate law enforcement objective.

(2) *Applicability.* The expedited removal provisions shall apply to the following classes of aliens who are determined to be inadmissible under section 212(a)(6)(C) or (7) of the Act:

(i) Arriving aliens, as defined in § 1.1(q) of this chapter, except for citizens of Cuba arriving at a United States port-of-entry by aircraft;

(ii) As specifically designated by the Commissioner, aliens who arrive in, attempt to enter, or have entered the United States without having been admitted or paroled following inspection by an immigration officer at a designated port-of-entry, and who have not established to the satisfaction of the immigration officer that they have been physically present in the United States continuously for the 2-year period immediately prior to the date of determination of inadmissibility. The Commissioner shall have the sole discretion to apply the provisions of section 235(b)(1) of the Act, at any time, to any class of aliens described in this section. The Commissioner's designation shall become effective upon publication of a notice in the Federal Register. However, if the Commissioner determines, in the exercise of discretion, that the delay caused by publication would adversely affect the interests of

the United States or the effective enforcement of the immigration laws, the Commissioner's designation shall become effective immediately upon issuance, and shall be published in the Federal Register as soon as practicable thereafter. When these provisions are in effect for aliens who enter without inspection, the burden of proof rests with the alien to affirmatively show that he or she has the required continuous physical presence in the United States. Any absence from the United States shall serve to break the period of continuous physical presence. An alien who was not inspected and admitted or paroled into the United States but who establishes that he or she has been continuously physically present in the United States for the 2-year period immediately prior to the date of determination of inadmissibility shall be detained in accordance with section 235(b)(2) of the Act for a proceeding under section 240 of the Act.

(3) *Additional charges of inadmissibility.* In the expedited removal process, the Service may not charge an alien with any additional grounds of inadmissibility other than section 212(a)(6)(C) or 212(a)(7) of the Act. if an alien appears to be inadmissible under other grounds contained in section 212(a) of the Act, and if the Service wishes to pursue such additional grounds of inadmissibility, the alien shall be detained and referred for a removal hearing before an immigration judge pursuant to sections 235(b)(2) and 240 of the Act for inquiry into all charges. Once the alien is in removal proceedings under section 240 of the Act, the Service is not precluded from lodging additional charges against the alien. Nothing in this paragraph shall preclude the Service from pursuing such additional grounds of inadmissibility against the alien in any subsequent attempt to reenter the United States, provided the additional grounds of inadmissibility still exist.

(4) *Claim of asylum or fear of persecution.* If an alien subject to the expedited removal provisions indicates an intention to apply for asylum, a fear of persecution, or a fear of return to his or her country, the inspecting officer shall, before proceeding further with the case, detain the alien and refer him or her for an interview by an asylum officer in accordance with § 208.30 of this chapter to determine if the alien has a credible fear of persecution. The referring officer shall provide information to the alien concerning the nature and purpose of the credible fear interview and shall advise the alien that he or she may, prior to the interview, consult with a person or person of his or her choosing, at no expense to the Government and without unreasonably delaying the process. Pending the credible fear determination, the alien shall be detained. Parole of such alien in accordance with section 212(d)(5) of the Act may be permitted only when the Attorney General determines, in the exercise of discretion, that parole is required to meet a medical emergency or is necessary for a legitimate law enforcement objective.

(5) *Claim to lawful permanent resident, refugee, or asylee status.* (i) *Verification of status.* If an applicant for admission who is subject to expedited removal pursuant to section 235(b)(1) of the Act claims to have been lawfully admitted for permanent residence, admitted as a refugee under section 207 of the Act, or granted asylum under section 208 of the Act, the immigration officer shall attempt to verify the alien's claim. Such verification shall include a check of all available Service data systems and any other means available to the officer. An alien whose claim to lawful permanent resident, refugee, or asylee status cannot be verified will be advised of the penalties for perjury, and will be placed under oath or allowed to make a declaration as permitted under 28 U.S.C. 1746, concerning his or her lawful admission for permanent residence, admission as a refugee under section 207 of the Act, or grant of asylum status under section 208 of the Act. Whenever practicable, a written statement shall be taken from the alien. The immigration officer shall issue an expedited order of removal under section 235(b)(1)(A)(i) of the Act and refer the alien to the immigration judge for review of the order in accordance with paragraph (b)(5)(iv) of this section and § 235.6(a)(2)(ii).

(ii) *Claimed lawful permanent residents.* If the claim to lawful permanent resident status is verified, and such status has not been terminated in exclusion, deportation, or removal proceedings, the examining immigration officer shall not order the alien removed pursuant to section 235(b)(1) of the Act. The examining immigration officer will determine in accordance with section 101(a)(13)(C) of the Act whether the alien is considered to be making an application for admission. If the alien is determined to be seeking admission and the alien is otherwise admissible, except that he or she is not in possession of the required documentation, a discretionary waiver of documentary requirements may be considered in accordance with section 211(b) of the Act and § 211.1(b)(3) of this chapter or the alien's inspection may be deferred to an onward office for presentation of the required documents. If the alien appears to be inadmissible, the immigration officer may initiate removal proceedings against the alien under section 240 of the Act.

(iii) *Claimed refugees and asylees.* If a check of Service records or other means indicates that the alien has been granted refugee status or asylee status, and such status has not been terminated in deportation, exclusion, or removal proceedings, the immigration officer shall not order the alien removed pursuant to section 235(b)(1) of the Act. If the alien is not in possession of a valid, unexpired refugee travel document, the examining immigration officer may accept an application for a refugee travel document in accordance with § 223.2(b)(2)(ii) of this chapter. If accepted, the immigration officer shall readmit the refugee or asylee in accordance with § 223.3(d)(2)(i) of this chapter. If the alien is determined not to be eligible to file an application for a refugee travel document the immigration officer may initiate removal proceedings against the alien under section 240 of this Act.

(iv) *Review of order for claimed lawful permanent residents, refugees, or asylees.* When an alien whose status has not been verified but who is claiming under oath or under penalty or perjury to be a lawful permanent resident, refugee, or asylee is ordered removed pursuant to section 235(b)(1) of the Act, the case will be referred to an immigration judge for review of the expedited removal order under section 235(b)(1)(C) of the Act and § 235.6(a)(2)(ii). If the immigration judge determines that the alien has never been admitted as a lawful permanent resident or as a refugee, or granted asylum status, the order issued by the immigration officer will be affirmed and the Service will remove the alien. There is no appeal from the decision of the immigration judge. If the immigration judge determines that the alien was once so admitted as a lawful permanent resident or as a refugee, or was granted asylum status, and such status has not been terminated by final administrative action, the immigration judge will terminate proceedings and vacate the expedited removal order. The Service may initiate removal proceedings against such an alien in proceedings under section 240 of the Act. During removal proceedings, the immigration judge may consider any waivers, exceptions, or requests for relief for which the alien is eligible.

(6) *Opportunity for the alien to establish that he or she was admitted or paroled into the United States.* If the Commissioner determines that the

expedited removal provisions of section 235(b)(1) of the Act shall apply to any or all aliens described in paragraph (b)(2)(ii) of this section, such alien will be given a reasonable opportunity to establish to the satisfaction of the examining immigration officer that he or she was admitted or paroled into the United States following inspection at a port-of-entry. The alien will be allowed to present evidence or provide sufficient information to support the claim. Such evidence may consist of documentation in the possession of the alien, the Service, or a third party. The examining immigration officer will consider all such evidence and information, make further inquiry if necessary, and will attempt to verify the alien's status through a check of all available Service data systems. The burden rests with the alien to satisfy the examining immigration officer of the claim of lawful admission or parole. If the alien establishes that he or she was lawfully admitted or paroled, the case will be examined to determine if grounds of deportability under section 237(a) of the Act are applicable, or if paroled, whether such parole has been, or should be, terminated, and whether the alien is inadmissible under section 212(a) of the Act. An alien who cannot satisfy the examining officer that he or she was lawfully admitted or paroled will be ordered removed pursuant to section 235(b)(1) of the Act.

(7) *Review of expedited removal orders.* Any removal order entered by an examining immigration officer pursuant to section 235(b)(1) of the Act must be reviewed and approved by the appropriate supervisor before the order is considered final. Such supervisory review shall not be delegated below the level of the second line supervisor, or a person acting in that capacity. The supervisory review and approval of an expedited removal order for an alien described in section 235(b)(1)(A)(iii) of the Act must include a review of any claim of lawful admission or parole and any evidence or information presented to support such a claim, prior to approval of the order. In such cases, the supervisor may request additional information from any source and may require further interview of the alien.

(8) *Removal procedures relating to expedited removal.* An alien ordered removed pursuant to section 235(b)(1) of the Act shall be removed from the United States in accordance with section 241(c) of the Act and 8 CFR part 241.

(9) *Waivers of documentary requirements.* Nothing in this section limits the discretionary authority of the Attorney General, including authority under sections 211(b) or 212(d) of the Act, to waive the documentary requirements for arriving aliens.

(10) *Applicant for admission under section 217 of the Act.* The provisions of § 235.3(b) do not apply to an applicant for admission under section 217 of the Act.

(c) *Other inadmissible aliens.* Any alien applicant for admission, as included in sections 101(a)(13) and 235(a)(1) of the Act and § 235.1(d) of this chapter, who appears to the inspecting officer to be inadmissible, but who does not fall within paragraph (b) of this section, may be detained, paroled, or paroled for deferred inspection by the inspecting officer. In determining whether or not an alien shall be detained, paroled, or paroled for deferred inspection, the inspecting officer shall consider the likelihood that the alien will abscond or pose a security risk.

(d) *Service custody.* The Service will assume custody of any alien subject to detention under paragraph (b) or (c) of this section. In its discretion, the Service may require any alien who appears inadmissible and who arrives at a land border port-of-entry from Canada or Mexico, to remain in that country while awaiting a removal hearing. Such alien shall be considered detained for a proceeding within the meaning of section 235(b) of the Act and may be ordered removed in absentia by an immigration judge if the alien fails to appear for the hearing.

(e) *Detention in non-Service facility.* Whenever an alien is taken into Service custody and detained at a facility other than at a Service Processing Center, the public or private entities contracted to perform such service shall have been approved for such use by the Service's Jail Inspection Program or shall be performing such service under contract in compliance with the Standard Statement of Work for Contract Detention Facilities. Both programs are administered by the Detention and Deportation section having jurisdiction over the alien's place of detention. Under no circumstances shall an alien be detained in facilities not meeting the four mandatory criteria for usage. These are:

(1) 24-Hour supervision,

(2) Conformance with safety and emergency codes,

(3) Food Service, and

(4) Availability of emergency medical care.

(f) *Privilege of communication.* The mandatory notification requirements of consular and diplomatic officers pursuant to § 236.1(e) of this chapter apply when an inadmissible alien is detained for removal proceedings.

90. Section 235.4 is revised to read as follows:

§ 235.4 Withdrawal of application for admission.

(a) The Attorney General may, in his or her discretion, permit any alien applicant for admission to withdraw his or her application for admission in lieu of removal proceedings under section 240 of the Act or expedited removal under section 235(b)(1) of the Act. The alien's decision to withdraw his or her application for admission must be made voluntarily, but nothing in this section shall be construed as to give an alien the right to withdraw his or her application for admission. Permission to withdraw an application for admission should not normally be granted unless the alien intends and is able to depart the United States immediately. An alien permitted to withdraw his or her application for admission shall normally remain in carrier or Service custody pending departure, unless the district director determines that parole of the alien is warranted in accordance with § 212.5(a) of this chapter.

(b) An immigration judge may allow only an arriving alien to withdraw an application for admission. Once the issue of inadmissibility or deportability has been resolved, permission to withdraw an application for admission should ordinarily be granted only with the concurrence of the Service. An immigration judge shall not allow an alien to withdraw an application for admission unless the alien, in addition to demonstrating that he or she possesses both the intent and the means to depart immediately from the United States, establishes that factors directly relating to the issue of inadmissibility indicate that the granting of the withdrawal would be in the interest of justice. In addition, during the pendency of an appeal from the order of removal, permission to withdraw an application for admission must be obtained from the immigration judge or the Board.

91. Section 235.5 is revised to read as follows:

§ 235.5 Preinspection.

(a) *In United States territories and possessions.* In the case of any aircraft proceeding from Guam, Puerto Rico, or the United States Virgin Islands destined directly and without touching at a foreign port or place, to any other of such places, or to one of the States of the United States or the District of Columbia, the examination of the passengers and crew required by the Act

may be made prior to the departure of the aircraft, and in such event, final determination of admissibility shall be made immediately prior to such departure. The examination shall be conducted in accordance with sections 232, 235, and 240 of the Act and 8 CFR parts 235 and 240. If it appears to the examining immigration officer that any person in the United States being examined under this section is prima facie removable from the United States, further action with respect to his or her examination shall be deferred and further proceedings regarding removability conducted as provided in section 240 of the Act and 8 CFR part 240. When the foregoing inspection procedure is applied to any aircraft, persons examined and found admissible shall be placed aboard the aircraft, or kept at the airport separate and apart from the general public until they are permitted to board the aircraft. No other person shall be permitted to depart on such aircraft until and unless he or she is found to be admissible as provided in this section.

(b) *In foreign territory.* In the case of any aircraft, vessel, or train proceeding directly, without stopping, from a port or place in foreign territory to a port-of-entry in the United States, the examination and inspection of passengers and crew required by the Act and final determination of admissibility may be made prior to such departure at the port or place in the foreign territory and shall have the same effect under the Act as though made at the destined port-of-entry in the United States.

92. Section 235.6 is revised to read as follows:

§ 235.6 Referral to immigration judge.

(a) *Notice.* (1) *Referral by Form I–862, Notice to Appear.* An immigration officer or asylum officer will sign and deliver a Form I–862 to an alien in the following cases:

(i) If, in accordance with the provisions of section 235(b)(2)(A) of the Act, the examining immigration officer detains an alien for a proceeding before an immigration judge under section 240 of the Act; or

(ii) If, in accordance with section 235(b)(1)(B)(ii) of the Act, an asylum officer determines that an alien is expedited removal proceedings has a credible fear of persecution and refers the case to the immigration judge for consideration of the application for asylum.

(iii) If, in accordance with section 235(b)(1)(B)(iii)(III) of the Act, the immigration judge determines that an alien in expedited removal proceedings has a credible fear of persecution and vacates the expedited removal order issued by the asylum officer pursuant to section 235(b)(1)(B)(iii) of the Act.

(iv) If an immigration officer verifies that an alien subject to expedited removal under section 235(b)(1) of the Act has been admitted as a lawful permanent resident refugee, or asylee, or upon review pursuant to § 235.3(b)(5)(iv) an immigration judge determines that the alien was once so admitted, provided that such status has not been terminated by final administrative action, and the Service initiates removal proceedings against the alien under section 240 of the Act.

(2) *Referral by Form I–863, Notice of Referral to Immigration Judge.* An immigration officer will sign and deliver a Form I–863 to an alien in the following cases:

(i) If, in accordance with section 235(b)(1)(B)(iii)(III) of the Act, an asylum officer determines that an alien does not have a credible fear of persecution, and the alien requests a review of that determination by an immigration judge; or

(ii) If, in accordance with section 235(b)(1)(C) of the Act, an immigration officer refers an expedited removal order entered on an alien claiming to be a lawful permanent resident, refugee, or asylee for whom the officer could not verify such status to an immigration judge for review of the order.

(iii) If an immigration officer refers an applicant described in § 208.2(b)(1) of this chapter to an immigration judge for an asylum hearing under § 208.2(b)(2) of this chapter.

(b) *Certification for mental condition; medical appeal.* An alien certified under sections 212(a)(1) and 232(b) of the Act shall be advised by the examining immigration officer that he or she may appeal to a board of medical examiners of the United States Public Health Service pursuant to section 232 of the Act. If such appeal is taken, the district director shall arrange for the convening of the medical board.

§ 235.7 [Removed]

93. Section 235.7 is removed.

§ 235.13 [Redesignated as § 235.7]

94. Section 235.13 is redesignated as § 235.7.

95. Section 235.8 is revised to read as follows:

§ 235.8 Inadmissibility on security and related grounds.

(a) *Report.* When an immigration officer or an immigration judge suspects that an arriving alien appears to be inadmissible under section 212(a)(3)(A) (other than clause (ii), (B), or (C) of the Act, the immigration officer or immigration judge shall order the alien removed and report the action promptly to the district director who has administrative jurisdiction over the place where the alien has arrived or where the hearing is being held. The immigration officer shall, if possible, take a brief sworn question-and-answer statement from the alien, and the alien shall be notified by personal service of Form I–147, Notice of Temporary Inadmissibility, of the action taken and the right to submit a written statement and additional information for consideration by the Attorney General. The district director shall forward the report to the regional director for further action as provided in paragraph (b) of this section.

(b) *Action by regional director.* (1) In accordance with section 235(c)(2)(B) of the Act, the regional director may deny any further inquiry or hearing by an immigration judge and order the alien removed by personal service of Form I–148, Notice of Permanent Inadmissibility, or issue any other order disposing of the case that the regional director considers appropriate.

(2) If the regional director concludes that the case does not meet the criteria contained in section 235(c)(2)(B) of the Act, the regional director may direct that:

(i) An immigration officer shall conduct a further examination of the alien, concerning the alien's admissibility; or,

(ii) The alien's case be referred to an immigration judge for a hearing, or for the continuation of any prior hearing.

(3) The regional director's decision shall be in writing and shall be signed by the regional director. Unless the written decision contains confidential information, the disclosure of which would be prejudicial to the public interest, safety, or security of the United States, the written decision shall be served on the alien. If the written decision contains such confidential information, the alien shall be served with a separate written order showing the disposition of the case, but with the confidential information deleted.

(c) *Finality of decision.* The regional director's decision under this section is final when it is served upon the alien in accordance with paragraph (b)(3) of this section. There is no administrative appeal from the regional director's decision.

(d) *Hearing by immigration judge.* If the regional director directs that an alien subject to removal under this section be given a hearing or further hearing before an immigration judge, the hearing and all further proceedings in

the matter shall be conducted in accordance with the provisions of section 240 of the Act and other applicable sections of the Act to the same extent as though the alien had been referred to an immigration judge by the examining immigration officer. In a case where the immigration judge ordered the alien removed pursuant to paragraph (a) of this section, the Service shall refer the case back to the immigration judge and proceedings shall be automatically reopened upon receipt of the notice of referral. If confidential information, not previously considered in the matter, is presented supporting the inadmissibility of the alien under section 212(a)(3)(A) (other than clause (ii)), (B), or (C) of the Act, the disclosure of which, in the discretion of the immigration judge, may be prejudicial to the public interest, safety, or security, the immigration judge may again order the alien removed under the authority of section 235(c) of the Act and further action shall be taken as provided in this section.

(e) *Nonapplicability.* The provisions of this section shall apply only to arriving aliens, as defined in § 1.1(q) of this chapter. Aliens present in the United States who have not been admitted or paroled may be subject to proceedings under Title V of the Act.

§ 235.9 [Removed]

96. Section 235.9 is removed.

§ 235.12 [Redesignated as § 235.9 and revised]

97. Section 235.12 is redesignated as § 235.9 and is revised to read as follows:

§ 235.9 Northern Marianas identification card.

During the two-year period that ended July 1, 1990, the Service issued Northern Marianas Identification Cards to aliens who acquired United States citizenship when the Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States entered into force on November 3, 1986. These cards remain valid as evidence of United States citizenship. Although the Service no longer issues these cards, a United States citizen to whom a card was issued may file Form I–777, Application for Issuance or Replacement of Northern Marianas Card, to obtain replacement of a lost, stolen, or mutilated Northern Marianas Identification Card.

98. Section 235.10 is revised to read as follows:

§ 235.10 U.S. Citizen Identification Card.

(a) *General.* Form I–197, U.S. Citizen Identification Card, is no longer issued by the Service but valid existing cards will continue to be acceptable documentation of U.S. citizenship. Possession of the identification card is not mandatory for any purpose. A U.S. Citizen Identification Card remains the property of the United States. Because the identification card is no longer issued, there are no provisions for replacements cards.

(b) *Surrender and voidance.* (1) *Institution of proceeding under section 240 or 342 of the Act.* A U.S. Citizen Identification Card must be surrendered provisionally to a Service office upon notification by the district director that a proceeding under section 240 or 342 of the Act is being instituted against the person to whom the card was issued. The card shall be returned to the person if the final order in the proceeding does not result in voiding the card under this paragraph. A U.S. Citizen Identification Card is automatically void if the person to whom it was issued is determined to be an alien in a proceeding conducted under section 240 of the Act, or if a certificate, document, or record relating to that person is canceled under section 342 of the Act.

(2) *Investigation of validity of identification card.* A U.S. Citizen Identification Card must be surrendered provisionally upon notification by a district director that the validity of the card is being investigated. The card shall be returned to the person who surrendered it if the investigation does not result in a determination adverse to his or her claim to be a United States citizen. When an investigation results in a tentative determination adverse to the applicant's claim to be a United States citizen, the applicant shall be notified by certified mail directed to his or her last known address. The notification shall inform the applicant of the basis for the determination and of the intention of the district director to declare the card void unless within 30 days the applicant objects and demands an opportunity to see and rebut the adverse evidence. Any rebuttal, explanation, or evidence presented by the applicant must be included in the record of proceeding. The determination whether the applicant is a United States citizen must be based on the entire record and the applicant shall be notified of the determination. If it is determined that the applicant is not a United States citizen, the applicant shall be notified of the reasons, and the card deemed void. There is no appeal from the district director's decision.

(3) *Admission of alienage.* A U.S. Citizen Identification Card is void if the person to whom it was issued admits in a statement signed before an immigration officer that he or she is an alien and consents to the voidance of the card. Upon signing the statement the card must be surrendered to the immigration officer.

(4) *Surrender of void card.* A void U.S. Citizen Identification Card which has not been returned to the Service must be surrendered without delay to an immigration officer or to the issuing office of the Service.

(c) *U.S. Citizen Identification Card previously issued on Form I–179.* A valid Form I–179, U.S. Citizen Identification Card, continues to be valid subject to the provisions of this section.

99. Section 235.11 is revised to read as follows:

§ 235.11 Admission of conditional permanent residents.

(a) *General.* (1) *Conditional residence based on family relationship.* An alien seeking admission to the United States with an immigrant visa as the spouse or son or daughter of a United States citizen or lawful permanent resident shall be examined to determine whether the conditions of section 216 of the Act apply. If so, the alien shall be admitted conditionally for a period of 2 years. At the time of admission, the alien shall be notified that the alien and his or her petitioning spouse must file a Form I–751, Petition to Remove the Conditions on Residence, within the 90-day period immediately preceding the second anniversary of the alien's admission for permanent residence.

(2) *Conditional residence based on entrepreneurship.* An alien seeking admission to the United States with an immigrant visa as an alien entrepreneur (as defined in section 216A(f)(1) of the Act) or the spouse or unmarried minor child of an alien entrepreneur shall be admitted conditionally for a period of 2 years. At the time of admission, the alien shall be notified that the principal alien (entrepreneur) must file a Form I–829, Petition by Entrepreneur to Remove Conditions, within the 90-day period immediately preceding the second anniversary of the alien's admission for permanent residence.

(b) *Correction of endorsement on immigrant visa.* If the alien is subject to the provisions of section 216 of the Act, but the classification endorsed on the immigrant visa does not so indicate, the endorsement shall be corrected and the alien shall be admitted as a lawful permanent resident on a conditional basis, if otherwise admissible. Conversely, if the alien is not subject to the provisions of section 216 of the Act, but the visa classification endorsed on the immigrant visa indicates that the

alien is subject thereto (e.g., if the second anniversary of the marriage upon which the immigrant visa is based occurred after the issuance of the visa and prior to the alien's application for admission) the endorsement on the visa shall be corrected and the alien shall be admitted as a lawful permanent resident without conditions, if otherwise admissible.

(c) *Expired conditional permanent resident status.* The lawful permanent resident alien status of a conditional resident automatically terminates if the conditional basis of such status is not removed by the Service through approval of a Form I–751, Petition to Remove the Conditions on Residence or, in the case of an alien entrepreneur (as defined in section 216A(f)(1) of the Act), Form I–829, Petition by Entrepreneur to Remove Conditions. Therefore, an alien who is seeking admission as a returning resident subsequent to the second anniversary of the date on which conditional residence was obtained (except as provided in § 211.1(b)(1) of this chapter) and whose conditional basis of such residence has not been removed pursuant to section 216(c) or 216A(c) of the Act, whichever is applicable, shall be placed under removal proceedings. However, in a case where conditional residence was based on a marriage, removal proceedings may be terminated and the alien may be admitted as a returning resident if the required Form I–751 is filed jointly, or by the alien alone (if appropriate), and approved by the Service. In the case of an alien entrepreneur, removal proceedings may be terminated and the alien admitted as a returning resident if the required Form I–829 is filed by the alien entrepreneur and approved by the Service.

100–101. Part 236 is revised to read as follows:

PART 236—APPREHENSION AND DETENTION OF INADMISSIBLE AND DEPORTABLE ALIENS; REMOVAL OF ALIENS ORDERED REMOVED

Subpart A—Detention of Aliens Prior to Order of Removal

Sec.
236.1 Apprehension, custody, and detention.
236.2 Confined aliens, incompetents, and minors.
236.3 Detention and release of juveniles.
236.4 Removal of S–5, S–6, and S–7 nonimmigrants.
236.5 Fingerprints and photographs.

Subpart B—Family Unity Program

236.10 Description of program.
236.11 Definitions.
236.12 Eligibility.
236.13 Ineligible aliens.
236.14 Filing.
236.15 Voluntary departure and eligibility for employment.
236.16 Travel outside the United States.
236.17 Eligibility for Federal financial assistance programs.
236.18 Termination of Family Unity Program benefits.

Authority: 8 U.S.C. 1103, 1182, 1224, 1225, 1226, 1227, 1362; 8 CFR part 2.

Subpart A—Detention of Aliens Prior to Order of Removal

§ 236.1 Apprehension, custody, and detention.

(a) *Detainers.* The issuance of a detainer under this section shall be governed by the provisions of § 287.7 of this chapter.

(b) *Warrant of arrest.* (1) *In general.* At the time of issuance of the notice to appear, or at any time thereafter and up to the time removal proceedings are completed, the respondent may be arrested and taken into custody under the authority of Form I–200, Warrant of Arrest. A warrant of arrest may be issued only by those immigration officers listed in § 287.5(e)(2) of this chapter and may be served only by those immigration officers listed in § 287.5(e)(3) of this chapter.

(2) If, after the issuance of a warrant of arrest, a determination is made not to serve it, any officer authorized to issue such warrant may authorize its cancellation.

(c) *Custody issues and release procedures.* (1) After the expiration of the Transition Period Custody Rules under Pub. L. 104–208, no alien described in section 236(c)(1) of the Act shall be released from custody during removal proceedings except pursuant to section 236(c)(2) of the Act.

(2) Any officer authorized to issue a warrant of arrest may, in the officer's discretion, release an alien not described in section 236(c)(1) of the Act, under the conditions at section 236 (a)(2) and (3) of the Act; *provided* that the alien must demonstrate to the satisfaction of the officer that such release would not pose a danger to property or persons, and that the alien is likely to appear for any future proceeding.

(3) When an alien who, having been arrested and taken into custody, has been released, such release may be revoked at any time in the discretion of the district director, acting district director, deputy district director, assistant district director for investigations, assistant district director for detention and deportation, or officer in charge (except foreign), in which event the alien may be taken into physical custody and detained. If detained, unless a breach has occurred, any outstanding bond shall be revoked and canceled.

(4) The provisions of § 103.6 of this chapter shall apply to any bonds authorized. Subject to the provisions of this section, the provisions of § 3.19 of this chapter shall govern availability to the respondent of recourse to other administrative authority for release from custody.

(5) An immigration judge may not exercise authority provided in this section and the review process described in paragraph (d) of this section shall not apply with respect to:

(i) Inadmissible aliens in removal proceedings,

(ii) Arriving aliens, as described in § 1.1(q) of this chapter, including aliens paroled pursuant to section 212(d)(5) of the Act, in removal proceedings,

(iii) Aliens described in section 237(a)(4) of the Act, or

(iv) After the expiration of section 303(b)(3) of Pub. L. 104–208, aliens described in section 236(c)(1) of the Act.

(d) *Appeals from custody decisions.* (1) *Application to immigration judge.* After an initial custody determination by the district director, including the setting of a bond, the respondent may at any time before an order under 8 CFR part 240 becomes final, request amelioration of the conditions under which he or she may be released. Prior to such final order, and except as otherwise provided in this chapter, the immigration judge is authorized to exercise the authority in section 236 of the Act to detain the alien in custody, release the alien, and determine the amount of bond, if any, under which the respondent may be released, as provided in § 3.19 of this chapter. If the alien has been released from custody, an application for amelioration of the terms of release must be filed within 7 days of release. Once a removal order becomes administratively final, determinations regarding custody and bond are made by the district director.

(2) *Application to the district director.* (i) After expiration of the 7-day period in paragraph (d)(1) of this section, the respondent may request review by the district director of the conditions of his or her release.

(ii) After an order becomes administratively final, the respondent may request review by the district director of the conditions of his or her release.

(3) *Appeal to the Board of Immigration Appeals.* An appeal relating to bond and custody determinations may be filed within 10 days of the decision, to the Board of

Immigration Appeals in the following circumstances:

(i) In accordance with § 3.38 of this chapter, the alien or the Service may appeal the decision of an immigration judge pursuant to paragraph (d)(1) of this section.

(ii) The alien may appeal from the district director's decision under paragraph (d)(2)(i) of this section.

(iii) The alien may appeal from the district director's decision under paragraph (d)(2)(ii) of this section, except that no appeal shall be allowed when the Service notifies the alien that it is ready to execute an order of deportation and takes the alien into custody for that purpose.

(4) *Effect of filing an appeal.* The filing of an appeal from a determination of an immigration judge or district director under this paragraph shall not operate to delay compliance with the order, nor stay the administrative proceedings or removal.

(e) *Privilege of communication.* Every detained alien shall be notified that he or she may communicate with the consular or diplomatic officers of the country of his or her nationality in the United States. Existing treaties with the countries listed below require immediate communication with appropriate consular or diplomatic officers whenever nationals of the following countries are detained in removal proceedings, whether or not requested by the alien and even if the alien requests that no communication be undertaken in his or her behalf. When notifying consular or diplomatic officials, Service officers shall not reveal the fact that any detained alien has applied for asylum or withholding of removal.

Albania [1]
Antigua
Armenia
Azerbaijan
Bahamas
Barbados
Belarus
Belize
Brunei
Bulgaria
China (People's Republic of) [2]
Costa Rica
Cyprus
Czech Republic
Dominica
Fiji
Gambia, The
Georgia
Ghana
Grenada
Guyana
Hungary
Jamaica
Kazakhstan
Kiribati
Kuwait
Kyrgyzstan
Malaysia
Malta
Mauritius
Moldova
Mongolia
Nigeria
Philippines
Poland
Romania
Russian Federation
St. Kitts/Nevis
St. Lucia
St. Vincent/Grenadines
Seychelles
Sierra Leone
Singapore
Slovak Republic
South Korea
Tajikistan
Tanzania
Tonga
Trinidad/Tobago
Turkmenistan
Tuvalu
Ukraine
United Kingdom [3]
U.S.S.R.[4]
Uzbekistan
Zambia

(f) *Notification to Executive Office for Immigration Review of change in custody status.* The Service shall notify the Immigration Court having administrative control over the Record of Proceeding of any change in custody location or of release from, or subsequent taking into, Service custody of a respondent/applicant pursuant to § 3.19(g) of this chapter.

§ 236.2 Confined aliens, incompetents, and minors.

(a) *Service.* If the respondent is confined, or if he or she is an incompetent, or a minor under the age of 14, the notice to appear, and the warrant of arrest, if issued, shall be served in the manner prescribed in § 239.1 of this chapter upon the person or persons specified by § 103.5a(c) of this chapter.

(b) *Service custody and cost of maintenance.* An alien confined because of physical or mental disability in an institution or hospital shall not be accepted into physical custody by the Service until an order of removal has been entered and the Service is ready to remove the alien. When such an alien is an inmate of a public or private institution at the time of the commencement of the removal proceedings, expenses for the maintenance of the alien shall not be incurred by the Government until he or she is taken into physical custody by the Service.

§ 236.3 Detention and release of juveniles.

(a) *Juveniles.* A juvenile is defined as an alien under the age of 18 years.

(b) *Release.* Juveniles for whom bond has been posted, for whom parole has been authorized, or who have been ordered released on recognizance, shall be released pursuant to the following guidelines:

(1) Juveniles shall be released, in order of preference, to:

(i) A parent;

(ii) Legal guardian; or

(iii) An adult relative (brother, sister, aunt, uncle, grandparent) who is not presently in Service detention, unless a determination is made that the detention of such juvenile is required to secure his or her timely appearance before the Service or the Immigration Court or to ensure the juvenile's safety or that of others. In cases where the parent, legal guardian, or adult relative resides at a location distant from where the juvenile is detained, he or she may secure release at a Service office located near the parent, legal guardian, or adult relative.

(2) If an individual specified in paragraphs (b)(1) (i) through (iii) of this section cannot be located to accept custody of a juvenile, and the juvenile has identified a parent, legal guardian, or adult relative in Service detention, simultaneous release of the juvenile and the parent, legal guardian, or adult relative shall be evaluated on a discretionary case-by-case basis.

(3) In cases where the parent or legal guardian is in Service detention or outside the United States, the juvenile may be released to such person as is designated by the parent or legal guardian in a sworn affidavit, executed before an immigration officer or consular officer, as capable and willing to care for the juvenile's well-being. Such person must execute an agreement

[1] Arrangements with these countries provide that U.S. authorities shall notify responsible representatives within 72 hours of the arrest or detention of one of their nationals.

[2] When Taiwan nationals (who carry ''Republic of China'' passports) are detained, notification should be made to the nearest office of the Taiwan Economic and Cultural Representative's Office, the unofficial entity representing Taiwan's interests in the United States.

[3] British dependencies are also covered by this agreement. They are: Anguilla, British Virgin Islands, Hong Kong, Bermuda, Montserrat, and the Turks and Caicos Islands. Their residents carry British passports.

[4] All U.S.S.R. successor states are covered by this agreement. They are: Armenia, Azerbaijan, Belarus, Georgia, Kazakhstan, Kyrgyzstan, Moldova, Russian Federation, Tajikistan, Turkmenistan, Ukraine, and Uzbekistan.

to care for the juvenile and to ensure the juvenile's presence at all future proceedings before the Service or an immigration judge.

(4) In unusual and compelling circumstances and in the discretion of the district director or chief patrol agent, a juvenile may be released to an adult, other than those identified in paragraphs (b)(1) (i) through (iii) of this section, who executes an agreement to care for the juvenile's well-being and to ensure the juvenile's presence at all future proceedings before the Service or an immigration judge.

(c) *Juvenile coordinator.* The case of a juvenile for whom detention is determined to be necessary should be referred to the ''Juvenile Coordinator,'' whose responsibilities should include, but not be limited to, finding suitable placement of the juvenile in a facility designated for the occupancy of juveniles. These may include juvenile facilities contracted by the Service, state or local juvenile facilities, or other appropriate agencies authorized to accommodate juveniles by the laws of the state or locality.

(d) *Detention.* In the case of a juvenile for whom detention is determined to be necessary, for such interim period of time as is required to locate suitable placement for the juvenile, whether such placement is under paragraph (b) or (c) of this section, the juvenile may be temporarily held by Service authorities or placed in any Service detention facility having separate accommodations for juveniles.

(e) *Refusal of release.* If a parent of a juvenile detained by the Service can be located, and is otherwise suitable to receive custody of the juvenile, and the juvenile indicates a refusal to be released to his or her parent, the parent(s) shall be notified of the juvenile's refusal to be released to the parent(s), and shall be afforded an opportunity to present their views to the district director, chief patrol agent, or immigration judge before a custody determination is made.

(f) *Notice to parent of application for relief.* If a juvenile seeks release from detention, voluntary departure, parole, or any form of relief from removal, where it appears that the grant of such relief may effectively terminate some interest inherent in the parent-child relationship and/or the juvenile's rights and interests are adverse with those of the parent, and the parent is presently residing in the United States, the parent shall be given notice of the juvenile's application for relief, and shall be afforded an opportunity to present his or her views and assert his or her interest to the district director or immigration judge before a determination is made as to the merits of the request for relief.

(g) *Voluntary departure.* Each juvenile, apprehended in the immediate vicinity of the border, who resides permanently in Mexico or Canada, shall be informed, prior to presentation of the voluntary departure form or being allowed to withdraw his or her application for admission, that he or she may make a telephone call to a parent, close relative, a friend, or to an organization found on the free legal services list. A juvenile who does not reside in Mexico or Canada who is apprehended shall be provided access to a telephone and must in fact communicate either with a parent, adult relative, friend, or with an organization found on the free legal services list prior to presentation of the voluntary departure form. If such juvenile, of his or her own volition, asks to contact a consular officer, and does in fact make such contact, the requirements of this section are satisfied.

(h) *Notice and request for disposition.* When a juvenile alien is apprehended, he or she must be given a Form I–770, Notice of Rights and Disposition. If the juvenile is less than 14 years of age or unable to understand the notice, the notice shall be read and explained to the juvenile in a language he or she understands. In the event a juvenile who has requested a hearing pursuant to the notice subsequently decides to accept voluntary departure or is allowed to withdraw his or her application for admission, a new Form I–770 shall be given to, and signed by the juvenile.

§ 236.4 Removal of S–5, S–6, and S–7 nonimmigrants.

(a) *Condition of classification.* As a condition of classification and continued stay in classification pursuant to section 101(a)(15)(S) of the Act, nonimmigrants in S classification must have executed Form I–854, Part B, Inter-agency Alien Witness and Informant Record, certifying that they have knowingly waived their right to a removal hearing and right to contest, other than on the basis of an application for withholding of deportation or removal, any removal action, including detention pending deportation or removal, instituted before lawful permanent resident status is obtained.

(b) *Determination of deportability.* (1) A determination to remove a deportable alien classified pursuant to section 101(a)(15)(S) of the Act shall be made by the district director having jurisdiction over the place where the alien is located.

(2) A determination to remove such a deportable alien shall be based on one or more of the grounds of deportability listed in section 237 of the Act based on conduct committed after, or conduct or a condition not disclosed to the Service prior to, the alien's classification as an S nonimmigrant under section 101(a)(15)(S) of the Act, or for a violation of, or failure to adhere to, the particular terms and conditions of status in S nonimmigrant classification.

(c) *Removal procedures.* (1) A district director who determines to remove an alien witness or informant in S nonimmigrant classification shall notify the Commissioner, the Assistant Attorney General, Criminal Division, and the relevant law enforcement agency in writing to that effect. The Assistant Attorney General, Criminal Division, shall concur in or object to that decision. Unless the Assistant Attorney General, Criminal Division, objects within 7 days, he or she shall be deemed to have concurred in the decision. In the event of an objection by the Assistant Attorney General, Criminal Division, the matter will be expeditiously referred to the Deputy Attorney General for a final resolution. In no circumstances shall the alien or the relevant law enforcement agency have a right of appeal from any decision to remove.

(2) A district director who has provided notice as set forth in paragraph (c)(1) of this section and who has been advised by the Commissioner that the Assistant Attorney General, Criminal Division, has not objected shall issue a Warrant of Removal. The alien shall immediately be arrested and taken into custody by the district director initiating the removal. An alien classified under the provisions of section 101(a)(15)(S) of the Act who is determined, pursuant to a warrant issued by a district director, to be deportable from the United States shall be removed from the United States to his or her country of nationality or last residence. The agency that requested the alien's presence in the United States shall ensure departure from the United States and so inform the district director in whose jurisdiction the alien has last resided. The district director, if necessary, shall oversee the alien's departure from the United States and, in any event, shall notify the Commissioner of the alien's departure.

(d) *Withholding of removal.* An alien classified pursuant to section 101(a)(15)(S) of the Act who applies for withholding of removal shall have 10 days from the date the Warrant of Removal is served upon the alien to file an application for such relief with the

district director initiating the removal order. The procedures contained in §§ 208.2 and 208.16 of this chapter shall apply to such an alien who applies for withholding of removal.

(e) *Inadmissibility.* An alien who applies for admission under the provisions of section 101(a)(15)(S) of the Act who is determined by an immigration officer not to be eligible for admission under that section or to be inadmissible to the United States under one or more of the grounds of inadmissibility listed in section 212 of the Act and which have not been previously waived by the Commissioner will be taken into custody. The district director having jurisdiction over the port-of-entry shall follow the notification procedures specified in paragraph (c)(1) of this section. A district director who has provided such notice and who has been advised by the Commissioner that the Assistant Attorney General, Criminal Division, has not objected shall remove the alien without further hearing. An alien may not contest such removal, other than by applying for withholding of removal.

§ 236.5 Fingerprints and photographs.

Every alien 14 years of age or older against whom proceedings based on deportability under section 237 of the Act are commenced under this part by service of a notice to appear shall be fingerprinted and photographed. Such fingerprints and photographs shall be made available to Federal, State, and local law enforcement agencies upon request to the district director or chief patrol agent having jurisdiction over the alien's record. Any such alien, regardless of his or her age, shall be photographed and/or fingerprinted if required by any immigration officer authorized to issue a notice to appear. Every alien 14 years of age or older who is found to be inadmissible to the United States and ordered removed by an immigration judge shall be fingerprinted, unless during the preceding year he or she has been fingerprinted at an American consular office.

§§ 236.6–236.9 [Reserved]

Subpart B—Family Unity Program

§ 236.10 Description of program.

The family unity program implements the provisions of section 301 of the Immigration Act of 1990, Pub. L. 101–649. This Act is referred to in this section as ''IMMACT 90''.

§ 236.11 Definitions.

In this subpart, the term:

Eligible immigrant means a qualified immigrant who is the spouse or unmarried child of a legalized alien.

Legalized alien means an alien who:

(1) Is a temporary or permanent resident under section 210 or 245A of the Act; or

(2) Is a permanent resident under section 202 of the Immigration Reform and Control Act of 1986 (Cuban/Haitian Adjustment).

§ 236.12 Eligibility.

(a) *General.* An alien who is not a lawful permanent resident is eligible to apply for benefits under the Family Unity Program if he or she establishes:

(1) That he or she entered the United States before May 5, 1988 (in the case of a relationship to a legalized alien described in subsection (b)(2)(B) or (b)(2)(C) of section 301 of IMMACT 90), or as of December 1, 1988 (in the case of a relationship to a legalized alien described in subsection (b)(2)(A) of section 301 of IMMACT 90), and has been continuously residing in the United States since that date; and

(2) That on May 5, 1988 (in the case of a relationship to a legalized alien described in subsection (b)(2)(B) or (b)(2)(C) of section 301 of IMMACT 90), or as of December 1, 1988 (in the case of a relationship to a legalized alien described in subsection (b)(2)(A) of section 301 of IMMACT 90), he or she was the spouse or unmarried child of a legalized alien, and that he or she has been eligible continuously since that time for family-sponsored second preference immigrant status under section 203(a)(2) of the Act based on the same relationship.

(b) *Legalization application pending as of May 5, 1988 or December 1, 1988.* An alien whose legalization application was filed on or before May 5, 1988 (in the case of a relationship to a legalized alien described in subsection (b)(2)(B) or (b)(2)(C) of section 301 of IMMACT 90), or as of December 1, 1988 (in the case of a relationship to a legalized alien described in subsection (b)(2)(A) of section 301 of IMMACT 90), but not approved until after that date will be treated as having been a legalized alien as of May 5, 1988 (in the case of a relationship to a legalized alien described in subsection (b)(2)(B) or (b)(2)(C) of section 301 of IMMACT 90), or as of December 1, 1988 (in the case of a relationship to a legalized alien described in subsection (b)(2)(A) of section 301 of IMMACT 90), for purposes of the Family Unity Program.

§ 236.13 Ineligible aliens.

The following categories of aliens are ineligible for benefits under the Family Unity Program:

(a) An alien who is deportable under any paragraph in section 237(a) of the Act, except paragraphs (1)(A), (1)(B), (1)(C), and (3)(A); provided that an alien who is deportable under section 237(a)(1)(A) of such Act is also ineligible for benefits under the Family Unity Program if deportability is based upon a ground of inadmissibility described in section 212(a) (2) or (3) of the Act;

(b) An alien who has been convicted of a felony or three or more misdemeanors in the United States; or

(c) An alien described in section 241(b)(3)(B) of the Act.

§ 236.14 Filing.

(a) *General.* An application for voluntary departure under the Family Unity Program must be filed at the service center having jurisdiction over the alien's place of residence. A Form I–817, Application for Voluntary Departure under the Family Unity Program, must be filed with the correct fee required in § 103.7(b)(1) of this chapter and the required supporting documentation. A separate application with appropriate fee and documentation must be filed for each person claiming eligibility.

(b) *Decision.* The service center director has sole jurisdiction to adjudicate an application for benefits under the Family Unity Program. The director will provide the applicant with specific reasons for any decision to deny an application. Denial of an application may not be appealed. An applicant who believes that the grounds for denial have been overcome may submit another application with the appropriate fee and documentation.

(c) *Referral of denied cases for consideration of issuance of notice to appear.* If an application is denied, the case will be referred to the district director with jurisdiction over the alien's place of residence for consideration of whether to issue a notice to appear. After an initial denial, an applicant's case will not be referred for issuance of a notice to appear until 90 days from the date of the initial denial, to allow the alien the opportunity to file a new Form I–817 application in order to attempt to overcome the basis of the denial. However, if the applicant is found not to be eligible for benefits under § 236.13(b), the Service reserves the right to issue a notice to appear at any time after the initial denial.

§ 236.15 Voluntary departure and eligibility for employment.

(a) *Authority.* Voluntary departure under this section implements the provisions of section 301 of IMMACT 90, and authority to grant voluntary departure under the family unity program derives solely from that section. Voluntary departure under the family unity program shall be governed solely by this section, notwithstanding the provisions of section 240B of the Act and 8 CFR part 240.

(b) *Children of legalized aliens.* Children of legalized aliens residing in the United States, who were born during an authorized absence from the United States of mothers who are currently residing in the United States under voluntary departure pursuant to the Family Unity Program, may be granted voluntary departure under section 301 of IMMACT 90 for a period of 2 years.

(c) *Duration of voluntary departure.* An alien whose application for benefits under the Family Unity Program is approved will receive voluntary departure for 2 years, commencing with the date of approval of the application. Voluntary departure under this section shall be considered effective from the date on which the application was properly filed.

(d) *Employment authorization.* An alien granted benefits under the Family Unity Program is authorized to be employed in the United States and may apply for an employment authorization document on Form I–765, Application for Employment Authorization. The application may be filed concurrently with Form I–817. The application must be accompanied by the correct fee required by § 103.7(b)(1) of this chapter. The validity period of the employment authorization will coincide with the period of voluntary departure.

(e) *Extension of voluntary departure.* An application for an extension of voluntary departure under the Family Unity Program must be filed by the alien on Form I–817 along with the correct fee required in § 103.7(b)(1) of this chapter and the required supporting documentation. The submission of a copy of the previous approval notice will assist in shortening the processing time. An extension may be granted if the alien continues to be eligible for benefits under the Family Unity Program. However, an extension may not be approved if the legalized alien is a lawful permanent resident, and a petition for family-sponsored immigrant status has not been filed in behalf of the applicant. In such case the Service will notify the alien of the reason for the denial and afford him or her the opportunity to file another Form I–817 once the petition, Form I–130, has been filed in behalf of him or her. No charging document will be issued for a period of 90 days.

(f) *Supporting documentation for extension application.* Supporting documentation need not include documentation provided with the previous application(s). The extension application need only include changes to previous applications and evidence of continuing eligibility since the date of the prior approval.

§ 236.16 Travel outside the United States.

An alien granted Family Unity Program benefits who intends to travel outside the United States temporarily must apply for advance authorization using Form I–131, Application for Travel Document. The authority to grant an application for advance authorization for an alien granted Family Unity Program benefits rests soley with the district director. An alien who is granted advance authorization and returns to the United States in accordance with such authorization, and who is found not to be inadmissible under section 212(a) (2) or (3) of the Act, shall be inspected and admitted in the same immigration status as the alien had at the time of departure, and shall be provided the remainder of the voluntary departure period previously granted under the Family Unity Program.

§ 236.17 Eligibility for Federal financial assistance programs.

An alien granted Family Unity Program benefits based on a relationship to a legalized alien as defined in § 236.11 is ineligible for public welfare assistance in the same manner and for the same period as the legalized alien who is ineligible for such assistance under section 245A(h) or 210(f) of the Act, respectively.

§ 236.18 Termination of Family Unity Program benefits.

(a) *Grounds of termination.* The Service may terminate benefits under the Family Unity Program whenever the necessity for the termination comes to the attention of the Service. Such grounds will exist in situations including, but not limited to, those in which:

(1) A determination is made that Family Unity Program benefits were acquired as the result of fraud or willful misrepresentation of a material fact;

(2) The beneficiary commits an act or acts which render him or her inadmissible as an immigrant or who are ineligible for benefits under the Family Unity Program;

(3) The legalized alien upon whose status benefits under the Family Unity Program were based loses his or her legalized status;

(4) The beneficiary is the subject of a final order of exclusion, deportation, or removal issued subsequent to the grant of Family Unity benefits unless such final order is based on entry without inspection; violation of status; or failure to comply with section 265 of the Act; or inadmissibility at the time of entry other than inadmissibility pursuant to section 212(a)(2) or 212(a)(3) of the Act, regardless of whether the facts giving rise to such ground occurred before or after the benefits were granted; or

(5) A qualifying relationship to a legalized alien no longer exists.

(b) *Notice procedure.* Notice of intent to terminate and of the grounds thereof shall be served pursuant to the provisions of § 103.5a of this chapter. The alien shall be given 30 days to respond to the notice and may submit to the Service additional evidence in rebuttal. Any final decision of termination shall also be served pursuant to the provisions of § 103.5a of this chapter. Nothing in this section shall preclude the Service from commencing exclusion or deportation proceedings prior to termination of Family Unity Program benefits.

(c) *Effect of termination.* Termination of benefits under the Family Unity Program, other than as a result of a final order of removal, shall render the alien amenable to removal proceedings under section 240 of the Act. If benefits are terminated, the period of voluntary departure under this section is also terminated.

PART 237—[REMOVED AND RESERVED]

102. Part 237 is removed and reserved.

103. Part 238 is added to read as follows:

PART 238—EXPEDITED REMOVAL OF AGGRAVATED FELONS

§ 238.1 Proceedings under section 238(b) of the Act.

(a) *Definitions.* As used in this part:

Deciding Service officer means a district director, chief patrol agent, or another immigration officer designated by a district director or chief patrol agent, who is not the same person as the issuing Service officer.

Issuing Service officer means any Service officer listed in § 239.1 of this chapter as authorized to issue notices to appear.

(b) *Preliminary consideration and Notice of Intent to Issue a Final*

Administrative Deportation Order; commencement of proceedings. (1) *Basis of Service charge.* An issuing Service officer shall cause to be served upon an alien a Form I–851, Notice of Intent to Issue a Final Administrative Deportation Order (Notice of Intent), if the officer is satisfied that there is sufficient evidence, based upon questioning of the alien by an immigration officer and upon any other evidence obtained, to support a finding that the individual:

(i) Is an alien;

(ii) Has not been lawfully admitted for permanent residence, or has conditional permanent resident status under section 216 of the Act;

(iii) Has been convicted (as defined in section 101(a)(48) of the Act and as demonstrated by any of the documents or records listed in § 3.41 of this chapter) of an aggravated felony and such conviction has become final; and

(iv) Is deportable under section 237(a)(2)(A)(iii) of the Act, including an alien who has neither been admitted nor paroled, but who is conclusively presumed deportable under section 237(a)(2)(A)(iii) by operation of section 238(c) of the Act (''Presumption of Deportability'').

(2) *Notice.* (i) Removal proceedings under section 238(b) of the Act shall commence upon personal service of the Notice of Intent upon the alien, as prescribed by §§ 103.5a(a)(2) and 103.5a(c)(2) of this chapter. The Notice of Intent shall set forth the preliminary determinations and inform the alien of the Service's intention to issue a Form I–851A, Final Administrative Removal Order, without a hearing before an immigration judge. This Notice shall constitute the charging document. The Notice of Intent shall include allegations of fact and conclusions of law. It shall advise that the alien: has the privilege of being represented, at no expense to the Government, by counsel of the alien's choosing, as long as counsel is authorized to practice in deportation proceedings; may inspect the evidence supporting the Notice of Intent; and may rebut the charges within 10 calendar days after service of such Notice (or 13 calendar days if service of the Notice was by mail).

(ii) The Notice of Intent also shall advise the alien that he or she may designate in writing, within the rebuttal period, the country to which he or she chooses to be deported in accordance with section 241 of the Act, in the event that a Final Administrative Removal Order is issued, and that the Service will honor such designation only to the extent permitted under the terms, limitations, and conditions of section 241 of the Act.

(iii) The Service must determine that the person served with the Notice of Intent is the person named on the Notice.

(iv) The Service shall provide the alien with a list of available free legal services programs qualified under 8 CFR part 3 and organizations recognized pursuant to 8 CFR part 292, located within the district or sector where the Notice of Intent is issued.

(v) The Service must either provide the alien with a written translation of the Notice of Intent or explain the contents of the Notice of Intent to the alien in the alien's native language or in a language that the alien understands.

(c) *Alien's response.* (1) *Time for response.* The alien will have 10 calendar days from service of the Notice of Intent, or 13 calendar days if service is by mail, to file a response to the Notice of Intent. In the response, the alien may: designate his or her choice of country for removal; submit a written response rebutting the allegations supporting the charge and/or requesting the opportunity to review the Government's evidence; and/or request in writing an extension of time for response, stating the specific reasons why such an extension is necessary. Alternatively, the alien may, in writing, choose to accept immediate issuance of a Final Administrative Removal Order. The deciding Service officer may extend the time for response for good cause shown. A request for extension of time for response will not automatically extend the period for the response. The alien will be permitted to file a response outside the prescribed period only if the deciding Service officer permits it. The alien must send the response to the deciding Service officer at the address provided in the Notice of Intent.

(2) *Nature of rebuttal or request to review evidence.* (i) If an alien chooses to rebut the allegations contained in the Notice of Intent, the alien's written response must indicate which finding(s) are being challenged and should be accompanied by affidavit(s), documentary information, or other specific evidence supporting the challenge.

(ii) If an alien's written response requests the opportunity to review the Government's evidence, the Service shall serve the alien with a copy of the evidence in the record of proceeding upon which the Service is relying to support the charge. The alien may, within 10 calendar days following service of the Government's evidence (13 calendar days if service is by mail), furnish a final response in accordance with paragraph (c)(1) of this section. If the alien's final response is a rebuttal of the allegations, such a final response should be accompanied by affidavit(s), documentary information, or other specific evidence supporting the challenge.

(d) *Determination by deciding Service officer.* (1) *No response submitted or concession of deportability.* If the deciding Service officer does not receive a timely response and the evidence in the record of processing establishes deportability by clear, convincing, and unequivocal evidence, or if the alien concedes deportability, then the deciding Service officer shall issue and cause to be served upon the alien a Final Administrative Removal Order that states the reasons for the deportation decision. The alien may, in writing, knowingly and voluntarily waive the 14-day waiting period before execution of the final order of removal provided in a paragraph (f) of this section.

(2) *Response submitted.* (i) *Insufficient rebuttal; no genuine issue of material fact.* If the alien timely submits a rebuttal to the allegations, but the deciding Service officer finds that deportability is established by clear, convincing, and unequivocal evidence in the record of proceeding, the deciding Service officer shall issue and cause to be served upon the alien a Final Administrative Removal Order that states the reasons for the decision of deportability.

(ii) *Additional evidence required.* (A) If the deciding Service officer finds that the record of proceeding, including the alien's timely rebuttal, raises a genuine issue of material fact regarding the preliminary findings, the deciding Service officer may either obtain additional evidence from any source, including the alien, or cause to be issued a notice to appear to initiate removal proceedings under section 240 of the Act. The deciding Service officer may also obtain additional evidence from any source, including the alien, if the deciding Service officer deems that such additional evidence may aid the officer in the rendering of a decision.

(B) If the deciding Service officer considers additional evidence from a source other than the alien, that evidence shall be made a part of the record of proceeding, and shall be provided to the alien. If the alien elects to submit a response to such additional evidence, such response must be filed with the Service within 10 calendar days of service of the additional evidence (or 13 calendar days if service is by mail). If the deciding Service officer finds, after considering all

additional evidence, that deportability is established by clear, convincing, and unequivocal evidence in the record of proceeding, the deciding Service officer shall issue and cause to be served upon the alien a Final Administrative Deportation Order that states the reasons for the decision of deportability.

(iii) *Conversion to proceedings under section 240 of the Act.* If the deciding Service officer finds that the alien is not amenable to removal under section 238 of the Act, the deciding Service officer shall terminate the expedited proceedings under section 238 of the Act and shall, where appropriate, cause to be issued a notice to appear for the purpose of initiating removal proceedings before an immigration judge under section 240 of the Act.

(3) *Termination of proceedings by deciding Service officer.* Only the deciding Service officer may terminate proceedings under section 238 of the Act, in accordance with this section.

(e) *Proceedings commenced under section 240 of the Act.* In any proceeding commenced under section 240 of the Act which is based on deportability under section 237 of the Act, if it appears that the respondent alien is subject to removal pursuant to section 238 of the Act, the immigration judge may, upon the Service's request, terminate the case and, upon such termination, the Service may commence administrative proceedings under section 238 of the Act. However, in the absence of any such request, the immigration judge shall complete the proceeding commenced under section 240 of the Act.

(f) *Executing final removal order of deciding Service officer.* (1) *Time of execution.* Upon the issuance of a Final Administrative Removal Order, the Service shall issue a Warrant of Removal in accordance with § 241.2 of this chapter; such warrant shall be executed no sooner than 14 calendar days after the date the Final Administrative Removal Order is issued, unless the alien knowingly, voluntarily, and in writing waives the 14-day period.

(2) *Country to which alien is to be removed.* The deciding Service officer shall designate the country of removal in the manner prescribed by section 241 of the Act.

(g) *Arrest and detention.* At the time of issuance of a Notice of Intent or at any time thereafter and up to the time the alien becomes the subject of a Warrant of Removal, the alien may be arrested and taken into custody under the authority of a Warrant of Arrest issued by an officer listed in § 287.5(e)(2) of this chapter. The decision of the Service concerning custody or bond shall not be administratively appealable during proceedings initiated under section 238 of the Act and this part.

(h) *Record of proceeding.* The Service shall maintain a record of proceeding for judicial review of the Final Administrative Removal Order sought by any petition for review. The record of proceeding shall include, but not necessarily be limited to: the charging document (Notice of Intent); the Final Administrative Removal Order (including any supplemental memorandum of decision); the alien's response, if any; all evidence in support of the charge; and any admissible evidence, briefs, or documents submitted by either party respecting deportability. The executed duplicate of the Notice of Intent in the record of proceedings shall be retained as evidence that the individual upon whom the notice for the proceeding was served was, in fact, the alien named in the notice.

Authority: 8 U.S.C. 1228; 8 CFR part 2.

104. Part 239 is added to read as follows:

PART 239—INITIATION OF REMOVAL PROCEEDINGS

Sec.
239.1 Notice to appear.
239.2 Cancellation of notice to appear.
239.3 Effect of filing notice to appear.

Authority: 8 U.S.C. 1103, 1221, 1229; 8 CFR part 2.

§ 239.1 Notice to appear.

(a) *Commencement.* Every removal proceeding conducted under section 240 of the Act to determine the deportability or inadmissibility of an alien is commenced by the filing of a notice to appear with the Immigration Court. Any immigration officer performing an inspection of an arriving alien at a port-of-entry may issue a notice to appear to such an alien. In addition, the following officers, or officers acting in such capacity, may issue a notice to appear:

(1) District directors (except foreign);

(2) Deputy district directors (except foreign);

(3) Assistant district directors for investigations;

(4) Deputy assistant district directors for investigations;

(5) Assistant district directors for deportation;

(6) Deputy assistant district directors for deportation;

(7) Assistant district directors for examinations;

(8) Deputy assistant district directors for examinations;

(9) Officers in charge (except foreign);

(10) Assistant officers in charge (except foreign);

(11) Chief patrol agents;

(12) Deputy chief patrol agents;

(13) Associate chief patrol agents;

(14) Assistant chief patrol agents;

(15) Patrol agents in charge;

(16) The Assistant Commissioner, Investigations;

(17) Service center directors;

(18) Deputy center directors;

(19) Assistant center directors for examinations;

(20) Supervisory asylum officers; or

(21) Institutional Hearing Program directors.

(b) *Service of notice to appear.* Service of the notice to appear shall be in accordance with section 239 of the Act.

§ 239.2 Cancellation of notice to appear.

(a) Any officer authorized by § 239.1(a) to issue a notice to appear may cancel such notice prior to jurisdiction vesting with the immigration judge pursuant to § 3.14 of this chapter provided the officer is satisfied that:

(1) The respondent is a national of the United States;

(2) The respondent is not deportable or inadmissable under immigration laws;

(3) The respondent is deceased;

(4) The respondent is not in the United States;

(5) The notice was issued for the respondent's failure to file a timely petition as required by section 216(c) of the Act, but his or her failure to file a timely petition was excused in accordance with section 216(d)(2)(B) of the Act; or

(6) The notice to appear was improvidently issued.

(b) A notice to appear issued pursuant to section 235(b)(3) of the Act may be canceled under provisions in paragraphs (a)(2) and (a)(6) of this section only by the issuing officer, unless it is impracticable for the issuing officer to cancel the notice.

(c) *Motion to dismiss.* After commencement of proceedings pursuant to § 3.14 of this chapter, any officer enumerated in paragraph (a) of this section may move for dismissal of the matter on the grounds set out under paragraph (a) of this section. Dismissal of the matter shall be without prejudice to the alien or the Service.

(d) *Motion for remand.* After commencement of the hearing, any officer enumerated in paragraph (a) of this section may move for remand of the

matter to district jurisdiction on the ground that the foreign relations of the United States are involved and require further consideration. Remand of the matter shall be without prejudice to the alien or the Service.

(e) *Warrant of arrest.* When a notice to appear is canceled or proceedings are terminated under this section any outstanding warrant of arrest is canceled.

(f) *Termination of removal proceedings by immigration judge.* An immigration judge may terminate removal proceedings to permit the alien to proceed to a final hearing on a pending application or petition for naturalization when the alien has established prima facie eligibility for naturalization and the matter involves exceptionally appealing or humanitarian factors; in every other case, the removal hearing shall be completely as promptly as possible notwithstanding the pendency of an application for naturalization during any state of the proceedings.

§ 239.3 Effect of filing notice to appear.

The filing of a notice to appear shall have no effect in determining periods of unlawful presence as defined in section 212(a)(9)(B) of the Act.

§§ 240.1–240.20 Redesignated as §§ 244.3–244.22]

105. Sections 240.1 through 240.20 are redesignated as §§ 244.3 through 244.22.

106. Part 240 is revised to read as follows:

PART 240—PROCEEDINGS TO DETERMINE REMOVABILITY OF ALIENS IN THE UNITED STATES

Subpart A—Removal Proceedings

Sec.
240.1 Immigration judges.
240.2 Attorney for the Service.
240.3 Representation by counsel.
240.4 Incompetent respondents.
240.5 Interpreter.
240.6 Postponement and adjournment of hearing.
240.7 Evidence in removal proceedings under section 240 of the Act.
240.8 Burdens of proof in removal proceedings.
240.9 Contents of record.
240.10 Hearing.
240.11 Ancillary matters, applications.
240.12 Decision of the immigration judge.
240.13 Notice of decision.
240.14 Finality of order.
240.15 Appeals.
240.16 Application of new procedures or termination of proceedings in old proceedings pursuant to section 309(c) of Pub. L. 104–208.

Subpart B—Cancellation of Removal

240.20 Cancellation of removal and adjustment of status under section 240A(a) and 240A(b) of the Act

Subpart C—Voluntary Depature

240.25 Voluntary departure—authority of the Service.
240.26 Voluntary departure—authority of the Executive Office for Immigration Review.

Subpart D—Exclusion of aliens (for proceedings commenced prior to April 1, 1997)

240.30 Proceedings prior to April 1, 1997.
240.31 Authority of immigration judges.
240.32 Hearing.
240.33 Applications for asylum or withholding of deportation.
240.34 Renewal of application for adjustment of status under section 245 of the Act.
240.35 Decision of the immigration judge; notice of the applicant.
240.36 Finality of order.
240.37 Appeals.
240.38 Fingerprinting of excluded aliens.
240.39 Reopening or reconsideration.

Subpart E—Proceedings to determine deportability of aliens in the United States: Hearing and Appeal (for proceedings commenced prior to April 1, 1997)

240.40 Proceedings commenced prior to April 1, 1997.
240.41 Immigration judges.
240.42 Representation by counsel.
240.43 Incompetent respondents.
240.44 Interpreter.
240.45 Postponement and adjournment of hearing.
240.46 Evidence.
240.47 Contents of record.
240.48 Hearing.
240.49 Ancillary matters, applications.
240.50 Decision of the immigration judge.
240.51 Notice of decision.
240.52 Finality of order.
240.53 Appeals.
240.54 Proceedings under section 242(f) of the Act.

Subpart F—Suspension of deportation and voluntary departure (for proceedings commenced prior to April 1, 1997)

240.55 Proceedings commenced prior to April 1, 1997.
240.56 Application.
240.57 Extension of time to depart.

Subpart G—Civil penalties for failure to depart [Reserved]

Authority: 8 U.S.C. 1103; 1182, 1186a, 1224, 1225, 1226, 1227, 1251, 1252 note, 1252a, 1252b, 1362; 8 CFR part 2.

Subpart A—Removal Proceedings

§ 240.1 Immigration judges.

(a) *Authority:* In any removal proceeding pursuant to section 240 of the Act, the immigration judge shall have the authority to: determine removability pursuant to section 240(a)(1) of the Act; to make decisions, including orders of removal as provided by section 240(c)(1)(A) of the Act; to determine applications under sections 208, 212(a)(2)(F), 212(a)(6)(F)(ii), 212(a)(9)(B)(v), 212(d)(11), 212(d)(12), 212(g), 212(h), 212(i), 212(k), 237(a)(1)(E)(iii), 237(a)(1)(H), 237(a)(3)(C)(ii), 240A(a) and (b), 240B, 245, and 249 of the Act; to order withholding of removal pursuant to section 241(b)(3) of the Act; and to take any other action consistent with applicable law and regulations as may be appropriate. In determining cases referred for further inquiry, immigration judges shall have the powers and authority conferred upon them by the Act and this chapter. Subject to any specific limitation prescribed by the Act and this chapter, immigration judges shall also exercise the discretion and authority conferred upon the Attorney General by the Act as is appropriate and necessary for the disposition of such cases. An immigration judge may certify his or her decision in any case under section 240 of the Act to the Board of Immigration Appeals when it involves an unusually complex or novel question of law or fact. Nothing contained in this part shall be construed to diminish the authority conferred on immigration judges under sections 101(b)(4) and 103 of the Act.

(b) *Withdrawal and substitution of immigration judges.* The immigration judge assigned to conduct the hearing shall at any time withdraw if he or she deems himself or herself disqualified. If an immigration judge becomes unavailable to complete his or her duties, another immigration judge may be assigned to complete the case. The new immigration judge shall familiarize himself or herself with the record in the case and shall state for the record that he or she has done so.

(c) *Conduct of hearing.* The immigration judge shall receive and consider material and relevant evidence, rule upon objections, and otherwise regulate the course of the hearing.

§ 240.2 Attorney for the Service.

(a) *Authority.* The attorney for the Service shall present on behalf of the government evidence material to the issues of deportability or inadmissibility and any other issues that may require disposition by the immigration judge. The duties of the Service attorney include, but are not limited to, the presentation of evidence and the interrogation, examination, and cross-examination of the respondent or other witnesses. Nothing contained herein diminishes the authority of an immigration judge to conduct proceedings under this part. The Service

attorney is authorized to appeal from a decision of the immigration judge pursuant to § 3.38 of this chapter and to move for reopening or reconsideration pursuant to § 3.23 of this chapter.

(b) *Assignment.* In a removal proceeding, the Service shall assign an attorney to each case within the provisions of § 240.10(d), and to each case in which an unrepresented respondent is incompetent or is under 18 years of age, and is not accompanied by a guardian, relative, or friend. In a case in which the removal proceeding would result in an order of removal, the Service shall assign an attorney to each case in which a respondent's nationality is in issue. A Service attorney shall be assigned in every case in which the Commissioner approves the submission of non-record information under § 240.11(a)(3). In his or her discretion, whenever he or she deems such assignment necessary or advantageous, the General Counsel may assign a Service attorney to any other case at any stage of the proceeding.

§ 240.3 Representation by counsel.

The respondent may be represented at the hearing by an attorney or other representative qualified under 8 CFR part 292.

§ 240.4 Incompetent respondents.

When it is impracticable for the respondent to be present at the hearing because of mental incompetency, the attorney, legal representative, legal guardian, near relative, or friend who was served with a copy of the notice to appear shall be permitted to appear on behalf of the respondent. If such a person cannot reasonably be found or fails or refuses to appear, the custodian of the respondent shall be requested to appear on behalf of the respondent.

§ 240.5 Interpreter.

Any person acting as an interpreter in a hearing before an immigration judge under this part shall be sworn to interpret and translate accurately, unless the interpreter is an employee of the United States Government, in which event no such oath shall be required.

§ 240.6 Postponement and adjournment of hearing.

After the commencement of the hearing, the immigration judge may grant a reasonable adjournment either at his or her own instance or, for good cause shown, upon application by the respondent or the Service.

§ 240.7 Evidence in removal proceedings under section 240 of the Act.

(a) *Use of prior statements.* The immigration judge may receive in evidence any oral or written statement that is material and relevant to any issue in the case previously made by the respondent or any other person during any investigation, examination, hearing, or trial.

(b) *Testimony.* Testimony of witnesses appearing at the hearing shall be under oath or affirmation administered by the immigration judge.

(c) *Depositions.* The immigration judge may order the taking of depositions pursuant to § 3.35 of this chapter.

§ 240.8 Burdens of proof in removal proceedings.

(a) *Deportable aliens.* A respondent charged with deportability shall be found to be removable if the Service proves by clear and convincing evidence that the respondent is deportable.

(b) *Arriving aliens.* In proceedings commenced upon a respondent's arrival in the United States or after the revocation or expiration of parole, the respondent must prove that he or she is clearly and beyond a doubt entitled to be admitted to the United States and is not inadmissible as charged.

(c) *Aliens present in the United States without being admitted or paroled.* In the case of a respondent in the United States without being admitted or paroled, the Service must first establish the alienage of the respondent. Once alienage has been established, unless the respondent demonstrates by clear and convincing evidence that he or she is lawfully in the United States pursuant to a prior admission, the respondent must prove that he or she is clearly and beyond a doubt entitled to be admitted to the United States and is not inadmissible as charged.

(d) *Relief from removal.* The respondent shall have the burden of establishing that he or she is eligible for any requested benefit or privilege and that it should be granted in the exercise of discretion. If the evidence indicates that one or more of the grounds for mandatory denial of the application for relief may apply, the alien shall have the burden of proving by a preponderance of the evidence that such grounds do not apply.

§ 240.9 Contents of record.

The hearing before the immigration judge, including the testimony, exhibits, applications, proffers, and requests, the immigration judge's decision, and all written orders, motions, appeals, briefs, and other papers filed in the proceedings shall constitute the record in the case. The hearing shall be recorded verbatim except for statements made off the record with the permission of the immigration judge. In his or her decision, the immigration judge may exclude from the record any arguments made in connection with motions, applications, requests, or objections, but in such event the person affected may submit a brief.

§ 240.10 Hearing.

(a) *Opening.* In a removal proceeding, the immigration judge shall:

(1) Advise the respondent of his or her right to representation, at no expense to the government, by counsel of his or her own choice authorized to practice in the proceedings and require the respondent to state then and there whether he or she desires representation;

(2) Advise the respondent of the availability of free legal services provided by organizations and attorneys qualified under 8 CFR part 3 and organizations recognized pursuant to § 292.2 of this chapter, located in the district where the removal hearing is being held;

(3) Ascertain that the respondent has received a list of such programs, and a copy of appeal rights;

(4) Advise the respondent that he or she will have a reasonable opportunity to examine and object to the evidence against him or her, to present evidence in his or her own behalf and to cross-examine witnesses presented by the government (but respondent shall not be entitled to examine such national security information as the government may proffer in opposition to the respondent's admission to the United States or to an application by the respondent for discretionary relief);

(5) Place the respondent under oath;

(6) Read the factual allegations and the charges in the notice to appear to the respondent and explain them in non-technical language; and

(7) Enter the notice to appear as an exhibit in the Record of Proceeding.

(b) *Public access to hearings.* Removal hearings shall be open to the public, except that the immigration judge may, in his or her discretion, close proceedings as provided in § 3.27 of this chapter.

(c) *Pleading by respondent.* The immigration judge shall require the respondent to plead to the notice to appear by stating whether he or she admits or denies the factual allegations and his or her removability under the charges contained therein. If the respondent admits the factual allegations and admits his or her removability under the charges and the immigration judge is satisfied that no

issues of law or fact remain, the immigration judge may determine that removability as charged has been established by the admissions of the respondent. The immigration judge shall not accept an admission of removability from an unrepresented respondent who is incompetent or under the age of 18 and is not accompanied by an attorney or legal representative, a near relative, legal guardian, or friend; nor from an officer of an institution in which a respondent is an inmate or patient. When, pursuant to this paragraph, the immigration judge does not accept an admission of removability, he or she shall direct a hearing on the issues.

(d) *Issues of removability.* When removability is not determined under the provisions of paragraph (b) of this section, the immigration judge shall request the assignment of an assistant district counsel, and shall receive evidence as to any unresolved issues, except that no further evidence need be received as to any facts admitted during the pleading. The alien shall provide a court certified copy of a Judicial Recommendation Against Deportation (JRAD) to the immigration judge when such recommendation will be the basis of denying any charge(s) brought by the Service in the proceedings against the alien. No JRAD is effective against a charge of deportability under former section 241(a)(11) of the Act or if the JRAD was granted on or after November 29, 1990.

(e) *Additional charges in removal hearings.* At any time during the proceeding, additional or substituted charges of inadmissibility and/or deportability and/or factual allegations may be lodged by the Service in writing. The alien in removal proceedings shall be served with a copy of these additional charges and allegations. The immigration judge shall read the additional factual allegations and charges to the and explain them to him or her. The immigration judge shall advise the alien, if he or she is not represented by counsel, that the alien may be so represented, and that he or she may be given a reasonable continuance to respond to the additional factual allegations and charges. Thereafter, the provision of § 240.6(b) relating to pleading shall apply to the additional factual allegations and charges.

(f) *Country of removal.*The immigration judge shall notify the alien that if he or she is finally ordered removed, the country of removal will in the first instance be directed pursuant to section 241(b) of the Act to the country designated by the alien, unless section 241(b)(2)(C) of the Act applies, and shall afford him or her an opportunity then and there to make such designation. The immigration judge shall then specify and state for the record the country, or countries in the alternative, to which the alien's removal will be directed pursuant to section 241(b) of the Act if the country of his or her designation will not accept him or her into its territory, or fails to furnish timely notice of acceptance, or if the alien declines to designate a country.

(g) In the event that the Service is unable to remove the alien to the specified or alternative country or countries, the Service may remove the alien to any other country as permitted by section 241(b) of the Act.

§ 240.11 Ancillary matters, applications.

(a) *Creation of the status of an alien lawfully admitted for permanent residence.* (1) In a removal proceeding, an alien may apply to the immigration judge for cancellation of removal under section 240A of the Act, adjustment of status under section 245 of the Act, adjustment of status under section 1 of the Act of November 2, 1996 (as modified by section 606 of Pub. L 104–132) or under section 101 or 104 of the Act of October 28, 1977, or for the creation of a record of lawful admission for permanent residence under section 249 of the Act. The application shall be subject to the requirements of § 240.20, and 8 CFR parts 245 and 249. The approval of any application made to the immigration judge under section 245 of the Act by an alien spouse (as defined in section 216(g)(1) of the Act) or by an alien entrepreneur (as defined in section 216A(f)(1) of the Act) shall result in the alien's obtaining the status of lawful permanent resident on a conditional basis in accordance with the provisions of section 216 or 216A of the Act, whichever is applicable. However, the Petition to Remove the Conditions on Residence required by section 216(c) of the Act, or the Petition by Entrepreneur to Remove Conditions required by section 216A(c) of the Act shall be made to the director in accordance with 8 CFR part 216.

(2) In conjunction with any application for creation of status of an alien lawfully admitted for permanent residence made to an immigration judge, if the alien is inadmissible under any provision of section 212(a) of the Act, and believes that he or she meets the eligibility requirements for a waiver of the ground of inadmissibility, he or she may apply to the immigration judge for such waiver. The immigration judge shall inform the alien of his or her apparent eligibility to apply for any of the benefits enumerated in this chapter and shall afford the alien an opportunity to make application during the hearing.

(3) In exercising discretionary power when considering an application for status as a permanent resident under this chapter, the immigration judge may consider and base the decision on information not contained in the record and not made available for inspection by the alien, provided the Commissioner has determined that such information is relevant and is classified under the applicable Executive Order as requiring protection from unauthorized disclosure in the interest of national security. Whenever the immigration judge believes that he or she can do so while safeguarding both the information and its source, the immigration judge should inform the alien of the general nature of the information in order that the alien may have an opportunity to offer opposing evidence. A decision based in whole or in part on such classified information shall state that the information is material to the decision.

(b) *Voluntary departure.* The alien may apply to the immigration judge for voluntary departure in lieu of removal pursuant to section 240B of the Act and subpart C of this part.

(c) *Applications for asylum and withholding of removal.* (1) If the alien expresses fear of persecution or harm upon return to any of the countries to which the alien might be removed pursuant to § 240.10(f), and the alien has not previously filed an application for asylum or withholding of removal that has been referred to the immigration judge by an asylum officer in accordance with § 208.14 of this chapter, the immigration judge shall:

(i) Advise the alien that he or she may apply for asylum in the United States or withholding of removal of those countries;

(ii) Make available the appropriate application forms; and

(iii) Advise the alien of the privilege of being represented by counsel at no expense to the government and of the consequences, pursuant to section 208(d)(6) of the Act, of knowingly, filing a frivolous application for asylum. The immigration judge shall provide to the alien a list of persons who have indicated their availability to represent aliens in asylum proceedings on a pro bono basis.

(2) An application for asylum or withholding of removal must be filed with the Immigration Court, pursuant to § 208.4(c) of this chapter. Upon receipt of an application that has not been referred by an asylum officer, the Immigration Court shall forward a copy

to the Department of State pursuant to § 208.11 of this chapter and shall calendar the case for a hearing. The reply, if any, from the Department of State, unless classified under the applicable Executive Order, shall be given to both the alien and to the assistant district counsel representing the government.

(3) Applications for asylum and withholding of removal so filed will be decided by the immigration judge pursuant to the requirements and standards established in 8 CFR part 208 of this chapter after an evidentiary hearing to resolve factual issues in dispute. An evidentiary hearing extending beyond issues related to the basis for a mandatory denial of the application pursuant to § 208.14 or § 208.16 of this chapter is not necessary once the immigration judge has determined that such a denial is required.

(i) Evidentiary hearings on applications for asylum or withholding of removal will be open to the public unless the alien expressly requests that the hearings be closed pursuant to § 3.27 of this chapter. The immigration judge shall inquire whether the alien requests such closure.

(ii) Nothing in this section is intended to limit the authority of the immigration judge to properly control the scope of any evidentiary hearing.

(iii) During the removal hearing, the alien shall be examined under oath on his or her application and may present evidence and witnesses in his or her own behalf. The alien has the burden of establishing that he or she is a refugee as defined in section 101(a)(42) of the Act pursuant to the standards set forth in § 208.13 of this chapter.

(iv) The assistant district counsel may call witnesses and present evidence for the record, including information classified under the applicable Executive Order, provided the immigration judge or the Board has determined that such information is relevant to the hearing. When the immigration judge receives such classified information, he or she shall inform the alien. The agency that provides the classified information to the immigration judge may provide an unclassified summary of the information for release to the alien, whenever it determines it can do so consistently with safeguarding both the classified nature of the information and its sources. The summary should be as detailed as possible, in order that the alien may have an opportunity to offer opposing evidence. A decision based in whole or in part on such classified information shall state whether such information is material to the decision.

(4) The decision of an immigration judge to grant or deny asylum or withholding of removal shall be communicated to the alien and to the assistant district counsel. An adverse decision shall state why asylum or withholding of removal was denied.

(d) *Application for relief under sections 237(a)(1)(H) and 237(a)(1)(E)(iii) of the Act.* The respondent may apply to the immigration judge for relief from removal under sections 237(a)(1)(H) and 237(a)(1)(E)(iii) of the Act.

(e) *General.* An application under this section shall be made only during the hearing and shall not be held to constitute a concession of alienage or deportability in any case in which the respondent does not admit his or her alienage or deportability. However, nothing in this section shall prohibit the Service from using information supplied in an application for asylum or withholding of deportation or removal submitted to the Service on or after January 4, 1995, as the basis for issuance of a charging document or to establish alienage or deportability in a case referred to an immigration judge under § 208.14(b) of this chapter. The alien shall have the burden of establishing that he or she is eligible for any requested benefit or privilege and that it should be granted in the exercise of discretion. Nothing contained herein is intended to foreclose the respondent from applying for any benefit or privilege that he or she believes himself or herself eligible to receive in proceedings under this part. Nothing in this section is intended to limit the Attorney General's authority to remove an alien to any country permitted by section 241(b) of the Act.

(f) *Fees.* The alien shall not be required to pay a fee on more than one application within paragraphs (a) and (c) of this section, provided that the minimum fee imposed when more than one application is made shall be determined by the cost of the application with the highest fee.

§ 240.12 Decision of the immigration judge.

(a) *Contents.* The decision of the immigration judge may be oral or written. The decision of the immigration judge shall include a finding as to inadmissibility or deportability. The formal enumeration of findings is not required. The decision shall also contain reasons for granting or denying the request. The decision shall be concluded with the order of the immigration judge.

(b) *Summary decision.* Notwithstanding the provisions of paragraph (a) of this section, in any case where inadmissibility or deportability is determined on the pleadings pursuant to § 240.10(b) and the respondent does not make an application under § 240.11, the alien is statutorily ineligible for relief, or the respondent applies for voluntary departure only and the immigration judge grants the application, the immigration judge may enter a summary decision or, if voluntary departure is granted, a summary decision with an alternate order of removal.

(c) *Order of the immigration judge.* The order of the immigration judge shall direct the respondent's removal, or the termination of the proceedings, or such other disposition of the case as may be appropriate. When removal is ordered, the immigration judge shall specify the country, or countries in the alternate, to which respondent's removal shall be directed. The immigration judge is authorized to issue orders in the alternative or in combination as he or she may deem necessary.

§ 240.13 Notice of decision.

(a) *Written decision.* A written decision shall be served upon the respondent and the service counsel, together with the notice referred to in § 3.3 of this chapter. Service by mail is complete upon mailing.

(b) *Oral decision.* An oral decision shall be stated by the immigration judge in the presence of the respondent and the service counsel, if any, at the conclusion of the hearing. A copy of the summary written order shall be furnished at the request of the respondent or the service counsel.

(c) *Summary decision.* When the immigration judge renders a summary decision as provided in § 240.12(b), he or she shall serve a copy thereof upon the respondent at the conclusion of the hearing.

(d) *Decision to remove.* If the immigration judge decides that the respondent is removable and orders the respondent to be removed, the immigration judge shall advise the respondent of such decision, and of the consequences for failure to depart under the order of removal, including civil and criminal penalties described at sections 274D and 243 of the Act. Unless appeal from the decision is waived, the respondent shall be furnished with Form EOIR–26, Notice of Appeal, and advised of the provisions of § 240.15.

§ 240.14 Finality of order.

The order of the immigration judge shall become final in accordance with § 3.39 of this chapter.

§ 240.15 Appeals.

Pursuant to 8 CFR part 3, an appeal shall lie from a decision of an immigration judge to the Board of Immigration Appeals, except that no appeal shall lie from an order of removal entered in absentia. The procedures regarding the filing of a Form EOIR 26, Notice of Appeal, fees, and briefs are set forth in §§ 3.3, 3.31, and 3.38 of this chapter. An appeal shall be filed within 30 calendar days after the mailing of a written decision, the stating of an oral decision, or the service of a summary decision. The filing date is defined as the date of receipt of the Notice of Appeal by the Board of Immigration Appeals. The reasons for the appeal shall be stated in the Notice of Appeal in accordance with the provisions of § 3.3(b) of this chapter. Failure to do so may constitute a ground for dismissal of the appeal by the Board pursuant to § 3.1(d)(1–a) of this chapter.

§ 240.16 Application of new procedures or termination of proceedings in old proceedings pursuant to section 309(c) of Pub. L. 104–208.

The Attorney General shall have the sole discretion to apply the provisions of section 309(c) of Pub. L. 104–208, which provides for the application of new removal procedures to certain cases in exclusion or deportation proceedings and for the termination of certain cases in exclusion or deportation proceedings and initiation of new removal proceedings. The Attorney General's application of the provisions of section 309(c) shall become effective upon publication of a notice in the Federal Register. However, if the Attorney General determines, in the exercise of discretion, that the delay caused by publication would adversely affect the interests of the United States or the effective enforcement of the immigration laws, the Attorney General's application shall become effective immediately upon issuance, and shall be published in the Federal Register as soon as practicable thereafter.

§§ 240.17–240.19 [Reserved]

Subpart B—Cancellation of Removal

§ 240.20 Cancellation of removal and adjustment of status under section 240A of the Act.

(a) *Jurisdiction.* An application for the exercise of discretion under section 240A of the Act shall be submitted on Form EOIR–42, Application for Cancellation of Removal, to the Immigration Court having administrative control over the Record of Proceeding of the underlying removal proceeding under section 240 of the Act.

(b) *Filing the application.* The application may be filed only with the immigration Court after jurisdiction has vested pursuant to § 3.14 of this chapter.

§§ 240.21–240.24 [Reserved]

Subpart C—Voluntary Departure

§ 240.25 Voluntary departure—authority of the Service.

(a) *Authorized officers.* The authority contained in section 240B(a) of the Act to permit aliens to depart voluntarily from the United States may be exercised in lieu of being subject to proceedings under section 240 of the Act or prior to the completion of such proceedings by district directors, assistant district directors for investigations, assistant district directors for examinations, officers in charge, chief patrol agents, service center directors, and assistant center directors for examinations.

(b) *Conditions.* The Service may attach to the granting of voluntary departure any conditions it deems necessary to ensure the alien's timely departure from the United States, including the posting of a bond, continued detention pending departure, and removal under safeguards. The alien shall be required to present to the Service, for inspection and photocopying, his or her passport or other travel documentation sufficient to assure lawful entry into the country to which the alien is departing. The Service may hold the passport or documentation for sufficient time to investigate its authenticity.

(c) *Periods of time.* The authorized officer, in his or her discretion, shall specify the period of time permitted for voluntary departure, and may grant extensions thereof, except that the total period allowed, including any extensions, shall not exceed 120 days.

(d) *Application.* Any alien who believes himself or herself to be eligible for voluntary departure under this section may apply therefor at any office of the Service. After the commencement of removal proceedings, the application may be communicated through the Service attorney. If the Service agrees to voluntary departure after proceedings have commenced, it may either:

(1) Join in a motion to terminate the proceedings, and if the proceedings are terminated, grant voluntary departure; or

(2) Join in a motion asking the immigration judge to permit voluntary departure in accordance with § 240.26.

(e) *Appeals.* An appeal shall not lie from a denial of an application for voluntary departure under this section, but the denial shall be without prejudice to the alien's right to apply to the immigration judge for voluntary departure in accordance with § 240.26 or for relief from removal under any provision of law.

(f) *Revocation.* If, subsequent to the granting of an application for voluntary departure under this section, it is ascertained that the application should not have been granted, that grant may be revoked without notice by any officer authorized to grant voluntary departure under § 240.25(a).

§ 240.26 Voluntary departure—authority of the Executive Office for Immigration Review.

(a) *Eligibility; general.* An alien previously granted voluntary departure under section 240B of the Act, including by the Service under § 240.25, and who fails to depart voluntarily within the time specified, shall thereafter be ineligible, for a period of ten years, for voluntary departure or for relief under sections 240A, 245, 248, and 249 of the Act.

(b) *Prior to completion of removal proceedings.* (1) *Grant by the immigration judge.* (i) An alien may be granted voluntary departure by an immigration judge pursuant to section 240B(a) of the Act only if the alien:

(A) Makes such request prior to or at a master calendar hearing;

(B) Makes no additional request for relief (or if such requests have been made, such requests are withdrawn prior to any grant of voluntary departure pursuant to this section);

(C) Concedes removability; and

(D) Waives appeal of all issues.

(ii) The judge may not grant voluntary departure under section 240B(a) of the Act beyond 30 days after the case has been calendared for a merits hearing, except pursuant to a stipulation under paragraph (b)(2) of this section.

(2) *Stipulation.* At any time prior to the completion of removal proceedings, the Service attorney may stipulate to a grant of voluntary departure under section 240B(a) of the Act.

(3) *Conditions.* (i) The judge may impose such conditions as he or she deems necessary to ensure the alien's timely departure from the United States, including the posting of a voluntary departure bond to be canceled upon proof that the alien has departed the United States within the time specified. The alien shall be required to present to

the Service, for inspection and photocopying, his or her passport or other travel documentation sufficient to assure lawful entry into the country to which the alien is departing, unless:

(A) A travel document is not necessary to return to his or her native country or to which country the alien is departing; or

(B) The document is already in the possession of the Service.

(ii) The Service may hold the passport or documentation for sufficient time to investigate its authenticity. If such documentation is not immediately available to the alien, but the immigration judge is satisfied that the alien is making diligent efforts to secure it, voluntary departure may be granted for a period not to exceed 120 days, subject to the condition that the alien within 60 days must secure such documentation and present it to the Service. The Service in its discretion may extend the period within which the alien must provide such documentation. If the documentation is not presented within the 60-day period or any extension thereof, the voluntary departure order shall vacate automatically and the alternate order of deportation will take effect, as if in effect on the date of issuance of the immigration judge order.

(c) *At the conclusion of the removal proceedings.* (1) *Required findings.* An immigration judge may grant voluntary departure at the conclusion of the removal proceedings under section 240B(b) of the Act, if he or she finds that:

(i) The alien has been physically present in the United States for period of at least one year preceding the date the Notice to Appear was served under section 239(a) of the Act;

(ii) the alien is, and has been, a person of good moral character for at least five years immediately preceding the application;

(iii) the alien is not deportable under section 237(a)(2)(A)(iii) or 237(a)(4) of the Act; and

(iv) the alien has established by clear and convincing evidence that the alien has the means to depart the United States and has the intention to do so.

(2) *Travel documentation.* Except as otherwise provided in paragraph (b)(3) of this section, the clear and convincing evidence of the means to depart shall include in all cases presentation by the alien of a passport or other travel documentation sufficient to assure lawful entry into the country to which the alien is departing. The Service shall have full opportunity to inspect and photocopy the documentation, and to challenge its authenticity or sufficiency before voluntary departure is granted.

(3) *Conditions.* The judge may impose such conditions as he or she deems necessary to ensure the alien's timely departure from the United States. In all cases under section 240B(b) of the Act, the alien shall be required to post a voluntary departure bond, in an amount necessary to ensure that the alien departs within the time specified, but in no case less than $500. The voluntary departure bond shall be posted with the district director within 5 business days of the immigration judge's order granting voluntary departure, and the district director may, at his or her discretion, hold the alien in custody until the bond is posted. If the bond is not posted within 5 business days, the voluntary departure order shall vacate automatically and the alternate order of removal will take effect on the following day. In order for the bond to be canceled, the alien must provide proof of departure to the district director.

(d) *Alternate order of removal.* Upon granting a request made for voluntary departure either prior to the completion of proceedings or at the conclusion of proceedings, the immigration judge shall also enter an alternate order or removal.

(e) *Periods of time.* If voluntary departure is granted prior to the completion of removal proceedings, the immigration judge may grant a period not to exceed 120 days. If voluntary departure is granted at the conclusion of proceedings, the immigration judge may grant a period not to exceed 60 days.

(f) *Extension of time to depart.* Authority to extend the time within which to depart voluntarily specified initially by an immigration judge or the Board is within the sole jurisdiction of the district director. An immigration judge or the Board may reinstate voluntary departure in a removal proceeding that has been reopened for a purpose other than solely making an application for voluntary departure if reopening was granted prior to the expiration of the original period of voluntary departure. In no event can the total period of time, including any extension, exceed 120 days or 60 days as set forth in section 240B of the Act.

(g) *Administrative Appeals.* (1) *Grants of requests made prior to the completion of the section 240 removal proceeding.* A Service appeal of a grant of voluntary departure prior to the completion of section 240 removal proceedings shall be limited to the issue of whether the alien merits the grant of voluntary departure as a matter of discretion. Such an appeal shall not challenge the number of days of voluntary departure granted.

(2) *At the conclusion of the section 240 removal proceeding.* An appeal of a grant or denial of voluntary departure at the conclusion of the section 240 removal proceeding shall be limited to the issues of whether the alien is eligible for a grant of voluntary departure under the Act and this chapter and whether the alien merits a grant of voluntary departure as a matter of discretion. Such an appeal shall not challenge the number of days of voluntary departure granted.

(h) *Reinstatement of voluntary departure.* An immigration judge or the Board may reinstate voluntary departure in a removal proceeding that has been reopened for a purpose other than solely making application for voluntary departure, if reopening was granted prior to the expiration of the original period of voluntary departure. In no event can the total period of time, including any extension, exceed 120 days or 60 days as set forth in section 240B of the Act and paragraph (a) of this section.

§§ 240.27–240.29 [Reserved]

Subpart D—Exclusion of Aliens (for Hearings Commenced Prior to April 1, 1997)

§ 240.30 Proceedings prior to April 1, 1997.

Subpart D of 8 CFR part 240 applies to exclusion proceedings commenced prior to April 1, 1997, pursuant to the former section 236 of the Act. All references to the Act contained in this subpart are references to the Act in effect prior to April 1, 1997.

§ 240.31 Authority of immigration judges.

In determining cases referred for further inquiry as provided in section 235 of the Act, immigration judges shall have the powers and authority conferred upon them by the Act and this chapter. Subject to any specific limitation prescribed by the Act and this chapter, immigration judges shall also exercise the discretion and authority conferred upon the Attorney General by the Act as is appropriate and necessary for the disposition of such cases.

§ 240.32 Hearing.

(a) *Opening.* Exclusion hearings shall be closed to the public, unless the alien at his or her own instance requests that the public, including the press, be permitted to attend; in that event, the hearing shall be open, provided that the alien states for the record that he or she is waiving the requirement in section 236 of the Act that the inquiry shall be kept separate and apart from the public.

When the hearing is to be open, depending upon physical facilities, reasonable limitation may be placed upon the number in attendance at any one time, with priority being given to the press over the general public. The immigration judge shall ascertain whether the applicant for admission is the person to whom Form I–122 was previously delivered by the examining immigration officer as provided in 8 CFR part 235; enter a copy of such form in evidence as an exhibit in the case; inform the applicant of the nature and purpose of the hearing; advise him or her of the privilege of being represented by an attorney of his or her own choice at no expense to the Government, and of the availability of free legal services programs qualified under 8 CFR part 3 and organizations recognized pursuant to § 292.2 of this chapter located in the district where his or her exclusion hearing is to be held; and shall ascertain that the applicant has received a list of such programs; and request him or her to ascertain then and there whether he or she desires representation; advise him or her that he or she will have a reasonable opportunity to present evidence in his or her own behalf, to examine and object to evidence against him or her, and to cross-examine witnesses presented by the Government; and place the applicant under oath.

(b) *Procedure.* The immigration judge shall receive and adduce material and relevant evidence, rule upon objections, and otherwise regulate the course of the hearing.

(c) *Attorney for the Service.* The Service shall assign an attorney to each case in which an applicant's nationality is in issue and may assign an attorney to any case in which such assignment is deemed necessary or advantageous. The duties of the Service attorney include, but are not limited to, the presentation of evidence and the interrogation, examination, and cross-examination of the applicant and other witnesses. Nothing contained herein diminishes the authority of an immigration judge to conduct proceedings under this part.

(d) *Depositions.* The procedures specified in § 240.48(e) shall apply.

(e) *Record.* The hearing before the immigration judge, including the testimony, exhibits, applications, proffers, and requests, the immigration judge's decision, and all written orders, motions, appeals, and other papers filed in the proceeding shall constitute the record in the case. The hearing shall be recorded verbatim except for statements made off the record with the permission of the immigration judge.

§ 240.33 Applications for asylum or withholding of deportation.

(a) If the alien expresses fear of persecution or harm upon return to his or her country of origin or to a country to which the alien may be deported after a determination of excludability from the United States pursuant to this subpart, and the alien has not been referred to the immigration judge by an asylum officer in accordance with § 208.14(b) of this chapter, the immigration judge shall:

(1) Advise the alien that he may apply for asylum in the United States or withholding of deportation to that other country; and

(2) Make available the appropriate application forms.

(b) An application for asylum or withholding of deportation must be filed with the Immigration Court, pursuant to § 208.4(c) of this chapter. Upon receipt of an application that has not been referred by an asylum officer, the Immigration Court shall forward a copy to the Department of State pursuant to § 208.11 of this chapter and shall calendar the case for a hearing. The reply, if any, from the Department of State, unless classified under the applicable Executive Order, shall be given to both the applicant and to the trial attorney representing the government.

(c) Applications for asylum or withholding of deportation so filed will be decided by the immigration judge pursuant to the requirements and standards established in 8 CFR part 208 after an evidentiary hearing that is necessary to resolve material factual issues in dispute. An evidentiary hearing extending beyond issues related to the basis for a mandatory denial of the application pursuant to § 208.13(c) of this chapter is not necessary once the immigration judge has determined that such denial is required.

(1) Evidentiary hearings on applications for asylum or withholding of deportation will be closed to the public unless the applicant expressly requests that it be open pursuant to § 236.3 of this chapter.

(2) Nothing in this section is intended to limit the authority of the immigration judge properly to control the scope of any evidentiary hearing.

(3) During the exclusion hearing, the applicant shall be examined under oath on his or her application and may present evidence and witnesses on his or her own behalf. The applicant has the burden of establishing that he or she is a refugee as defined in section 101(a)(42) of the Act pursuant to the standard set forth in § 208.13 of this chapter.

(4) The trial attorney for the government may call witnesses and present evidence for the record, including information classified under the applicable Executive Order, provided the immigration judge or the Board has determined that such information is relevant to the hearing. The applicant shall be informed when the immigration judge receives such classified information. The agency that provides the classified information to the immigration judge may provide an unclassified summary of the information for release to the applicant whenever it determines it can do so consistently with safeguarding both the classified nature of the information and its source. The summary should be as detailed as possible, in order that the applicant may have an opportunity to offer opposing evidence. A decision based in whole or in part on such classified information shall state that such information is material to the decision.

(d) The decision of an immigration judge to grant or deny asylum or withholding of deportation shall be communicated to the applicant and to the trial attorney for the government. An adverse decision will state why asylum or withholding of deportation was denied.

§ 240.34 Renewal of application for adjustment of status under section 245 of the Act.

An adjustment application by an alien paroled under section 212(d)(5) of the Act, which has been denied by the district director, may be renewed in exclusion proceedings under section 236 of the Act (as in effect prior to April 1, 1997) before an immigration judge under the following two conditions: first, the denied application must have been properly filed subsequent to the applicant's earlier inspection and admission to the United States; and second, the applicant's later absence from and return to the United States must have been under the terms of an advance parole authorization on Form I–512 granted to permit the applicant's absence and return to pursue the previously filed adjustment application.

§ 240.35 Decision of the immigration judge; notice to the applicant.

(a) *Decision.* The immigration judge shall inform the applicant of his or her decision in accordance with § 3.37 of this chapter.

(b) *Advice to alien ordered excluded.* An alien ordered excluded shall be furnished with Form I–296, Notice to Alien Ordered Excluded by Immigration Judge, at the time of an oral decision by

the immigration judge or upon service of a written decision.

(c) *Holders of refugee travel documents.* Aliens who are holders of valid unexpired refugee travel documents may be ordered excluded only if they are found to be inadmissible under section 212(a)(2), 212(a)(3), or 212(a)(6)(E) of the Act, and it is determined that on the basis of the acts for which they are inadmissible there are compelling reasons of national security or public order for their exclusion. If the immigration judge finds that the alien is inadmissible but determines that there are no compelling reasons of national security or public order for exclusion, the immigration judge shall remand the case to the district director for parole.

§ 240.36 Finality of order.

The decision of the immigration judge shall become final in accordance with § 3.37 of this chapter.

§ 240.37 Appeals.

Except for temporary exclusions under section 235(c) of the Act, an appeal from a decision of an Immigration Judge under this part may be taken by either party pursuant to § 3.38 of this chapter.

§ 240.38 Fingerprinting of excluded aliens.

Every alien 14 years of age or older who is excluded from admission to the United States by an immigration judge shall be fingerprinted, unless during the preceding year he or she has been fingerprinted at an American consular office.

§ 240.39 Reopening or reconsideration.

Except as otherwise provided in this section, a motion to reopen or reconsider shall be subject to the requirements of § 103.5 of this chapter. The immigration judge may upon his or her own motion, or upon motion of the trial attorney or the respondent, reopen or reconsider any case in which he or she had made a decision, unless jurisdiction in the case is vested in the Board of Immigration Appeals under 8 CFR part 3. An order by the immigration judge granting a motion to reopen may be made on Form I–328. A motion to reopen will not be granted unless the immigration judge is satisfied that evidence sought to be offered is material and was not available and could not have been discovered or presented at the hearing; nor will any motion to reopen for the purpose of providing the respondent with an opportunity to make an application under § 242.17 of this chapter be granted if respondent's right to make such application were fully explained to him or her by the immigration judge and he or she was afforded an opportunity to do so at the hearing, unless circumstances have arisen thereafter on the basis of which the request is being made. The filing of a motion under this section with an immigration judge shall not serve to stay the execution of an outstanding decision; execution shall proceed unless the immigration judge who has jurisdiction over the motion specifically grants a stay of deportation. The immigration judge may stay deportation pending his or her determination of the motion and also pending the taking and disposition of an appeal from such determination.

Subpart E—Proceedings To Determine Deportability of Aliens in the United States: Hearing and Appeal (for Proceedings Commenced Prior to April 1, 1997)

§ 240.40 Proceedings commenced prior to April 1, 1997.

Subpart E of 8 CFR part 240 applies only to deportation proceedings commenced prior to April 1, 1997. All references to the Act contained in this subpart pertain to the Act as in effect prior to April 1, 1997.

§ 240.41 Immigration Judges.

(a) *Authority.* In any proceeding conducted under this part the immigration judge shall have the authority to determine deportability and to make decisions, including orders of deportation, as provided by section 242(b) and 242B of the Act; to reinstate orders of deportation as provided by section 242(f) of the Act; to determine applications under sections 208, 212(k), 241(a)(1)(E)(iii), 241(a)(1)(H), 244, 245, and 249 of the Act; to determine the country to which an alien's deportation will be directed in accordance with section 243(a) of the Act; to order temporary withholding of deportation pursuant to section 243(h) of the Act; and to take any other action consistent with applicable law and regulations as may be appropriate. An immigration judge may certify his or her decision in any case to the Board of Immigration Appeals when it involves an unusually complex or novel question of law or fact. Nothing contained in this part shall be construed to diminish the authority conferred on immigration judges under section 103 of the Act.

(b) *Withdrawal and substitution of immigration judges.* The immigration judge assigned to conduct the hearing shall at any time withdraw if he deems himself disqualified. If an immigration judge becomes unavailable to complete his or her duties within a reasonable time, or if at any time the respondent consents to a substitution, another immigration judge may be assigned to complete the case. The new immigration judge shall familiarize himself or herself with the record in the case and shall state for the record that he has done so.

§ 240.42 Representation by counsel.

The respondent may be represented at the hearing by an attorney or other representative qualified under 8 CFR part 292.

§ 240.43 Incompetent respondents.

When it is impracticable for the respondent to be present at the hearing because of mental incompetency, the guardian, near relative, or friend who was served with a copy of the order to show cause shall be permitted to appear on behalf of the respondent. If such a person cannot reasonably be found or fails or refuses to appear, the custodian of the respondent shall be requested to appear on behalf of the respondent.

§ 240.44 Interpreter.

Any person acting as interpreter in a hearing before an immigration judge under this part shall be sworn to interpret and translate accurately, unless the interpreter is an employee of the United States Government, in which event no such oath shall be required.

§ 240.45 Postponement and adjournment of hearing.

After the commencement of the hearing, the immigration judge may grant a reasonable adjournment either at his or her own instance or, for good cause shown, upon application by the respondent or the Service.

§ 240.46 Evidence.

(a) *Sufficiency.* A determination of deportability shall not be valid unless it is found by clear, unequivocal, and convincing evidence that the facts alleged as grounds for deportation are true.

(b) *Use of prior statements.* The immigration judge may receive in evidence any oral or written statement that is material and relevant to any issue in the case previously made by the respondent or any other person during any investigation, examination, hearing, or trial.

(c) *Testimony.* Testimony of witnesses appearing at the hearing shall be under oath or affirmation administered by the immigration judge.

(d) *Depositions.* The immigration judge may order the taking of depositions pursuant to § 3.35 of this chapter.

§ 240.47 Contents of record.

The hearing before the immigration judge, including the testimony, exhibits, applications, proffers, and requests, the immigration judge's decision, and all written orders, motions, appeals, briefs, and other papers filed in the proceedings shall constitute the record in the case. The hearing shall be recorded verbatim except for statements made off the record with the permission of the immigration judge. In his or her discretion, the immigration judge may exclude from the record any arguments made in connection with motions, applications, requests, or objections, but in such event the person affected may submit a brief.

§ 240.48 Hearing.

(a) *Opening.* The immigration judge shall advise the respondent of his or her right to representation, at no expense to the Government, by counsel of his or her own choice authorized to practice in the proceedings and require him or her to state then and there whether he desires representations; advise the respondent of the availability of free legal services programs qualified under 8 CFR part 3 and organizations recognized pursuant to § 292.2 of this chapter, located in the district where the deportation hearing is being held; ascertain that the respondent has received a list of such programs, and a copy of Form I–618, Written Notice of Appeal Rights; advise the respondent that he or she will have a reasonable opportunity to examine and object to the evidence against him, to present evidence in his or her own behalf and to cross-examine witnesses presented by the Government; place the respondent under oath; read the factual allegations and the charges in the order to show cause to the respondent and explain them in nontechnical language, and enter the order to show cause as an exhibit in the record. Deportation hearings shall be open to the public, except that the immigration judge may, in his or her discretion and for the purpose of protecting witnesses, respondents, or the public interest, direct that the general public or particular individuals shall be excluded from the hearing in any specific case. Depending upon physical facilities, reasonable limitation may be placed upon the number in attendance at any one time, with priority being given to the press over the general public.

(b) *Pleading by respondent.* The immigration judge shall require the respondent to plead to the order to show cause by stating whether he or she admits or denies the factual allegations and his or her reportability under the charges contained therein. If the respondent admits the factual allegations and admits his or her deportability under the charges and the immigration judge is satisfied that no issues of law or fact remain, the immigration judge may determine that deportability as charged has been established by the admissions of the respondent. The immigration judge shall not accept an admission of deportability from an unrepresented respondent who is incompetent or under age 16 and is not accompanied by a guardian, relative, or friend; nor from an officer of an institution in which a respondent is an inmate or patient. When, pursuant to this paragraph, the immigration judge may not accept an admission of deportability, he or she shall direct a hearing on the issues.

(c) *Issues of deportability.* When deportability is not determined under the provisions of paragraph (b) of this section, the immigration judge shall request the assignment of a trial attorney, and shall receive evidence as to any unresolved issues, except that no further evidence need be received as to any facts admitted during the pleading. The respondent shall provide a court certified copy of a Judicial Recommendation Against Deportation (JRAD) to the special inquiry officer when such recommendation will be the basis of denying any charge(s) brought by the Service in the proceedings against the respondent. No JRAD is effective against a charge of deportability under section 241(a)(11) of the Act or if the JRAD was granted on or after November 29, 1990.

(d) *Additional charges.* The Service may at any time during a hearing lodge additional charges of deportability, including factual allegations, against the respondent. Copies of the additional factual allegations and charges shall be submitted in writing for service on the respondent and entry as an exhibit in the record. The immigration judge shall read the additional factual allegations and charges to the respondent and explain them to him or her. The immigration judge shall advise the respondent if he or she is not represented by counsel that he or she may be so represented and also that he or she may have a reasonable time within which to meet the additional factual allegations and charges. The respondent shall be required to state then and there whether he or she desires a continuance for either of these reasons. Thereafter, the provisions of paragraph (b) of this section shall apply to the additional factual allegations and lodged charges.

§ 240.49 Ancillary matters, applications.

(a) *Creation of the status of an alien lawfully admitted for permanent residence.* The respondent may apply to the immigration judge for suspension of deportation under section 244(a) of the Act; for adjustment of status under section 245 of the Act, or under section 1 of the Act of November 2, 1966, or under section 101 or 104 of the Act of October 28, 1977; or for the creation of a record of lawful admission for permanent residence under section 249 of the Act. The application shall be subject to the requirements of 8 CFR parts 240, 245, and 249. The approval of any application made to the immigration judge under section 245 of the Act by an alien spouse (as defined in section 216(g)(1) of the Act) or by an alien entrepreneur (as defined in section 216A(f)(1) of the Act), shall result in the alien's obtaining the status of lawful permanent resident on a conditional basis in accordance with the provisions of section 216 or 216A of the Act, whichever is applicable. However, the Petition to Remove the Conditions on Residence required by section 216(c) of the Act of the Petition by Entrepreneur to Remove Conditions required by section 216A(c) of the Act shall be made to the director in accordance with 8 CFR part 216. In conjunction with any application for creation of status of an alien lawfully admitted for permanent residence made to an immigration judge, if the respondent is inadmissible under any provision of section 212(a) of the Act and believes that he or she meets the eligibility requirements for a waiver of the ground of inadmissibility, he or she may apply to the immigration judge for such waiver. The immigration judge shall inform the respondent of his or her apparent eligibility to apply for any of the benefits enumerated in this paragraph and shall afford the respondent an opportunity to make application therefor during the hearing. In exercising discretionary power when considering an application under this paragraph, the immigration judge may consider and base the decision on information not contained in the record and not made available for inspection by the respondent, provided the Commissioner has determined that such information is relevant and is classified under the applicable Executive Order as requiring protection from unauthorized disclosure in the interest of national security. Whenever the immigration judge believes that he or she can do so while safeguarding both the information and its source, the immigration judge should inform the respondent of the general nature of the information in

order that the respondent may have an opportunity to offer opposing evidence. A decision based in whole or in part on such classified information shall state that the information is material to the decision.

(b) *Voluntary departure.* The respondent may apply to the immigration judge for voluntary departure in lieu of deportation pursuant to section 244(e) of the Act and § 240.56.

(c) *Applications for asylum or withholding of deportation.* (1) The immigration judge shall notify the respondent that if he or she is finally ordered deported, his or her deportation will in the first instance be directed pursuant to section 243(a) of the Act to the country designated by the respondent and shall afford him an opportunity then and there to make such designation. The immigration judge shall then specify and state for the record the country, or countries in the alternative, to which respondent's deportation will be directed pursuant to section 243(a) of the Act if the country of his or her designation will not accept him or her into its territory, or fails to furnish timely notice of acceptance, or if the respondent declines to designate a country.

(2) If the alien expresses fear of persecution or harm upon return to any of the countries to which the alien might be deported pursuant to paragraph (c)(1) of this section, and the alien has not previously filed on application for asylum or withholding of deportation that has been referred to the immigration judge by an asylum officer in accordance with § 208.14(b) of this chapter, the immigration judge shall:

(i) Advise the alien that he may apply for asylum in the United States or withholding of deportation to those countries; and

(ii) Make available the appropriate application forms.

(3) An application for asylum or withholding of deportation must be filed with the Immigration Court, pursuant to § 208.4(b) of this chapter. Upon receipt of an application that has not been referred by an asylum officer, the Immigration Court shall forward a copy to the Department of State pursuant to § 208.11 of this chapter and shall calendar the case for a hearing. The reply, if any, of the Department of State, unless classified under the applicable Executive Order, shall be given to both the applicant and to the trial attorney representing the government.

(4) Applications for asylum or withholding of deportation so filed will be decided by the immigration judge pursuant to the requirements and standards established in 8 CFR part 208 after an evidentiary hearing that is necessary to resolve factual issues in dispute. An evidentiary hearing extending beyond issues related to the basis for a mandatory denial of the application pursuant to § 208.13 or § 208.16 of this chapter is not necessary once the immigration judge has determined that such a denial is required.

(i) Evidentiary hearings on applications for asylum or withholding of deportation will be open to the public unless the applicant expressly requests that it be closed.

(ii) Nothing in this section is intended to limit the authority of the immigration judge properly to control the scope of any evidentiary hearing.

(iii) During the deportation hearing, the applicant shall be examined under oath on his or her application and may present evidence and witnesses in his or her own behalf. The applicant has the burden of establishing that he or she is a refugee as defined in section 101(a)(42) of the Act pursuant to the standard set forth in § 208.13 of this chapter.

(iv) The trial attorney for the government may call witnesses and present evidence for the record, including information classified under the applicable Executive Order, provided the immigration judge or the Board has determined that such information is relevant to the hearing. When the immigration judge receives such classified information he or she shall inform the applicant. The agency that provides the classified information to the immigration judge may provide an unclassified summary of the information for release to the applicant, whenever it determines it can do so consistently with safeguarding both the classified nature of the information and its source. The summary should be as detailed as possible, in order that the applicant may have an opportunity to offer opposing evidence. A decision based in whole or in part on such classified information shall state whether such information is material to the decision.

(5) The decision of an immigration judge to grant or deny asylum or withholding of deportation shall be communicated to the applicant and to the trial attorney for the government. An adverse decision will state why asylum or withholding of deportation was denied.

(d) *Application for relief under sections 241(a)(1)(H) and 241(a)(1)(E)(iii) of the Act.* The respondent may apply to the immigration judge for relief from deportation under sections 241(a)(1)(H) and 241(a)(1)(E)(iii) of the Act.

(e) *General.* An application under this section shall be made only during the hearing and shall not be held to constitute a concession of alienage or deportability in any case in which the respondent does not admit his alienage or deportability. However, nothing in this section shall prohibit the Service from using information supplied in an application for asylum or withholding of deportation submitted to an asylum officer pursuant to § 208.2 of this chapter on or after January 4, 1995, as the basis for issuance of an order to show cause or a notice to appear to establish alienage or deportability in a case referred to an immigration judge under § 208.14(b) of this chapter. The respondent shall have the burden of establishing that he or she is eligible for any request benefit or privilege and that it should be granted in the exercise of discretion. The respondent shall not be required to pay a fee on more than one application within paragraphs (a) and (c) of this section, provided that the minimum fee imposed when more than one application is made shall be determined by the cost of the application with the highest fee. Nothing contained herein is intended to foreclose the respondent from applying for any benefit or privilege which he or she believes himself or herself eligible to receive in proceedings under this part.

§ 240.50 Decision of the immigration judge.

(a) *Contents.* The decision of the immigration judge may be oral or written. Except when deportability is determined on the pleadings pursuant to § 240.48(b), the decision of the immigration judge shall include a finding as to deportability. The formal enumeration of findings is not required. The decision shall also contain the reasons for granting or denying the request. The decision shall be concluded with the order of the immigration judge.

(b) *Summary decision.* Notwithstanding the provisions of paragraph (a) of this section, in any case where deportability is determined on the pleadings pursuant to § 240.48(b) and the respondent does not make an application under § 240.49, or the respondent applies for voluntary departure only and the immigration judge grants the application, the immigration judge may enter a summary decision on Form EOIR–7, Summary Order of Deportation, if deportation is

ordered, or on Form EOIR–6, Summary Order of Voluntary Departure, if voluntary departure is granted with an alternate order of deportation.

(c) *Order of the immigration judge.* The order of the immigration judge shall direct the respondent's deportation, or the termination of the proceedings, or such other disposition of the case as may be appropriate. When deportation is ordered, the immigration judge shall specify the country, or countries in the alternate, to which respondent's deportation shall be directed. The immigration judge is authorized to issue orders in the alternative or in combination as he or she may deem necessary.

§ 240.51 Notice of decision.

(a) *Written decision.* A written decision shall be served upon the respondent and the trial attorney, together with the notice referred to in § 3.3 of this chapter. Service by mail is complete upon mailing.

(b) *Oral decision.* An oral decision shall be stated by the immigration judge in the presence of the respondent and the trail attorney, if any, at the conclusion of the hearing. Unless appeal from the decision is waived, the respondent shall be furnished with Form EOIR–26, Notice of Appeal, and advised of the provisions of § 240.53. A typewritten copy of the oral decision shall be furnished at the request of the respondent or the trial attorney.

(c) *Summary decision.* When the immigration judge renders a summary decision as provided in § 240.51(b), he or she shall serve a copy thereof upon the respondent at the conclusion of the hearing. Unless appeal from the decision is waived, the respondent shall be furnished with Form EOIR–26, Notice of Appeal, and advised of the provisions of § 240.54.

§ 240.52 Finality of order.

The decision of the immigration judge shall become final in accordance with § 3.39 of this chapter.

§ 240.53 Appeals.

(a) Pursuant to 8 CFR part 3, an appeal shall lie from a decision of an immigration judge to the Board, except that no appeal shall lie from an order of deportation entered in absentia. The procedures regarding the filing of a Form EOIR–26, Notice of Appeal, fees, and briefs are set forth in §§ 3.3, 3.31, and 3.38 of this chapter. An appeal shall be filed within 30 calendar days after the mailing of a written decision, the stating of an oral decision, or the service of a summary decision. The filing date is defined as the date of receipt of the Notice of Appeal by the Board. The reasons for the appeal shall be stated in the Form EOIR–26, Notice of Appeal, in accordance with the provisions of § 3.3(b) of this chapter. Failure to do so may constitute a ground for dismissal of the appeal by the Board pursuant to § 3.1(d)(1–a) of this chapter.

(b) *Prohibited appeals; legalization or applications.* An alien respondent defined in § 245a.2(c)(6) or (7) of this chapter who fails to file an application for adjustment of status to that of a temporary resident within the prescribed period(s), and who is thereafter found to be deportable by decision of an immigration judge, shall not be permitted to appeal the finding of deportability based solely on refusal by the immigration judge to entertain such an application in deportation proceedings.

§ 240.54 Proceedings under section 242(f) of the Act.

(a) *Order to show cause.* In the case of an alien within the provisions of section 242(f) of the Act, the order to show cause shall charge him or her with deportability under section 242(f) of the Act. The prior order of deportation and evidence of the execution thereof, properly identified, shall constitute prima facie cause for deportability under this section.

(b) *Applicable procedure.* Except as otherwise provided in this section, proceedings under section 242(f) of the Act shall be conducted in general accordance with the rules prescribed in this part.

(c) *Deportability.* In determining the deportability of an alien alleged to be within the purview of paragraph (a) of this section, the issues shall be limited to solely to a determination of the identity of the respondent, i.e., whether the respondent is in fact an alien who was previously deported, or who departed while an order of deportation was outstanding; whether the respondent was previously deported as a member of any of the classes described in section 241(a)(2),(3) or (4) of the Act; and whether respondent has unlawfully reentered the United States.

(d) *Order.* If deportability as charged in the order to show cause is established, the Immigration Judge shall order that the respondent be deported under the previous order of deportation in accordance with section 242(f) of the Act.

(e) *Service counsel; additional charges.* When Service counsel is assigned to a proceeding under this section and additional charges are lodged against the respondent, the provisions of paragraphs (c) and (d) of this section shall cease to apply.

Subpart F—Suspension of Deportation and Voluntary Departure (for Proceedings Commenced Prior to April 1, 1997)

§ 240.55 Proceedings commenced prior to April 1, 1997.

Subpart F of 8 CFR part 240 applies to deportation proceedings commenced prior to April 1, 1997. All references to the Act contained in this subpart are references to the Act in effect prior to April 1, 1997.

§ 240.56 Application.

Notwithstanding any other provision of this chapter, an alien who is deportable because of a conviction on or after November 18, 1988, for an aggravated felony as defined in section 101(a)(43) of the Act, shall not be eligible for voluntary departure as prescribed in 8 CFR part 240 and section 244 of the Act. Pursuant to subpart F of this part and section 244 of the Act, an immigration judge may authorized the suspension of an alien's deportation; or, if the alien established that he or she is willing and has the immediate means with which to depart promptly from the United States, an immigration judge may authorized the alien to depart voluntarily from the United States in lieu of deportation within such time as may be specified by the immigration judge when first authorizing voluntary departure, and under such conditions as the district director shall direct. An application for suspension of deportation shall be made on Form EOIR–40.

§ 240.57 Extension of time to depart.

Authority to reinstate or extend the time within which to depart voluntarily specified initially by an immigration judge or the Board is within the sole jurisdiction of the district director, except that an immigration judge or the Board may reinstate voluntary departure in a deportation proceeding that has been reopened for a purpose other than solely making an application for voluntary departure. A request by an alien for reinstatement or an extension of time within which to depart voluntarily shall be filed with the district director having jurisdiction over the alien's place of residence. Written notice of the district director's decision shall be served upon the alien and no appeal may be taken therefrom.

Subpart G—Civil Penalties for Failure To Depart [Reserved]

107. Part 241 is revised to read as follows:

PART 241—APPREHENSION AND DETENTION OF ALIENS ORDERED REMOVED

Subpart A—Post-Hearing Detention and Removal

Sec.
241.1 Final order of removal.
241.2 Warrant of removal.
241.3 Detention of aliens during removal period.
241.4 Continued detention beyond the removal period.
241.5 Conditions of release after removal period.
241.6 Administrative stay of removal.
241.7 Self-removal.
241.8 Reinstatement of removal orders.
241.9 Notice to transportation line of inadmissible alien's removal.
241.10 Special care and attention of removable aliens.
241.11 Detention and removal of stowaways.
241.12 Nonapplication of costs of detention and maintenance.

Subpart B—Deportation of Excluded Aliens (for Hearings Commenced Prior to April 1, 1997).

241.20 Proceedings commenced prior to April 1, 1997.
241.21 Stay of deportation of excluded alien.
241.22 Notice to surrender for deportation.
241.23 Cost of maintenance not assessed.
241.24 Notice to transportation line of alien's exclusion.
241.25 Deportation.

Subpart C—Deportation of Aliens in the United States (for Hearings Commenced Prior to April 1, 1997)

241.30 Proceedings commenced prior to April 1, 1997.
241.31 Final order of deportation.
241.32 Warrant of deportation.
241.33 Expulsion.

Authority: 8 U.S.C. 1103, 1223, 1227, 1251, 1253, 1255, and 1330; 8 CFR part 2.

Subpart A—Post-hearing Detention and Removal

§ 241.1 Final order of removal.

An order of removal made by the immigration judge at the conclusion of proceedings under section 240 of the Act shall become final:

(a) Upon dismissal of an appeal by the Board of Immigration Appeals;

(b) Upon waiver of appeal by the respondent;

(c) Upon expiration of the time allotted for an appeal if the respondent does not file an appeal within that time;

(d) If certified to the Board or Attorney General, upon the date of the subsequent decision ordering removal;

(e) If an immigration judge orders an alien removed in the alien's absence, immediately upon entry of such order; or

(f) If an immigration judge issues an alternate order of removal in connection with a grant of voluntary departure, upon overstay of the voluntary departure period except where the respondent has filed a timely appeal with the Board. In such a case, the order shall become final upon an order of removal by the Board or the Attorney General, or upon overstay of any voluntary departure period granted or reinstated by the Board or the Attorney General.

§ 241.2 Warrant of removal.

(a) *Issuance of a warrant of removal.* A Form I–205, Warrant of Removal, based upon the final administrative removal order in the alien's case shall be issued by a district director. The district director shall exercise the authority contained in section 241 of the Act to determine at whose expense the alien shall be removed and whether his or her mental or physical condition requires personal care and attention en route to his or her destination.

(b) *Execution of the warrant of removal.* Any officer authorized by § 287.5(e) of this chapter to execute administrative warrants of arrest may execute a warrant of removal.

§ 241.3 Detention of aliens during removal period.

(a) *Assumption of custody.* Once the removal period defined in section 241(a)(1) of the Act begins, an alien in the United States will be taken into custody pursuant to the warrant of removal.

(b) *Cancellation of bond.* Any bond previously posted will be canceled unless it has been breached or is subject to being breached.

(c) *Judicial stays.* The filing of (or intention of file) a petition or action in a Federal court seeking review of the issuance or execution of an order of removal shall not delay execution of the Warrant of Removal except upon an affirmative order of the court.

§ 241.4 Continued detention beyond the removal period.

(a) *Continuation of custody for inadmissible or criminal aliens.* The district director may continue in custody any alien inadmissible under section 212(a) of the Act or removable under section 237(a)(1)(C), 237(a)(2), or 237(a)(4) of the Act, or who presents a significant risk of noncompliance with the order of removal, beyond the removal period, as necessary, until removal from the United States. If such an alien demonstrates by clear and convincing evidence that the release would not pose a danger to the community or a significant flight risk, the district director may, in the exercise of discretion, order the alien released from custody on such conditions as the district director may prescribe, including bond in an amount sufficient to ensure the alien's appearance for removal. The district may consider, but is not limited to considering, the following factors:

(1) The nature and seriousness of the alien's criminal convictions;

(2) Other criminal history;

(3) Sentence(s) imposed and time actually served;

(4) History of failures to appear for court (defaults);

(5) Probation history;

(6) Disciplinary problems while incarcerated;

(7) Evidence of rehabilitative effort or recidivism;

(8) Equities in the United States; and

(9) Prior immigration violations and history.

(b) *Continuation of custody for other aliens.* Any alien removable under any section of the Act other than section 212(a), 237(a)(1)(C), 237(a)(2), or 237(a)(4) may be detained beyond the removal period, in the discretion of the district director, unless the alien demonstrates to the satisfaction of the district director that he or she is likely to comply with the remvoal order and is not a risk to the community.

§ 241.5 Conditions of release after removal period.

(a) *Order of supervision.* An alien released pursuant to § 241.4 shall be released pursuant to an order of supervision. A district director, acting district director, deputy district director, assistant district director for investigations, assistant district director for detention and deportation, or officer in charge may issue an order of supervision on Form I–220B. The order shall specify conditions of supervision including, but not limited to, the following:

(1) A requirement that the alien report to a specified officer periodically and provide relevant information under oath as directed;

(2) A requirement that the alien continue efforts to obtain a travel document and assist the Service in obtaining a travel document;

(3) A requirement that the alien report as directed for a mental or physical examinations as directed by the Service;

(4) A requirement that the alien obtain advance approval of travel beyond previously specified times and distances; and

(5) A requirement that the alien provide the Service with written notice of any change of address within five days of the change.

(b) *Posting of bond.* An officer authorized to issue an order of supervision may require the posting of a bond in an amount determined by the officer to be sufficient to ensure compliance with the conditions of the order, including surrender for removal.

(c) *Employment authorization.* An officer authorized to issue an order of supervision may, in his or her discretion, grant employment authorization to an alien released under an order of supervision if the officer specifically finds that:

(1) The alien cannot be removed because no country will accept the alien; or

(2) The removal of the alien is impracticable or contrary to public interest.

§ 241.6 Administrative stay of removal.

Any request of an alien under a final order of deportation or removal for a stay of deportation or removal shall be filed on Form I–246, Stay of Removal, with the district director having jurisdiction over the place where the alien is at the time of filing. The district director, in his or her discretion and in consideration of factors such as are listed in § 212.5 of this chapter and section 241(c) of the Act, may grant a stay of removal or deportation for such time and under such conditions as he or she may deem appropriate. Neither the request nor the failure to receive notice of disposition of the request shall delay removal or relieve the alien from strict compliance with any outstanding notice to surrender for deportation or removal. Denial by the district director of a request for a stay is not appealable, but such denial shall not preclude an immigration judge or the Board from granting a stay in connection with a motion to reopen or a motion to reconsider as provided in 8 CFR part 3. The Service shall take all reasonable steps to comply with a stay granted by an immigration judge or the Board. However, such a stay shall cease to have effect if granted (or communicated) after the alien has been placed aboard an aircraft or other conveyance for removal and the normal boarding has been completed.

§ 241.7 Self-removal.

A district director may permit an alien ordered removed (including an alien ordered excluded or deported in proceedings prior to April 1, 1997) to depart at his or her own expense to a destination of his or her own choice. Any alien who has departed from the United States while an order of deportation or removal is outstanding shall be considered to have been deported, excluded and deported, or removed, except that an alien who departed before the expiration of the voluntary departure period granted in connection with an alternate order of deportation or removal shall not be considered to have been so deported or removed.

§ 241.8 Reinstatement of removal orders.

(a) *Applicability.* An alien who illegally reenters the United States after having been removed, or having departed voluntarily, while under an order of exclusion, deportation, or removal shall be removed from the United States by reinstating the prior order. The alien has no right to a hearing before an immigration judge in such circumstances. In establishing whether an alien is subject to this section, the immigration officer shall determine the following:

(1) Whether the alien has been subject to a prior order of removal. The immigration officer must obtain the prior order of exclusion, deportation, or removal relating to the alien.

(2) The identity of the alien, i.e., whether the alien is in fact an alien who was previously removed, or who departed voluntarily while under an order of exclusion, deportation, or removal. In disputed cases, verification of identity shall be accomplished by a comparison of fingerprints between those of the previously excluded, deported, or removed alien contained in Service records and those of the subject alien. In the absence of fingerprints in a disputed case the alien shall not be removed pursuant to this paragraph.

(3) Whether the alien unlawfully reentered the United States. In making this determination, the officer shall consider all relevant evidence, including statements made by the alien and any evidence in the alien's possession. The immigration officer shall attempt to verify an alien's claim, if any, that he or she was lawfully admitted, which shall include a check of Service data systems available to the officer.

(b) *Notice.* If an officer determines that an alien is subject to removal under this section, he or shall provide the alien with written notice of his or her determination. The officer shall advise the alien that he or she may make a written or oral statement contesting the determination. If the alien wishes to make such a statement, the officer shall allow the alien to do so and shall consider whether the alien's statement warrants reconsideration of the determination.

(c) *Order.* If the requirements of paragraph (a) of this section are met, the alien shall be removed under the previous order of exclusion, deportation, or removal in accordance with section 241(a)(5) of the Act.

(d) *Exception for withholding of removal.* If an alien whose prior order of removal has been reinstated under this section expresses a fear of returning to the country designated in that order, the alien shall be immediately referred to an asylum officer to determine whether the alien's removal to that country must be withheld under section 241(b)(3) of the Act. The alien's claim will be granted or denied by an asylum officer in accordance with § 208.16 of this chapter. If the alien has previously had a claim to withholding of deportation or removal denied, then that decision shall prevail unless the alien can establish the existence of changed circumstances that materially affect the alien's eligibility for withholding. The alien's case shall not be referred to an immigration judge, and there is no appeal from the decision of the asylum officer. If the alien is found to merit withholding of removal, the Service shall not enforce the reinstated order.

(e) *Execution of reinstated order.* Execution of the reinstated order of removal and detention of the alien shall be administered in accordance with this part.

§ 241.9 Notice to transportation line of alien's removal.

(a) An alien who has been ordered removed shall, immediately or as promptly as the circumstances permit, be offered for removal to the owner, agent, master, commanding officer, person in charge, purser, or consignee of the vessel or aircraft on which the alien is to be removed, as determined by the district director, with a written notice specifying the cause of inadmissibility or deportability, the class of travel in which such alien arrived and is to be removed, and with the return of any documentation that will assist in effecting his or her removal. If special care and attention are required, the provisions of § 241.10 shall apply.

(b) Failure of the carrier to accept for removal an alien who has been ordered removed shall result in the carrier being assessed any costs incurred by the Service for detention after the carrier's failure to accept the alien for removal, including the cost of any transportation

as required under section 241(e) of the Act. The User Fee Account shall not be assessed for expenses incurred because of the carrier's violation of the provisions of section 241 of the Act and this paragraph. The Service will, at the carrier's option, retain custody of the alien for an additional 7 days beyond the date of the removal order. If, after the third day of this additional 7-day period, the carrier has not made all the necessary transportation arrangements for the alien to be returned to his or her point of embarkation by the end of the additional 7-day period, the Service will make the arrangements and bill the carrier for its costs.

241.10 Special care and attention of removable aliens.

When, in accordance with section 241(c)(3) of the Act, a transportation line is responsible for the expenses of an inadmissible or deportable alien's removal, and the alien requires special care and attention, the alien shall be delivered to the owner, agent, master, commanding officer, person in charge, purser, or consignee of the vessel or aircraft on which the alien will be removed, who shall be given Forms I–287, I–287A, and I–287B. The reverse of Form I–287A shall be signed by the officer of the vessel or aircraft to whom the alien has been delivered and immediately returned to the immigration officer effecting delivery. Form I–287B shall be retained by the receiving officer and subsequently filled out by the agents or persons therein designated and returned by mail to the district director named on the form. The transportation line shall at its own expense forward the alien from the foreign port of disembarkation to the final destination specified on Form I–287. The special care and attention shall be continued to such final destination, except when the foreign public officers decline to allow such attendant to proceed and they take charge of the alien, in which case this fact shall be recorded by the transportation line on the reverse of Form I–287B. If the transportation line fails, refuses, or neglects to provide the necessary special care and attention or comply with the directions of Form I–287, the district director shall thereafter and without notice employ suitable persons, at the expense of the transportation line, and effect such removal.

§ 241.11 Detention and removal of stowaways.

(a) *Presentation of stowaways.* The owner, agent, master, commanding officer, charterer, or consignee of a vessel or aircraft (referred to in this section as the carrier) bringing any alien stowaway to the United States is required to detain the stowaway on board the vessel or aircraft, at the expense of the owner of the vessel or aircraft, until completion of the inspection of the alien by an immigration officer. If detention on board the vessel or aircraft pending inspection is not possible, the carrier shall advise the Service of this fact without delay, and the Service may authorize that the carrier detain the stowaway at another designated location, at the expense of the owner, until the immigration officer arrives. No notice to detain the alien shall be required. Failure to detain an alien stowaway pending inspection shall result in a civil penalty under section 243(c)(1)(A) of the Act. The owner, agent, master, commanding officer, charterer, or consignee of a vessel or aircraft must present the stowaway for inspection, along with any documents or evidence of identity or nationality in the possession of the alien or obtained by the carrier relating to the alien stowaway, and must provide any available information concerning the alien's boarding or apprehension.

(b) *Removal of stowaways from vessel or aircraft for medical treatment.* The district director may parole an alien stowaway into the United States for medical treatment, but the costs of detention and treatment of the alien stowaway shall be at the expense of the owner of the vessel or aircraft, and such removal of the stowaway from the vessel or aircraft does not relieve the carrier of the requirement to remove the stowaway from the United States once such medical treatment has been completed.

(c) *Repatriation of stowaways.* (1) *Requirements of carrier.* Following inspection, an immigration officer may order the owner, agent, master, commanding officer, charterer, or consignee of a vessel or aircraft bringing any alien stowaway to the United States to remove the stowaway on the vessel or aircraft of arrival. If the owner, agent, master, commanding officer, cahrterer, or consignee requests that he or she be allowed to remove the stowaway by other means, the Service shall consider any such request, provided the carrier has obtained, or will obtain in a timely manner, any necessary travel documents and has made or will make all transportation arrangements. The owner, agent, master, commanding officer, charterer, or consignee shall transport the stowaway or arrange for secure escort of the stowaway to the vessel or aircraft of departure to ensure that the stowaway departs the United States. All expenses relating to removal shall be borne by the owner. Other than requiring compliance with the detention and removal requirements contained in section 241(d)(2) of the Act, the Service shall not impose additional conditions on the carrier regarding security arrangements. Failure to comply with an order to remove an alien stowaway shall result in a civil penalty under section 243(c)(1)(A) of the Act.

(2) *Detention of stowaways ordered removed.* If detention of the stowaway is required pending removal on other than the vessel or aircraft of arrival, or if the stowaway is to be removed on the vessel or aircraft of arrival but departure of the vessel or aircraft is not imminent and circumstances preclude keeping the stowaway on board the vessel or aircraft, the Service shall take the stowaway into Service custody. The owner is responsible for all costs of maintaining and detaining the stowaway pending removal, including costs for stowaways seeking asylum as described in paragraph (d) of this section. Such costs will be limited to those normally incurred in the detention of an alien by the Service, including, but not limited to, housing, food, transportation, medical expenses, and other reasonable costs incident to the detention of the stowaway. The Service may require the posting of a bond or other surety to ensure payment of costs of detention.

(d) *Stowaways claiming asylum.* (1) *Referral for credible fear determination.* A stowaway who indicates an intention to apply for asylum or a fear of persecution shall be removed from the vessel or aircraft of arrival in accordance with § 208.5(b) of this chapter. The immigration officer shall refer the alien to an asylum officer for a determination of credible fear in accordance with section 235(b)(1)(B) of the Act and § 208.18 of this chapter. The stowaway shall be detained in the custody of the Service pending the credible fear determination and during any consideration of the asylum application.

(2) *Costs of detention of asylum-seeking stowaways.* The owner of the vessel or aircraft that brought the stowaway to the United States shall reimburse the Service for the costs of maintaining and detaining the stowaway pending a determination of credible fear under section 235(b)(1)(B) of the Act, up to a maximum period of 72 hours. The owner is also responsible for the costs of maintaining and detaining the stowaway during the period in which the stowaway is pursuing his or her asylum application, for a maximum period of 15 working days, excluding Saturdays, Sundays,

and holidays. The 15-day period shall begin on the day following the day in which the alien is determined to have a credible fear of persecution by the asylum officer, or by the immigration judge if such review was requested by the alien pursuant to section 235(b)(1)(B)(iii)(III), but not later than 72 hours after the stowaway was initially presented to the Service for inspection. Following the determination of credible fear, if the stowaway's application for asylum is not adjudicated within 15 working days, the Service shall pay the costs of detention beyond this time period. If the stowaway is determined not to have a credible fear of persecution, or if the stowaway's application for asylum is denied, including any appeals, the carrier shall be notified and shall arrange for repatriation of the stowaway at the expense of the owner of the vessel or aircraft on which the stowaway arrived.

§ 241.12 Nonapplication of costs of detention and maintenance.

The owner of a vessel or aircraft bringing an alien to the United States who claims to be exempt from payment of the costs of detention and maintenance of the alien pursuant to section 241(c)(3)(B) of the Act shall establish to the satisfaction of the district director in charge of the port of arrival that such costs should not be applied. The district director shall afford the line a reasonable time within which to submit affidavits and briefs to support its claim. There is no appeal from the decision of the district director.

§§ 241.13–241.19 [Reserved]

Subpart B—Deportation of Excluded Aliens (for hearings commenced prior to April 1, 1997)

§ 241.20 Proceedings commenced prior to April 1, 1997.

Subpart B of 8 CFR part 241 applies to exclusion proceedings commenced prior to April 1, 1997. All references to the Act contained in this subpart are references to the Act in effect prior to April 1, 1997.

§ 241.21 Stay of deportation of excluded alien.

The district director in charge of the port of arrival may stay the immediate deportation of an excluded alien pursuant to sections 237 (a) and (d) of the Act under such conditions as he or she may prescribe.

§ 241.22 Notice to surrender for deportation.

An alien who has been finally excluded pursuant to 8 CFR part 240, subpart D may at any time surrender himself or herself to the custody of the Service and shall surrender to such custody upon notice in writing of the time and place for his or her surrender. The Service may take the alien into custody at any time. An alien taken into custody either upon notice to surrender or by arrest shall not be deported less than 72 hours thereafter without his or her consent thereto filed in writing with the district director in charge of the place of his or her detention. An alien in foreign contiguous territory shall be informed that he or she may remain there in lieu of surrendering to the Service, but that he or she will be deemed to have acknowledged the execution of the order of exclusion and deportation in his or her case upon his or her failure to surrender at the time and place prescribed.

§ 241.23 Cost of maintenance not assessed.

A claim pursuant to section 237(a)(1) of the Act shall be established to the satisfaction of the district director in charge of the port of arrival, from whose adverse decision no appeal shall lie. The district director shall afford the line a reasonable time within which to submit affidavits and briefs to support its claim.

§ 241.24 Notice to transportation line of alien's exclusion.

(a) An excluded alien shall, immediately or as promptly as the circumstances permit, be offered for deportation to the master, commanding officer, purser, person in charge, agent, owner, or consignee of the vessel or aircraft on which the alien is to be deported, as determined by the district director, with a written notice specifying the cause of exclusion, the class of travel in which such alien arrived and is to be deported, and with the return of any documentation that will assist in effecting his or her deportation. If special care and attention are required, the provisions of § 241.10 shall apply.

(b) Failure of the carrier to accept for removal an alien who has been ordered excluded and deported shall result in the carrier being assessed any costs incurred by the Service for detention after the carrier's failure to accept the alien for removal including the cost of any transportation. The User Fee Account shall not be assessed for expenses incurred because of the carrier's violation of the provisions of section 237 of the Act and this paragraph. The Service will, at the carrier's option, retain custody of the excluded alien for an additional 7 days beyond the date of the deportation/exclusion order. If, after the third day of this additional 7-day period, the carrier has not made all the necessary transportation arrangements for the excluded alien to be returned to his or her point of embarkation by the end of the additional 7-day period, the Service will make the arrangements and bill the carrier for its costs.

§ 241.25 Deportation.

(a) *Definitions of terms.* For the purposes of this section, the following terms mean:

(1) Adjacent island—as defined in section 101(b)(5) of the Act.

(2) Foreign contiguous territory—any country sharing a common boundary with the United States.

(3) Residence in foreign contiguous territory or adjacent island—any physical presence, regardless of intent, in a foreign contiguous territory or an adjacent island if the government of such territory or island agrees to accept the alien.

(4) Aircraft or vessel—any conveyance and other mode of travel by which arrival is affected.

(5) Next available flight—the carrier's next regularly scheduled departure to the excluded alien's point of embarkation regardless of seat availability. If the carrier's next regulatory scheduled departure of the excluded aliens point of embarkation is full, the carrier has the option of arranging for return transportation on other carrier which service the excluded aliens point of embarkation.

(b) *Place to which deported.* Any alien (other than an alien crew member or an alien who boarded an aircraft or vessel in foreign contiguous territory or an adjacent island) who is ordered excluded shall be deported to the country where the alien boarded the vessel or aircraft on which the alien arrived in the United States. If that country refuses to accept the alien, the alien shall be deported to:

(1) The country of which the alien is a subject, citizen, or national;

(2) The country where the alien was born;

(3) The country where the alien has a residence; or

(4) Any country willing to accept the alien.

(c) *Contiguous territory and adjacent islands.* Any alien ordered excluded who boarded an aircraft or vessel in foreign contiguous territory or in any adjacent island shall be deported to such foreign contiguous territory or adjacent island is the alien is a native, citizen, subject or national of such foreign contiguous territory or adjacent

island, or if the alien has a residence in such foreign contiguous territory or adjacent island. Otherwise, the alien shall be deported, in the first instance, to the country in which is located the port at which the alien embarked for such foreign contiguous territory or adjacent island.

(d) *Land border pedestrian arrivals.* Any alien ordered excluded who arrived at a land border on foot shall be deported in the same manner as if the alien had boarded a vessel or aircraft in foreign contiguous territory.

§§ 241.26–241.29 [Reserved]

Subpart C—Deportation of Aliens in the United States (For Hearings Commenced Prior to April 1, 1997)

§ 241.30 Proceedings commenced prior to April 1, 1997.

Subpart C of 8 CFR part 241 applies to deportation proceedings commenced prior to April 1, 1997. All references to the Act contained in this subpart are references to the Act in effect prior to April 1, 1997.

§ 241.31 Final order of deportation.

Except as otherwise required by section 242(c) of the Act for the specific purposes of that section, an order of deportation, including an alternate order of deportation coupled with an order of voluntary departure, made by the immigration judge in proceedings under 8 CFR part 240 shall become final upon dismissal of an appeal by the Board of Immigration Appeals, upon waiver of appeal, or upon expiration of the time allotted for an appeal when no appeal is taken; of, if such an order is issued by the Board or approved by the Board upon certification, it shall be final as of the date of the Board's decision.

§ 241.32 Warrant of deportation.

A Form I–205, Warrant of Deportation, based upon the final administrative order of deportation in the alien's case shall be issued by a district director. The director shall exercise the authority contained in such 243 of the Act to determine at whose expense the alien shall be deported and whether his or her mental or physical condition requires personal care and attention en route to his or her destination.

§ 241.33 Expulsion.

(a) *Execution of order.* Except in the exercise of discretion by the district director, and for such reasons as are set forth in § 212.5(a) of this chapter, once an order of deportation becomes final, an alien shall be taken into custody and the order shall be executed. For the purposes of this part, and order of deportation is final and subject to execution upon the date when any of the following occurs:

(1) A grant of voluntary departure expires;

(2) An immigration judge enters an order of deportation without granting voluntary departure or other relief, and the alien respondent waives his or order right to appeal;

(3) The Board of Immigration Appeals enters and order of deportation on appeals, without granting voluntary departure or other relief; or

(4) A Federal district or appellate court affirms an administrative order of deportation in a petition for review or habeas corpus action.

(b) *Service of decision.* In the case of an order entered by any of the authorities enumerated above, the order shall be executed no sooner than 72 hours after service of the decision, regardless of whether the alien is in Service custody, provided that such period may be waived on the knowing and voluntary request of the alien. Nothing in this paragraph shall be construed, however, to preclude assumption of custody by the Service at the time of issuance of the final order.

PART 242—[REMOVED AND RESERVED]

108. Part 242 is removed and reserved.

PART 243—[REMOVED AND RESERVED]

109. Part 243 is removed and reserved.

PART 244—TEMPORARY PROTECTED STATUS FOR NATIONALS OF DESIGNATED STATES

110. The heading for part 244 is revised as set forth above.

111. The authority citation for part 244 is revised to read as follows:

Authority: 8 U.S.C. 1103, 1254, 1254a note.

§§ 244.1 and 244.2 [Removed]

112. Sections 244.1 and 244.2 are removed.

§§ 244.3 through 244.22 [Redesignated as §§ 244.1 through 244.20]

113. Newly redesignated §§ 244.3 through 244.22 are further redesignated as §§ 244.1 through 244.20, respectively.

PART 245—ADJUSTMENT OF STATUS TO THAT OF PERSON ADMITTED FOR PERMANENT RESIDENCE

114. The authority citation for part 245 is revised to read as follows:

Authority: 8 U.S.C. 1101, 1103, 1182, 1255; 8 CFR part 2.

115. Section 245.1 is amended by:

a. Removing the word ''and'' at the end of the paragraph (c)(3);

b. Removing the ''.'' at the end of paragraphs (c)(4) through (c)(7), and replacing it with a '';'';

c. Redesignating paragraph (c)(8) as paragraph (c)(9);

d. Adding a new paragraph (c)(8);

e. Revising newly redesignated paragraph (c)(9) introductory text,

f. Revising newly redesignated paragraphs (c)(9)(i) through (c)(9)(iii); and by

g. Revising paragraph (f), to read as follows:

§ 245.1 Eligibility.

* * * * *

(c) * * *

(8) Any arriving alien who is in removal proceedings pursuant to section 235(b)(1) or section 240 of the Act; and

(9) Any alien who seeks to adjust status based upon a marriage which occurred on or after November 10, 1986, and while the alien was in exclusion, deportation, or removal proceedings, or judicial proceedings relating thereto.

(i) *Commencement of proceedings.* The period during which the alien is in deportation, exclusion, or removal proceedings or judicial proceedings relating thereto, commences:

(A) With the issuance of the Form I–221, Order to Show Cause and Notice of Hearing prior to June 20, 1991;

(B) With the filing of a Form I–221, Order to Show Cause and Notice of Hearing, issued on or after June 20, 1991, with the Immigration Court;

(C) With the issuance of Form I–122, Notice to Applicant for Admission Detained for Hearing Before Immigration Judge, prior to April 1, 1997,

(D) With the filing of a Form I–862, Notice to Appear, with the Immigration Court, or

(E) With the issuance and service of Form I–860, Notice and Order of Expedited Removal.

(ii) *Termination of proceedings.* The period during which the alien is in exclusion, deportation, or removal proceedings, or judicial proceedings relating thereto, terminates:

(A) When the alien departs from the United States while an order of exclusion, deportation, or removal is outstanding or before the expiration of the voluntary departure time granted in connection with an alternate order of deportation or removal;

(B) When the alien is found not to be inadmissible or deportable from the United States;

(C) When the Form I–122, I–221, I–860, or I–862 is canceled;

(D) When proceedings are terminated by the immigration judge or the Board of Immigration Appeals; or

(E) When a petition for review or an action for habeas corpus is granted by a Federal court on judicial review.

(iii) *Exemptions.* This prohibition shall no longer apply if:

(A) The alien is found not to be inadmissible or deportable from the United States;

(B) Form I–122, I–221, I–860, or I–862, is canceled;

(C) Proceedings are terminated by the immigration judge or the Board of Immigration Appeals;

(D) A petition for review or an action for habeas corpus is granted by a Federal court on judicial review;

(E) The alien has resided outside the United States for 2 or more years following the marriage; or

(F) The alien establishes the marriage is bona fide by providing clear and convincing evidence that the marriage was entered into in good faith and in accordance with the laws of the place where the marriage took place, was not entered into for the purpose of procuring the alien's entry as an immigrant, and no fee or other consideration was given (other than to an attorney for assistance in preparation of a lawful petition) for the filing of a petition.

* * * * *

(f) *Concurrent applications to overcome grounds of inadmissibility.* Except as provided in 8 CFR parts 235 and 249, an application under this part shall be the sole method of requesting the exercise of discretion under sections 212 (g), (h), (i), and (k) of the Act, as they relate to the inadmissibility of an alien in the United States. No fee is required for filing an application to overcome the grounds of inadmissibility of the Act if filed concurrently with an application for adjustment of status under the provisions of the Act of October 28, 1977, and of this part.

* * * * *

116. Section 245.2 is amended by:

a. Revising paragraph (a)(1);

b. Revising paragraph (a)(4)(ii);

c. Revising paragraph (a)(5) (ii) and (iii); and by

d. Revising paragraph (c), to read as follows:

§ 245.2 Application.

(a) *General.* (1) *Jurisdiction.* An alien who believes he or she meets the eligibility requirements of section 245 of the Act or section 1 of the Act of November 2, 1966, and § 245.1 shall apply to the director having jurisdiction over his or her place of residence unless otherwise instructed in 8 CFR part 245, or by the instruction on the application form. After an alien, other than an arriving alien, is in deportation or removal proceedings, his or her application for adjustment of status under section 245 of the Act or section 1 of the Act of November 2, 1966 shall be made and considered only in those proceedings. An arriving alien, other than an alien in removal proceedings, who believes he or she meets the eligibility requirements of section 245 of the Act or section 1 of the Act of November 2, 1966, and § 245.1 shall apply to the director having jurisdiction over his or her place of arrival. An adjustment application by an alien paroled under section 212(d)(5) of the Act, which has been denied by the Director, may be renewed in removal proceedings under 8 CFR part 240 only if:

(i) The denied application must have been properly filed subsequent to the applicant's earlier inspection and admission to the United States; and

(ii) The applicant's later absence from and return to the United States was under the terms of an advance parole authorization on Form I–512 granted to permit the applicant's absence and return to pursue the previously filed adjustment application.

* * * * *

(4) * * *

(ii) *Under section 245 of the Act.* The departure from the United States of an applicant who is under exclusion, deportation, or removal proceedings shall be deemed an abandonment of the application constituting grounds for termination of the proceeding by reason of the departure. The departure of an applicant who is not under exclusion, deportation, or removal proceedings shall be deemed an abandonment of his or her application constituting grounds for termination, unless the applicant was previously granted advance parole by the Service for such absence, and was inspected upon returning to the United States. If the application of an individual granted advance parole is subsequently denied, the applicant will be treated as an applicant for admission, and subject to the provisions of sections 212 and 235 of the Act.

* * * * *

(5) * * *

(ii) *Under section 245 of the Act.* If the application is approved, the applicant's permanent residence shall be recorded as of the date of the order approving the adjustment of status. An application for adjustment of status, as a preference alien, shall not be approved until an immigrant visa number has been allocated by the Department of State, except when the applicant has established eligibility for the benefits of Public Law 101–238. No appeal lies from the denial of an application by the director, but the applicant, if not an arriving alien, retains the right to renew his or her application in proceedings under 8 CFR part 240. Also, an applicant who is a parolee and meets the two conditions described in § 245.2(a)(1) may renew a denied application in proceedings under 8 CFR part 240 to determine admissibility. At the time of renewal of application, an applicant does not need to meet the statutory requirement of section 245(c) of the Act, or § 245.1(g), if, in fact, those requirements were met at the time the renewed application was initially filed with the director. Nothing in this section shall entitle an alien to proceedings under section 240 of the Act who is not otherwise so entitled.

(iii) *Under the Act of November 2, 1966.* If the application is approved, the applicant's permanent residence shall be recorded in accordance with the provisions of section 1. No appeal lies from the denial of an application by the director, but the applicant, if not an arriving alien, retains the right to renew his or her application in proceedings under 8 CFR part 240. Also, an applicant who is a parolee and meets the two conditions described in § 245.2(a)(1) may renew a denied application in proceedings under 8 CFR part 240 to determine admissibility.

* * * * *

(c) *Application under section 214(d) of the Act.* An application for permanent resident status pursuant to section 214(d) of the Act shall be filed on Form I–485 with the director having jurisdiction over the applicant's place of residence. A separate application shall be filed by each applicant. If the application is approved, the director shall record the lawful admission of the applicant as of the date of approval. The applicant shall be notified of the decision and, if the application is denied, of the reasons therefor. No appeal shall lie from the denial of an application by the director but such denial shall be without prejudice to the alien's right to renew his or her application in proceedings under 8 CFR part 240.

117. Section 245.5 is amended by revising the first sentence to read as follows:

§ 245.5 Medical examination.

Pursuant to section 232(b) of the Act, an applicant for adjustment of status

shall be required to have a medical examination by a designated civil surgeon, whose report setting forth the findings of the mental and physical condition of the applicant, including compliance with section 212(a)(1)(A)(ii) of the Act, shall be incorporated into the record.* * *

118. Section 245.8 is amended by revising paragraph (e), to read as follows:

§ 245.8 Adjustment of status as a special immigrant under section 101(a)(27)(K) of the Act.

* * * * *

(e) *Removal provisions of section 237 of the Act.* If the Service is made aware by notification from the appropriate executive department or by any other means that a section 101(a)(27)(K) special immigrant who has already been granted permanent residence fails to complete his or her total active duty service obligation for reasons other than an honorable discharge, the alien may become subject to the removal provisions of section 237 of the Act, provided the alien is in one or more of the classes of deportable aliens specified in section 237 of the Act. The Service shall obtain current Form DD–214, Certificate of Release or Discharge from Active Duty, from the appropriate executive department for verification of the alien's failure to maintain eligibility.

* * * * *

119. Section 245.9 is amended by revising paragraphs (d) and (m), to read as follows:

§ 245.9 Adjustment of Status of Certain Nationals of the People's Republic of China under Public Law 102–404.

* * * * *

(d) *Waivers of inadmissibility under section 212(a) of the Act.* An applicant for the benefits of the adjustment of status provisions of Pub. L. 102–404 is automatically exempted from compliance with the requirements of sections 212(a)(5) and 212(a)(7)(A) of the Act. A Pub. L. 102–404 applicant may also apply for one or more waivers of inadmissibility under section 212(a) of the Act, except for inadmissibility under section 212(a)(2)(C), 212(a)(3)(A), 212(a)(3)(B), 212(a)(3)(C) or 212(a)(3)(E) of the Act.

* * * * *

(m) *Effect of enactment on family members other than qualified family members.* The adjustment of status benefits and waivers provided by Pub. L. 102–404 do not apply to a spouse or child who is not a qualified family member as defined in paragraph (c) of this section. However, a spouse or child whose relationship to the principal alien was established prior to the approval of the principal's adjustment of status application may be accorded the derivative priority date and preference category of the principal alien, in accordance with the provisions of section 203(d) of the Act. The spouse or child may use the priority date and category when it becomes current, in accordance with the limitations set forth in sections 201 and 202 of the Act. Persons who are unable to maintain lawful nonimmigrant status in the United States and are not immediately eligible to apply for adjustment of status may request voluntary departure pursuant to 8 CFR part 240.

120. Section 245.10 is amended by:

a. Revising paragraphs (a)(3) and (6); and by

b. Revising introductory text in paragraph (b), to read as follows:

§ 245.10 Adjustment of status upon payment of additional sum under Public Law 103–317.

(a) * * *

(3) Is not inadmissible from the United States under any provision of section 212 of the Act, or all grounds for inadmissibility have been waived;

* * * * *

(6) Remits the sum specified in section 245(i) of the Act, unless payment of the sum is waived under section 245(i) of the Act; and

* * * * *

(b) *Payment of additional sum.* An applicant filing under the provisions of section 245(i) of the Act must pay the standard adjustment of status filing fee, as shown on Form I–485 and contained in § 103.7(b)(1) of this chapter. The applicant must also pay the additional sum specified in section 245(i) of the Act, unless at the time the application for adjustment of status is filed, the alien is:

* * * * *

121. Section 245.11 is amended by:

a. Revising paragraph (a)(4)(ii)(B);

b. Revising paragraph (b)(1)(iii);

c. Revising the introductory text in paragraph (c); and by

d. Revising paragraphs (h) and (i), to read as follows:

§ 245.11 Adjustment of aliens in S nonimmigrant classification.

(a) * * *

(4) * * *

(ii) * * *

(B) Be admissible to the United States as an immigrant, unless the ground of inadmissibility has been waived;

* * * * *

(b) * * *

(1) * * *

(iii) The family member is not inadmissible from the United States as a participant in Nazi persecution or genocide as described in section 212(a)(3)(E) of the Act;

* * * * *

(c) *Waivers of inadmissibility.* An alien seeking to adjust status pursuant to the provisions of section 101(a)(15)(S) of the Act may not be denied adjustment of status for conduct or a condition that:

* * * * *

(h) *Removal under section 237 of the Act.* Nothing in this section shall prevent an alien adjusted pursuant to the terms of these provisions from being removed for conviction of a crime of moral turpitude committed within 10 years after being provided lawful permanent residence under this section or for any other ground under section 237 of the Act.

(i) *Denial of application.* In the event the district decides to deny an application on Form I–485 and an approved Form I–854 to allow an S nonimmigrant to adjust status, the Assistant Attorney General, Criminal Division, and the relevant LEA shall be notified in writing to that effect. The Assistant Attorney General, Criminal Division, shall concur in or object to that decision. Unless the Assistant Attorney General, Criminal Division, objects within 7 days, he or she shall be deemed to have concurred in the decision. In the event of an objection by the Assistant Attorney General, Criminal Division, the matter will be expeditiously referred to the Deputy Attorney General for a final resolution. In no circumstances shall the alien or the relevant LEA have a right of appeal from any decision to deny. A denial of an adjustment application under this paragraph may not be renewed in subsequent removal proceedings.

PART 246—RESCISSION OF ADJUSTMENT OF STATUS

122. The authority citation for part 246 is revised to read as follows:

Authority: 8 U.S.C. 1103, 1254, 1255, 1256, 1259; 8 CFR part 2.

§ 246.8 [Removed]

123. Section 246.8 is removed.

PART 248—CHANGE OF NONIMMGRANT CLASSIFICATION

124. The authority citation for part 248 continues to read as follows:

Authority: 8 U.S.C. 1101, 1103, 1184, 1187, 1258; 8 CFR part 2.

125. Section 248.1 is amended by revising paragraph (b)(4) to read as follows:

§ 248.1 Eligibility.

* * * * *

(b) * * *

(4) The alien is not the subject of removal proceedings under 8 CFR part 240.

* * * * *

PART 249—CREATION OF RECORDS OF LAWFUL ADMISSION FOR PERMANENT RESIDENCE

126. The authority citation for part 249 is revised to read as follows:

Authority: 8 U.S.C. 1103, 1182, 1259; 8 CFR part 2.

127. Section 249.2 is amended by revising the first sentence in paragraph (a) and by revising paragraph (b), to read as follows:

§ 249.2 Application.

(a) *Jurisdiction.* An application by an alien, other than an arriving alien, who has been served with a notice to appear or warrant of arrest shall be considered only in proceedings under 8 CFR part 240. * * *

(b) *Decision.* The applicant shall be notified of the decision and, if the application is denied, of the reasons therefor. If the application is granted, a Form I–551, showing that the applicant has acquired the status of an alien lawfully admitted for permanent residence, shall not be issued until the applicant surrenders any other document in his or her possession evidencing compliance with the alien registration requirements of former or existing law. No appeal shall lie from the denial of an application by the district director. However, an alien, other than an arriving alien, may renew the denied application in proceedings under 8 CFR part 240.

PART 251—ARRIVAL MANIFESTS AND LISTS: SUPPORTING DOCUMENTS

128. The authority citation for part 251 is revised to read as follows:

Authority: 8 U.S.C. 1103, 1182, 1221, 1281, 1282, 8 CFR part 2.

129. Section 251.1 is revised to read as follows:

§ 251.1 Arrival manifests and lists.

(a) *Vessels.* (1) *General.* The master or agent of every vessel arriving in the United States from a foreign place or an outlying possession of the United States shall present to the immigration officer at the port where the immigration inspection is performed a manifest of all crewmen on board on Form I–418, Passenger List and Crew List, in accordance with the instructions contained thereon.

(2) *Longshore work notations.* The master or agent of the vessel shall indicate in writing immediately below the name of the alien listed on the Form I–418 whether or not crewmen aboard the vessel will be used to perform longshore work at any United States port before the vessel departs the United States.

(i) If no longshore work will be performed, no further notation regarding longshore work is required.

(ii) If longshore work will be performed, the master or agent shall note which exception listed in section 258 of the Act permits the work. The exceptions are:

(A) The hazardous cargo exception;

(B) The prevailing practice exception in accordance with a port's collective bargaining agreements;

(C) The prevailing practice exception in a port where there is no collective bargaining agreement, but for which the vessel files an attestation;

(D) The prevailing practice exception for automated vessels; and

(E) The reciprocity exception.

(iii) If longshore work will be performed under the hazardous cargo exception, the vessel must either be a tanker or be transporting dry bulk cargo that qualifies as hazardous. All tankers qualify for the hazardous cargo exception, except for a tanker that has been gas-freed to load non-hazardous dry bulk commodities.

(A) To invoke the exception for tankers, the master or agent shall note on the manifest that the vessel is a qualifying tanker.

(B) If the vessel is transporting dry bulk hazardous cargo, the master or agent shall note on the manifest that the vessel's dry bulk cargo is hazardous and shall show the immigration officer the dangerous cargo manifest that is signed by the master or an authorized representative of the owner, and that under 46 CFR 148.02 must be kept in a conspicuous place near the bridge house.

(iv) If longshore work will be performed under the prevailing practice exception, the master or agent shall note on the manifest each port at which longshore work will be performed under this exception. Additionally, for each port the master or agent shall note either that:

(A) The practice of nonimmigrant crewmen doing longshore work is in accordance with all collective bargaining agreements covering 30 percent or more of the longshore workers in the port;

(B) The port has no collective bargaining agreement covering 30 percent or more of the longshore workers in the port and an attestation has been filed with the Secretary of Labor;

(C) An attestation that was previously filed is still valid and the continues to comply with the conditions stated in that attestation; or

(D) The longshore work consists of operating an automated, self-unloading conveyor belt or a vacuum-actuated system.

(v) If longshore work will be performed under the reciprocity exception, the master or agent shall note on the manifest that the work will be done under the reciprocity exception, and will note the nationality of the vessel's registry and the nationality or nationalities of the holders of a majority of the ownership interest in the vessel.

(3) *Exception for certain Great Lakes vessels.* (i) A manifest shall not be required for a vessel of United States, Canadian, or British registry engaged solely in traffic on the Great Lakes or the St. Lawrence River and connecting waterways, herein designated as a Great Lakes vessel, unless:

(A) The vessel employs nonimmigrant crewmen who will do longshore work at a port in the United States; or

(B) The vessel employs crewmen of other than United States, Canadian, or British citizenship.

(ii) In either situation, the master shall note the manifest in the manner prescribed in paragraph (a)(2) of this section.

(iii) After submission of a manifest on the first voyage of a calendar year, a manifest shall not be required on subsequent arrivals unless a nonimmigrant crewman of other than Canadian or British citizenship is employed on the vessel who was not aboard and listed on the last prior manifest, or a change has occurred regarding the performance of longshore work in the United States by nonimmigrant crewmen, or a change has occurred in the exception that the master or agent of the vessel wishes to invoke which was not noted on the last prior manifest.

(4) The master or agent of a vessel that only bunkers at a United States port en route to another United States port shall annotate Form I–418 presented at the onward port to indicate the time, date, and place of bunkering.

(5) If documentation is required to support an exception, as described in § 258.2 of this chapter, it must accompany the manifest.

(b) *Aircraft.* The captain or agent of every aircraft arriving in the United States from a foreign place or from an outlying possession of the United States, except an aircraft arriving in the United

States directly from Canada on a flight originating in that country, shall present to the immigration officer at the port where the inspection is performed a manifest on United States Customs Service Form 7507 or on the International Civil Aviation Organization's General Declaration of all the alien crewmembers on board, including alien crewmembers who are returning to the United States after taking an aircraft of the same line from the United States to a foreign place or alien crewmembers who are entering the United States as passengers solely for the purpose of taking an aircraft of the same line from the United States to a foreign port. The captain or agent of an aircraft that only refuels at the United States en route to another United States port must annotate the manifest presented at the onward port to indicate the time, date, and place of refueling. The surname, given name, and middle initial of each alien crewman listed also shall be shown on the manifest. In addition, the captain or agent of the aircraft shall indicate the total number of United States citizen crewmembers and total number of alien crewmembers.

(c) *Additional documents.* The master, captain, or agent shall prepare as a part of the manifest, when one is required for presentation to an immigration officer, a completely executed set of Forms I–95, Conditional Landing Permit, for each nonimmigrant alien crewman on board, except:

(1) A Canadian or British citizen crewman serving on a vessel plying solely between Canada and the United States; or

(2) A nonimmigrant crewman who is in possession of an unmutilated Form I–184, Alien Crewman Landing Permit and Identification Card, or an unmutilated Form I–95 with space for additional endorsements previously issued to him or her as a member of the crew of the same vessel or an aircraft of the same line on his or her last prior arrival in the United States, following which he or she departed from the United States as a member of the crew of the same vessel or an aircraft of the same line.

130. Section 251.2 is revised to read as follows:

§ 251.2 Notification of illegal landings.

As soon as discovered, the master or agent of any vessel from which an alien crewman has illegally landed or deserted in the United States shall inform the immigration officer in charge of the port where the illegal landing or desertion occurred, in writing, or the name, nationality, passport number and, if known, the personal description, circumstances and time of such illegal landing or desertion of such alien crewman, and furnish any other information and documents that might aid in his or her apprehension, including any passport surrendered pursuant to § 252.1(d) of this chapter. Failure to file notice of illegal landing or desertion and to furnish any surrendered passport within 24 hours of the time of such landing or desertion becomes known shall be regarded as lack of compliance with section 251(d) of the Act.

131. Section 251.3 is revised to read as follows:

§ 251.3 Departure manifests and lists for vessels.

(a) *Form I–418, Passenger List-Crew List.* The master or agent of every vessel departing from the United States shall submit to the immigration officer at the post from which such vessel is to depart directly to some foreign place or outlying possession of the United States, except when a manifest is not required pursuant to § 251.1(a), a single Form I–418 completed in accordance with the instructions on the form. Submission of a Form I–418 that lacks any required endorsement shall be regarded as lack of compliance with section 251(c) of the Act.

(b) *Exception for certain Great Lakes vessels.* The required list need not be submitted for Canadian or British crewmembers of Great Lakes vessels described in § 251.1(a)(3).

132. Section 251.4 is revised to read as follows:

§ 251.4 Departure manifests and lists for aircraft.

(a) *United States Customs Service Form 7507 or International Civil Aviation Organization's General Declaration.* The captain or agent of every aircraft departing from the United States for a foreign place or an outlying possession of the United States, except on a flight departing for and terminating in Canada, shall submit to the immigration officer at the port from which such aircraft is to depart a completed United States Customs Service Form 7507 or the International Civil Aviation Organization's General Declaration. The form shall contain a list of all alien crewmen on board, including alien crewmen who arrived in the United States as crewmen on an aircraft of the same line and who are departing as passengers. The surname, given name, and middle initial of each such alien crewman listed shall be shown. In addition, the captain or agent of the craft shall indicate the total number of alien crewmembers and the total number of United States citizen crewmembers.

(b) *Notification of changes in employment for aircraft.* The agent of the air transportation line shall immediately notify in writing the nearest immigration office of the termination of employment in the United States of each alien employee of the line furnishing the name, birth date, birthplace, nationality, passport number, and other available information concerning such alien. The procedure to follow in obtaining permission to pay off or discharge an alien crewman in the United States after initial immigration inspection, other than an alien lawfully admitted for permanent residence, is set forth in § 252.1(f) of this chapter.

133. Section 251.5 is revised to read as follows:

§ 251.5 Exemptions for private vessels and aircraft.

The provisions of this part relating to submission of arrival and departure manifests and lists shall not apply to a private vessel or a private aircraft not engaged directly or indirectly in the carriage of persons or cargo for hire.

PART 252—LANDING OF ALIEN CREWMEN

134. The authority citation for part 252 is revised to read as follows:

Authority: 8 U.S.C. 1103, 1184, 1258, 1281, 1282; 8 CFR part 2.

135. Section 252.1 is amended by revising paragraphs (a) through (c) to read as follows:

§ 252.1 Examination of crewmen.

(a) *Detention prior to examination.* All persons employed in any capacity on board any vessel or aircraft arriving in the United States shall be detained on board the vessel or at the airport of arrival by the master or agent of such vessel or aircraft until admitted or otherwise permitted to land by an officer of the Service.

(b) *Classes of aliens subject to examination under this part.* The examination of every nonimmigrant alien crewman arriving in the United States shall be in accordance with this part except that the following classes of persons employeed on vessels or aircraft shall be examined in accordance with the provisions of 8 CFR parts 235 and 240:

(1) Canadian or British citizen crewmen serving on vessels plying solely between Canada and the United States; or

(2) Canadian or British citizen crewmen of aircraft arriving in a State of the United States directly from

Canada on flights originating in that country. The crew of a vessel arriving at a United States port that may not require inspection by or clearance from the United States Customs Service is, nevertheless, subject to examination under this part; however, the master of such a vessel is not required to present Form I–95 for any crewman who is not an applicant for a conditional landing permit.

(c) *Requirements for landing permits.* Every alien crewman applying for landing privileges in the United States must make his or her application in person before an immigration officer, present whatever documents are required, be photographed and fingerprinted as the district director may require, and establish to the satisfaction of the immigration officer that he or she is not inadmissible under any provision of the law and is entitled clearly and beyond doubt to landing privileges in the United States.

136. Section 252.2 is revised to read as follows:

§ 252.2 Revocation of conditional landing permits; removal.

(a) *Revocation and removal while vessel is in the United States.* A crewman whose landing permit is subject to revocation pursuant to section 252(b) of the Act may be taken into custody by any immigration officer without a warrant of arrest and be transferred to the vessel of arrival, if the vessel is in any port in the United States and has not departed foreign since the crewman was issued his or her conditional landing permit. Detention and removal of the crewman shall be at the expense of the transportation line on which the crewman arrived. Removal may be effected on the vessel of arrival or, if the master of the vessel has requested in writing, by alternate means if removal on the vessel of arrival is impractical.

(b) *Revocation and removal after vessel has departed the United States.* A crewman who was granted landing privileges prior to April 1, 1997, and who has not departed foreign on the vessel of arrival, or on another vessel or aircraft if such permission was granted pursuant to § 252.1(f), is subject to removal proceedings under section 240 of the Act as an alien deportable pursuant to section 237(a)(1)(C)(i) of the Act. A crewman who was granted landing privileges on or after April 1, 1997, and who has not departed foreign on the vessel of arrival, or on another vessel or aircraft if such permission was granted pursuant to § 252.1(f), shall be removed from the United States without a hearing. In either case, if the alien is removed within 5 years of the date of landing, removal of the crewman shall be at the expense of the owner of the vessel. In the case of a crewman ordered removed more than 5 years after the date of landing, removal shall be at the expense of the appropriation for the enforcement of the Act.

137. Section 252.3 is revised to read as follows:

§ 252.3 Great Lakes vessels and tugboats arriving in the United States from Canada; special procedures.

(a) *United States vessels and tugboats.* An immigration examination shall not be required of any crewman aboard a Great Lakes vessel of United States registry or a tugboat of United States registry arriving from Canada at a port of the United States who has been examined and admitted by an immigration officer as a member of the crew of the same vessel or tugboat or of any other vessel or tugboat of the same company during the current calendar year.

(b) *Canadian or British vessels or tugboats.* An alien crewman need not be presented for inspection if the alien crewman:

(1) Serves aboard a Great Lakes vessel of Canadian or British registry or aboard a tugboat of Canadian or British registry arriving at a United States port-of-entry from Canada;

(2) Seeks admission for a period of less than 29 days;

(3) Has, during the current calendar year, been inspected and admitted by an immigration officer as a member of the crew of the same vessel or tugboat, or of any other vessel or tugboat of the same company;

(4) Is either a British or Canadian citizen or is in possession of a valid Form I–95 previously issued to him or her as a member of the crew of the same vessel or tugboat, or of any vessel or tugboat of the same company;

(5) Does not request or require landing privileges in the United States beyond the time the vessel or tugboat will be in port; and,

(6) Will depart to Canada with the vessel or tugboat.

138. Section 252.4 is revised to read as follows:

§ 252.4 Permanent landing permit and identification card.

A Form I–184 is valid until revoked. It shall be revoked when an immigration officer finds that the crewman is in the United States in willful violation of the terms and conditions of his or her permission to land, or that he or she is inadmissible to the United States. On revocation, the Form I–184 shall be surrendered to an immigration officer. No appeal shall lie from the revocation of Form I–184.

139. Section 252.5 is revised to read as follows:

§ 252.5 Special procedures for deserters from Spanish or Greek ships of war.

(a) *General.* Under E.O. 11267 of January 19, 1966 (31 FR 807) and 28 CFR 0.109, and E.O. 11300 of August 17, 1966 (31 FR 11009), and 28 CFR 0.110, the Commissioner and immigration officers (as defined in § 103.1(j) of this chapter) are designated as ''competent national authorities'' on the part of the United States within the meaning of Article XXIV of the 1903 Treaty of Friendship and General Relations between the United States and Spain (33 Stat. 2105, 2117), and ''local authorities'' and ''competent officers'' on the part of the United States within the meaning of Article XIII of the Convention between the United States and Greece (33 Stat. 2122, 2131).

(b) *Application for restoration.* On application of a Consul General, Consul, Vice-Consul, or Consular-Agent of the Spanish or Greek Government, made in writing pursuant to Article XXIV of the treaty, or Article XIII of the Convention, respectively, stipulating for the restoration of crewmen deserting, stating that the person named therein has deserted from a ship of war of that government, while in any port of the United States, and on proof by the exhibition of the register, crew list, or official documents of the vessel, or a copy or extract therefrom, duly certified, that the person named belonged, at the time of desertion, to the crew of such vessel, such person shall be taken into custody by any immigration officer without a warrant of arrest. Written notification of charges shall be served on the alien when he or she is taken into custody or as soon as practical thereafter.

(c) *Examination.* Within a reasonable period of time after the arrest, the alien shall be accorded an examination by the district director, acting district director, or the deputy district director having jurisdiction over the place of arrest. The alien shall be informed that he or she may have the assistance of or be represented by a counsel or representative of his or her choice qualified under 8 CFR part 292 without expense to the Government, and that he or she may present such evidence in his or her behalf as may be relevant to this proceeding. If, upon the completion of such examination, it is determined that:

(1) The individual sought by the Spanish or Greek authorities had

deserted from a Spanish or Greek ship of war in a United States port;

(2) The individual actually arrested and detained is the person sought;

(3) The individual is not a citizen of the United States; and

(4) The individual had not previously been arrested for the same cause and set at liberty because he or she had been detained for more than 3 months, or more than 2 months in the case of a deserter from a Greek ship of war, from the day of his or her arrest without the Spanish or Greek authorities having found an opportunity to send him or her home, the individual shall be served with a copy of the findings, from which no appeal shall lie, and be surrendered forthwith to the Spanish or Greek authorities if they are prepared to remove him or her from the United States. On written request of the Spanish or Greek authorities, the individual shall be detained, at their expense, for a period not exceeding 3 months or 2 months, respectively, from the day of arrest to afford opportunity to arrange for his or her departure from the United States.

(d) *Timely departure not effected.* If the Spanish authorities delay in sending the individual home for more than 3 months, or if the Greek authorities delay in sending the individual home for more than 2 months, from the day of his or her arrest, the individual shall be dealt with as any other alien unlawfully in the United States under the removal provisions of the Act, as amended.

(e) *Commission of crime.* If the individual has committed any crime or offense in the United States, he or she shall not be placed at the disposal of the consul until after the proper tribunal having jurisdiction in his or her case shall have pronounced sentence, and such sentence shall have been executed.

PART 253—PAROLE OF ALIEN CREWMEN

140. The authority citation for part 253 is revised to read as follows:

Authority: 8 U.S.C. 1103, 1182, 1282, 1283, 1285; 8 CFR part 2.

141. In § 253.1, paragraph (f) is revised to read as follows:

§ 253.1 Parole.

* * * * *

(f) *Crewman, stowaway, or alien removable under section 235(c) alleging persecution.* Any alien crewman, stowaway, or alien removable under section 235(c) of the Act who alleges that he or she cannot return to his or her country of nationality or last habitual residence (if not a national of any country) because of fear of persecution in that country on account of race, religion, nationality, membership in a particular social group, or political opinion, is eligible to apply for asylum or withholding of removal under 8 CFR part 208. Service officers shall take particular care to ensure the provisions of § 208.5(b) of this chapter regarding special duties toward aliens aboard certain vessels are closely followed.

* * * * *

PART 274A—CONTROL OF EMPLOYMENT OF ALIENS

142. The authority citation for part 274a continues to read as follows:

Authority: 8 U.S.C. 1101, 1103, 1324a; 8 CFR part 2.

143. Section 274a.12 is amended by:

a. Revising paragraphs (a)(10) and (12);

b. Revising paragraphs (c)(8) and (10);

c. Removing and reserving paragraph (c)(12); and by

d. Revising paragraph (c)(18), to read as follows:

§ 274a.12 Classes of aliens authorized to accept employment.

(a) * * *

(10) An alien granted withholding of deportation or removal for the period of time in that status, as evidenced by an employment authorization document issued by the Service;

* * * * *

(12) An alien granted Temporary Protected Status under section 244 of the Act for the period of time in that status, as evidenced by an employment authorization document issued by the Service; or

* * * * *

(c) * * *

(8) An alien who has filed a complete application for asylum or withholding of deportation or removal pursuant to 8 CFR part 208, whose application has not been decided, and who is eligible to apply for employment authorization under § 208.7 of this chapter because the 150-day period set forth in that section has expired. Employment authorization may be granted according to the provisions of § 208.7 of this chapter in increments to be determined by the Commissioner and shall expire on a specified date;

* * * * *

(10) An alien who has filed an application for suspension of deportation under section 243 of the Act or cancellation of removal pursuant to section 240A of the Act. Employment authorization shall be granted in increments not exceeding one year during the period the application is pending (including any period when an administrative appeal or judicial review is pending) and shall expire on a specified date;

* * * * *

(12) [Reserved]

* * * * *

(18) An alien against whom a final order of deportation or removal exists and who is released on an order of supervision under the authority contained in section 241(a)(3) of the Act may be granted employment authorization in the discretion of the district director only if the alien cannot be removed due to the refusal of all countries designated by the alien or under section 241 of the Act to receive the alien, or because the removal of the alien is otherwise impracticable or contrary to the public interest. Additional factors which may be considered by the district director in adjudicating the application for employment authorization include, but are not limited to, the following:

(i) The existence of economic necessity to be employed;

(ii) The existence of a dependent spouse and/or children in the United States who rely on the alien for support; and

(iii) The anticipated length of time before the alien can be removed from the United States.

* * * * *

PART 286—IMMIGRATION USER FEE

144. The authority citation for part 286 continues to read as follows:

Authority: 8 U.S.C. 1103, 1356; 8 CFR part 2.

145. In § 286.9, paragraph (b)(3) is revised to read as follows:

§ 286.9 Fee for processing applications and issuing documentation at land border Ports-of-Entry.

* * * * *

(b) * * *

(3) A Mexican national in possession of a valid nonresident alien border crossing card or nonimmigrant B–1/B–2 visa who is required to be issued Form I–94, Arrival/Departure Record, pursuant to § 235.1(f) of this chapter, must remit the required fee for issuance of Form I–94 upon determination of admissibility.

* * * * *

PART 287—FIELD OFFICERS; POWERS AND DUTIES

146. The authority citation for part 287 continues to read as follows:

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

147. Section 287.3 is revised to read as follows:

§ 287.3 Disposition of cases of aliens arrested without warrant.

(a) *Examination.* An alien arrested without a warrant of arrest under the authority contained in section 287(a)(2) of the Act will be examined by an officer other than the arresting officer. If no other qualified officer is readily available and the taking of the alien before another officer would entail unnecessary delay, the arresting officer, if the conduct of such examination is a part of the duties assigned to him or her, may examine the alien.

(b) *Determination of proceedings.* If the examining officer is satisfied that there is prima facie evidence that the arrested alien was entering, attempting to enter, or is present in the United States in violation of the immigration laws, the examining officer will refer the case to an immigration judge for further inquiry in accordance with 8 CFR parts 235, 239, or 240, order the alien removed as provided for in section 235(b)(1) of the Act and § 235.3(b) of this chapter, or take whatever other action may be appropriate or required under the laws or regulations applicable to the particular case.

(c) *Notifications and information.* Except in the case of an alien subject to the expedited removal provisions of section 235(b)(1)(A) of the Act, all aliens arrested without warrant and placed in formal proceedings under section 238 or 240 of the Act will be advised of the reasons for his or her arrest and the right to be represented at no expense to the Government. The examining officer will provide the alien with a list of the available free legal services provided by organizations and attorneys qualified under 8 CFR part 3 and organizations recognized under § 292.2 of this chapter that are located in the district where the hearing will be held. The examining officer shall note on Form I–862 that such a list was provided to the alien. The officer will also advise the alien that any statement made may be used against him or her in a subsequent proceeding.

(d) *Custody procedures.* Unless voluntary departure has been granted pursuant to subpart C of 8 CFR part 240, a determination will be made within 24 hours of the arrest whether the alien will be continued in custody or released on bond or recognizance and whether a notice to appear and warrant of arrest as prescribed in 8 CFR parts 236 and 239 will be issued.

148. In § 287.4, paragraph (d) is revised to read as follows:

§ 287.4 Subpoena.

* * * * *

(d) *Invoking aid of court.* If a witness neglects to appear and testify as directed by the subpoena served upon him or her in accordance with the provisions of this section, the officer or immigration judge issuing the subpoena shall request the United States Attorney for the district in which the subpoena was issued to report such neglect or refusal to the United States District Court and to request such court to issue an order requiring the witness to appear and testify and to produce the books, papers, or documents designated in the subpoena.

149. In § 287.5, paragraphs (b) through (f) are revised to read as follows:

§ 287.5 Exercise of power by immigration officers.

* * * * *

(b) *Power and authority to patrol the border.* The following immigration officers who have successfully completed basic immigration law enforcement training are hereby authorized and designated to exercise the power to patrol the border conferred by section 287(a)(3) of the Act:

(1) border patrol agents, including aircraft pilots;

(2) Special agents;

(3) Immigration inspectors (seaport operations only);

(4) Adjustments officers and deportation officers when in the uniform of an immigration inspector and performing inspections or supervising other immigration inspectors performing inspections (seaport operations only);

(5) Supervisory and managerial personnel who are responsible for supervising the activities of those officers listed above; and

(6) Immigration officers who need the authority to patrol the border under section 287(a)(3) of the Act in order to effectively accomplish their individual missions and who are designated, individually or as a class, by the Commission.

(c) *Power and authority to arrest.* (1) *Arrests of aliens under section 287(a)(2) of the Act for immigration violations.* The following immigration officers who have successfully completed basic immigration law enforcement training are hereby authorized and designated to exercise the arrest power conferred by section 287(a)(2) of the Act and in accordance with § 287.8(c):

(i) Border patrol agents, including aircraft pilots;

(ii) Special agents;

(iii) Deportation officers;

(iv) Immigration inspectors;

(v) Adjudications officers;

(vi) Supervisory and managerial personnel who are responsible for supervising the activities of those officers listed above; and

(vii) Immigration officers who need the authority to arrest aliens under section 287(a)(2) of the Act in order to effectively accomplish their individual missions and who are designated, individually or as a class, by the Commissioner.

(2) *Arrests of persons under section 287(a)(4) of the Act for felonies regulating the admission or removal of aliens.* The following immigration officers who have successfully completed basic immigration law enforcement training are hereby authorized and designated to exercise the arrest power conferred by section 287(a)(4) of the Act and in accordance with § 287.8(c):

(i) Border patrol agents, including aircraft pilots;

(ii) Special agents;

(iii) Deportation officers;

(iv) Immigration inspectors;

(v) Adjudications officers;

(vi) Supervisory and managerial personnel who are responsible for supervising the activities of those officers listed above; and

(vii) Immigration officers who need the authority to arrest persons under section 287(a)(4) of the Act in order to effectively accomplish their individual missions and who are designated, individually or as a class, by the Commissioner with the approval of the Deputy Attorney General.

(3) *Arrests of persons under section 287(a)(5)(A) of the Act for any offense against the United States.* The following immigration officers who have successfully completed basic immigration law enforcement training are hereby authorized and designated to exercise the arrest power conferred by section 287(a)(5)(A) of the Act in accordance with § 287.8(c):

(i) Border patrol agents, including aircraft pilots;

(ii) Special agents;

(iii) Deportation officers;

(iv) Immigration inspectors (permanent full-time immigration inspectors only);

(v) Adjudications officers when in the uniform of an immigration inspector and performing inspections or supervising other immigration inspectors performing inspections;

(vi) Supervisory and managerial personnel who are responsible for supervising the activities of those officers listed above; and

(vii) Immigration officers who need the authority to arrest persons under

section 287(a)(5)(A) of the Act in order to effectively accomplish their individual missions and who are designated, individually or as a class, by the Commissioner with the approval of the Deputy Attorney General.

(4) *Arrests of persons under section 287(a)(5)(B) of the Act for any felony.* (i) Section 287(a)(5)(B) of the Act authorizes designated immigration officers, as listed in paragraph (c)(4)(iii) of this section, to arrest persons, without warrant, for any felony cognizable under the laws of the United States if:

(A) The immigration officer has reasonable grounds to believe that the person to be arrested has committed or is committing such a felony;

(B) The immigration officer is performing duties relating to the enforcement of the immigration laws at the time of the arrest;

(C) There is a likelihood of the person escaping before a warrant can be obtained of his or her arrest; and

(D) The immigration officer has been certified as successfully completing a training program that covers such arrests and the standards with respect to the enforcement activities of the Service as defined in § 287.8.

(ii) The following immigration officers who have successfully completed basic immigration law enforcement training are hereby authorized and designated to exercise the arrest power conferred by section 287(a)(5)(B) of the Act and in accordance with § 287.8(c):

(A) Border patrol agents, including aircraft pilots;

(B) Special agents;

(C) Deportation officers;

(D) Immigration inspectors (permanent full-time immigration inspectors only);

(E) Adjudications officers when in the uniform of an immigration inspector and performing inspections or supervising other immigration inspectors performing inspections;

(F) Supervisory and managerial personnel who are responsible for supervising the activities of those officers listed above; and

(G) Immigration officers who need the authority to arrest persons under section 287(a)(5)(B) of the Act in order to effectively accomplish their individual missions and who are designated, individually or as a class, by the Commissioner with the approval of the Deputy Attorney General.

(iii) Notwithstanding the authorization and designation set forth in paragraph (c)(4)(ii) of this section, no immigration officer is authorized to make an arrest for any felony under the authority of section 287(a)(5)(B) of the Act until such time as he or she has been certified by the Director of Training as successfully completing a training course encompassing such arrests and the standards for enforcement activities as defined in § 287.8. Such certification shall be valid for the duration of the immigration officer's continuous employment, unless it is suspended or revoked by the Commissioner or the Commissioner's designee for just cause.

(5) *Arrests of persons under section 274(a) of the Act who bring in, transport, or harbor certain aliens, or induce them to enter.*

(i) Section 274(a) of the Act authorizes designated immigration officers, as listed in paragraph (c)(5)(ii) of this section, to arrest persons who bring in, transport, or harbor aliens, or induce them to enter the United States in violation of law. When making an arrest, the designated immigration officer shall adhere to the provisions of the enforcement standard governing the conduct of arrests in § 287.8(c).

(ii) The following immigration officers who have successfully completed basic immigration law enforcement training are authorized and designated to exercise the arrest power conferred by section 274(a) of the Act:

(A) Border patrol agents, including aircraft pilots;

(B) Special agents;

(C) Deportation officers;

(D) Immigration inspectors;

(E) Adjudications officers when in the uniform of an immigration inspector and performing inspections or supervising other immigration inspectors performing inspections;

(F) Supervisory and managerial personnel who are responsible for supervising the activities of those officers listed above; and

(G) Immigration officers who need the authority to arrest persons under section 274(a) of the Act in order to effectively accomplish their individual missions and who are designated, individually or as a class, by the Commissioner with the approval of the Deputy Attorney General.

(6) *Custody and transportation of previously arrested persons.* In addition to the authority to arrest pursuant to a warrant of arrest in paragraph (e)(2)(i) of this section, detention enforcement officers who have successfully completed basic immigration law enforcement training are hereby authorized and designated to take and maintain custody of and transport any person who has been arrested by an immigration officer pursuant to paragraphs (c)(1) through (c)(5) of this section.

(d) *Power and authority to conduct searches.* The following immigration officers who have successfully completed basic immigration law enforcement training are hereby authorized and designated to exercise the power to conduct searches conferred by section 287(c) of the Act:

(1) Border patrol agents, including aircraft pilots;

(2) Special agents;

(3) Deportation officers;

(4) Immigration inspectors;

(5) Adjudications officers;

(6) Supervisory and managerial personnel who are responsible for supervising the activities of those officers listed above; and

(7) Immigration officers who need the authority to conduct searches under section 287(c) of the Act in order to effectively accomplish their individual missions and who are designated, individually or as a class, by the Commissioner.

(e) *Power and authority to execute warrants.* (1) *Search warrants.* The following immigration officers who have successfully completed basic immigration law enforcement training are hereby authorized and designated to exercise the power conferred by section 287(a) of the Act to execute a search warrant:

(i) Border patrol agents, including aircraft pilots;

(ii) Special agents;

(iii) Supervisory and managerial personnel who are responsible for supervising the activities of those officers listed above; and

(iv) Immigration officers who need the authority to execute search warrants under section 287(a) of the Act in order to effectively accomplish their individual missions and who are designated, individually or as a class, by the Commissioner with the approval of the Deputy Attorney General.

(2) *Issuance of arrest warrants for immigration violations.* A warrant of arrest may be issued only by the following immigration officers:

(i) District directors (except foreign);

(ii) Deputy district directors (except foreign);

(iii) Assistant district directors for investigations;

(iv) Deputy assistant district directors for investigations;

(v) Assistant district directors for deportation;

(vi) Deputy assistant district directors for deportation;

(vii) Assistant district directors for examinations;

(viii) Deputy assistant district directors for examinations;

(ix) Officers in charge (except foreign);

(x) Assistant officers in charge (except foreign);
(xi) Chief patrol agents;
(xii) Deputy chief patrol agents;
(xiii) Associate chief patrol agents;
(xiv) Assistant chief patrol agents;
(xv) Patrol agents in charge;
(xvi) The Assistant Commissioner, Investigations;
(xvii) Institutional Hearing Program Directors;
(xviii) Area Port Directors;
(xix) Port Directors; or
(xx) Deputy Port Directors.

(3) *Service of warrant of arrests for immigration violations.* The following immigration officers who have successfully completed basic immigration law enforcement training are hereby authorized and designated to exercise the power pursuant to section 287(a) of the Act to execute warrants of arrest for administrative immigration violations issued under section 236 of the Act or to execute warrants of criminal arrest issued under the authority of the United States:
(i) Border patrol agents, including aircraft pilots;
(ii) Special agents;
(iii) Deportation officers;
(iv) Detention enforcement officers (warrants of arrest for administrative immigration violations only);
(v) Immigration inspectors;
(vi) Adjudications officers when in the uniform of an immigration inspector and performing inspections or supervising other immigration inspectors performing inspections;
(vii) Supervisory and managerial personnel who are responsible for supervising the activities of those officers listed above; and
(viii) Immigration officers who need the authority to execute arrest warrants for immigration violations under section 287(a) of the Act in order to effectively accomplish their individual missions and who are designated, individually or as a class, by the Commissioner, for warrants of arrest for administrative immigration violations, and with the approval of the Deputy Attorney General, for warrants of criminal arrest.

(4) *Service of warrant of arrests for non-immigration violations.* The following immigration officers who have successfully completed basic immigration law enforcement training are hereby authorized and designated to exercise the power to execute warrants of criminal arrest for non-immigration violations issued under the authority of the United States:
(i) Border patrol agents, including aircraft pilots;
(ii) Special agents;
(iii) Deportation officers;
(iv) Supervisory and managerial personnel who are responsible for supervising the activities of those officers listed above; and
(v) Immigration officers who need the authority to execute warrants of arrest for non-immigration violations under section 287(a) of the Act in order to effectively accomplish their individual missions and who are designated, individually or as a class, by the Commissioner with the approval of the Deputy Attorney General.

(f) *Power and authority to carry firearms.* The following immigration officers who have successfully completed basic immigration enforcement training are hereby authorized and designated to exercise the power conferred by section 287(a) of the Act to carry firearms provided that they are individually qualified by training and experience to handle and safely operate the firearms they are permitted to carry, maintain proficiency in the use of such firearms, and adhere to the provisions of the enforcement standard governing the use of force in § 287.8(a):
(1) Border patrol agents, including aircraft pilots;
(2) Special agents;
(3) Deportation officers;
(4) Detention enforcement officers;
(5) Immigration inspectors;
(6) Adjudications officers when in the uniform of an immigration inspector and performing inspections or supervising other immigration inspectors performing inspections;
(7) Supervisory and managerial personnel who are responsible for supervising the activities of those officers listed above; and
(8) Immigration officers who need the authority to carry firearms under section 287(a) of the Act in order to effectively accomplish their individual missions and who are designated, individually or as a class, by the Commissioner with the approval of the Deputy Attorney General.

150. Section 287.7 is revised to read as follows:

§ 287.7 Detainer provisions under section 287(b)(3) of the Act.

(a) *Detainers in general.* Detainers are issued pursuant to sections 236 and 287 of the Act and this chapter. Any authorized Service official may at any time issue a Form I–247, Immigration Detainer-Notice of Action, to any other Federal, State, or local law enforcement agency. A detainer serves to advise another law enforcement agency that the Service seeks custody of an alien presently in the custody of that agency, for the purpose of arresting and removing the alien. The detainer is a request that such agency advise the Service, prior to release of the alien, in order for the Service to arrange to assume custody, in situations when gaining immediate physical custody is either impracticable or impossible.

(b) *Authority to issue detainers.* The following officers are authorized to issue detainers:
(1) Border patrol agents, including aircraft pilots;
(2) Special agents;
(3) Deportation officers;
(4) Immigration inspectors;
(5) Adjudications officers;
(6) Supervisory and managerial personnel who are responsible for supervising the activities of those officers listed above; and
(7) Immigration officers who need the authority to issue detainers under section 287(d)(3) of the Act in order to effectively accomplish their individual missions and who are designated individually or as a class, by the Commissioner.

(c) *Availability of records.* In order for the Service to accurately determine the propriety of issuing a detainer, serving a notice to appear, or taking custody of an alien in accordance with this section, the criminal justice agency requesting such action or informing the Service of a conviction or act that renders an alien inadmissible or removable under any provision of law shall provide the Service with all documentary records and information available from the agency that reasonably relates to the alien's status in the United States, or that may have an impact on conditions of release.

(d) *Temporary detention at Service request.* Upon a determination by the Service to issue a detainer for an alien not otherwise detained by a criminal justice agency, such agency shall maintain custody of the alien for a period not to exceed 48 hours, excluding Saturdays, Sundays, and holidays in order to permit assumption of custody by the Service.

(e) *Financial responsibility for detention.* No detainer issue as a result of a determination made under this chapter shall incur any fiscal obligation on the part of the Service, until actual assumption of custody by the Service, except as provided in paragraph (d) of this section.

PART 299—IMMIGRATION FORMS

151. The authority citation for part 299 continues to read as follows:

Authority: 8 U.S.C. 1101, 1103; 8 CFR part 2.

152. Section 299.1 is amended by:

a. Revising the entries for Forms ''I–147'', ''I–205'', ''I–246'', ''I–247'', ''I–259'', ''I–284'', ''I–286'', ''I–291'', ''I–296'', ''I–310'', ''I–408'', ''I–426'', ''I–541'', ''I–589'', ''I–775'', ''I–851'', and ''I–851A'';

b. Removing the entries for Forms ''I–122'', ''I–221'', ''I–259C'', ''I–290A'', and ''I–444'', and by

c. Adding the entries for Forms ''I–94T'', ''I–99'', ''I–148'', ''I–160'', ''I–210'', ''I–213'', ''I–217'', ''I–220A'', ''I–220B'', ''I–241'', ''I–261'', ''I–270'', ''I–275'', ''I–294'', ''I–407'', ''I–546'', ''I–701'', ''I–770'', ''I–771'', ''I–826'', ''I–827A'', ''I–827B'', ''I–860'', ''I–862'', and ''I–863'', in proper numerical sequence, to the listing of forms, to read as follows:

§ 299.1 Prescribed forms.

* * * * *

Form No.	Edition date	Title
*	*	* * * *
I–94T	09–22–87	Arrival-Departure Record (Transit without visa).
*	*	* * * *
I–99	04–01–97	Notice of Revocation and Penalty.
*	*	* * * *
I–147	04–01–97	Notice of Temporary Inadmissibility to U.S.
I–148	04–01–97	Notice of Permanent Inadmissibility.
*	*	* * * *
I–160	04–01–97	Notice of Parole/Lookout Intercept.
*	*	* * * *
I–205	04–01–97	Warrant of Removal.
I–210	04–01–97	Voluntary Departure Notice.
*	*	* * * *
I–213	04–01–97	Record of Deportable/Inadmissible Alien.
I–217	04–01–97	Information for Travel Document or Passport.
I–220A	04–01–97	Order of Release on Recognizance.
I–220B	04–01–97	Order of Supervision.
*	*	* * * *
I–241	04–01–97	Request for Travel Document to Country Designated by Alien.
*	*	* * * *
I–246	04–01–97	Application for Stay of Removal.
I–247	04–01–97	Immigration Detainer—Notice of Action.
I–259	04–01–97	Notice to Detain, Deport, Remove, or Present Aliens.
*	*	* * * *
I–261	04–01–97	Additional Charges of Removability.
*	*	* * * *
I–270	04–01–97	Request for Consent to Return Person to Canada.
I–275	04–01–97	Withdrawal of Application/Consular Notification.
I–284	04–01–97	Notice to Transportation Line Regarding Deportation and Detention Expenses of Detained Alien.
I–286	04–01–97	Notification to Alien of Conditions of Release or Detention.
*	*	* * * *
I–291	04–01–97	Decision on Application for Status as Permanent Resident.
*	*	* * * *
I–294	04–01–97	Notice of Country to Which Deportation has been Directed and Penalty for Reentry without Permission.
I–296	04–01–97	Notice to Alien Ordered Removed.
*	*	* * * *
I–310	04–01–97	Bond for Payment of Sums and Fines Imposed under Immigration and Nationality Act (Term or Single Entry).
*	*	* * * *
I–407	04–01–97	Abandonment by Alien of Status as Lawful Permanent Resident.
I–408	04–01–97	Application to Pay Off or Discharge Alien Crewman.
*	*	* * * *
I–426	04–01–97	Immediate and Continuous Transit Agreement Between a Transportation Line and United States of America (special direct transit procedure).
*	*	* * * *
I–541	04–01–97	Order of Denial of Application for Extension of Stay or Student Employment or Student Transfer.

Form No.	Edition date	Title
* *	*	* * * * *
I–546	04–01–97	Order to Appear—Deferred Inspection.
* *	*	* * * * *
I–589	04–01–97	Application for Asylum and Withholding of Removal.
* *	*	* * * * *
I–701	04–01–97	Detainee Transfer Worksheet.
* *	*	* * * * *
I–770	04–01–97	Notice of Rights and Request for Disposition.
I–771	04–01–97	Bond Computation Worksheet.
I–775	04–01–97	Visa Waiver Pilot Program Agreement.
* *	*	* * * * *
I–826	04–01–97	Notice of Rights.
I–827A	04–01–97	Request for Disposition.
* *	*	* * * * *
I–827B	04–01–97	Request for Disposition.
I–851	04–01–97	Notice of Intent to Issue Final Administrative Removal Order.
I–851A	04–01–97	Final Administrative Removal Order.
* *	*	* * * * *
I–860	04–01–97	Notice and Order of Expedited Removal.
I–862	04–01–97	Notice to Appear.
I–863	04–01–97	Notice of Referral to Immigration Judge.
* *	*	* * * * *

153. Section 299.5 is amended by:

a. Removing the entry for Form ''I–259C''; and by

b. Revising the entries for Forms ''I–246'' and ''I–589'', and to read as follows:

§ 299.5 Display of control numbers.

* * * * *

INS form No.	INS form title	Currently assigned OMB control no.
* *	* * * *	*
I–246	Application for Stay of Removal	1115–0055
* *	* * * *	*
I–589	Application for Asylum and Withholding of Removal	1115–0086
* *	* * * *	*

PART 316—GENERAL REQUIREMENTS FOR NATURALIZATION

154. The authority citation for part 316 is revised to read as follows:

Authority: 8 U.S.C. 1103, 1181, 1182, 1443, 1447; 8 CFR part 2.

155. Section 316.5 is amended by revising paragraph (c)(3) to read as follows:

§ 316.5 Residence in the United States.

* * * * *

(c) * * *

(3) *Removal and return.* Any departure from the United States while under an order of removal (including previously issued orders of exclusion or deportation) terminates the applicant's status as a lawful permanent resident and, therefore, disrupts the continuity of residence for purposes of this part.

* * * * *

PART 318—PENDING REMOVAL PROCEEDINGS

156. The heading for part 318 is revised as set forth above.

157. The authority citation for part 318 is revised to read as follows:

Authority: 8 U.S.C. 1103, 1252, 1429, 1443; 8 CFR part 2.

158. Section 318.1 is revised to read as follows:

§ 318.1 Warrant of arrest.

For the purposes of section 318 of the Act, a notice to appear issued under 8 CFR part 239 (including a charging document issued to commence proceedings under sections 236 or 242 of the Act prior to April 1, 1997) shall be regarded as a warrant of arrest.

PART 329—SPECIAL CLASSES OF PERSONS WHO MAY BE NATURALIZED: NATURALIZATION BASED ON ACTIVE DUTY SERVICE IN THE UNITED STATES ARMED FORCES DURING SPECIFIED PERIODS OF HOSTILITIES.

159. The authority citation for part 329 is revised to read as follows:

Authority: 8 U.S.C. 1103, 1440, 1443; 8 CFR part 2.

160. Section 329.2 is amended by revising paragraph (e)(3) to read as follows:

§ 329.2 Eligibility.

* * * * *

(e) * * *

(3) The applicant may be naturalized even if an outstanding notice to appear pursuant to 8 CFR part 239 (including a charging document issued to commence proceedings under sections 236 or 242 of the Act prior to April 1, 1997) exists.

Dated: December 24, 1996.

Janet Reno,

Attorney General.

[FR Doc. 96–33166 Filed 12–27–96; 12:10 pm]

BILLING CODE 4410–10–M

federal register

Friday
January 3, 1997

Part III

Securities and Exchange Commission

17 CFR Part 200, et al.

Anti-manipulation Rules Concerning Securities Offerings; Final Rule

SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 200, 228, 229, 230, 240, and 242

[Release Nos. 33–7375; 34–38067; IC–22412; International Series Release No. 1039; File No. S7–11–96]

RIN 3235–AF54

Anti-manipulation Rules Concerning Securities Offerings

AGENCY: Securities and Exchange Commission.

ACTION: Final rules.

SUMMARY: The Commission is adopting new Regulation M governing the activities of underwriters, issuers, selling security holders, and others in connection with offerings of securities. Regulation M is intended to preclude manipulative conduct by persons with an interest in the outcome of an offering. Regulation M significantly eases regulatory burdens on offering participants by eliminating the trading restrictions for underwriters of actively-traded securities; reducing the scope of coverage for other securities; reducing restrictions on issuer plans; providing a more flexible framework for stabilizing transactions; and deregulating rights offerings. Consisting of five new rules, plus a new definitional rule, Regulation M replaces Rules 10b–6, 10b–6A, 10b–7, 10b–8, and 10b–21 (''trading practices rules'') under the Securities Exchange Act of 1934 (''Exchange Act''), which are being rescinded. In addition, related amendments are being made to Items 502(d) and 508 of Regulations S–B and S–K, and to Rules 10b–18 and 17a–2 under the Exchange Act. Conforming changes to various rules under the Securities Act of 1933 (''Securities Act'') and the Exchange Act are being made to reflect the repeal of the trading practices rules and the adoption of Regulation M.

EFFECTIVE DATE: March 4, 1997. The requirement of § 242.104(i) and the amendments to § 240.17a–2 are effective on April 1, 1997.

FOR FURTHER INFORMATION CONTACT: Any of the following attorneys in the Office of Risk Management and Control, Division of Market Regulation, Securities and Exchange Commission, 450 Fifth Street, N.W., Mail Stop 5–1, Washington, D.C. 20549, at 202–942–0772: Nancy J. Sanow, M. Blair Corkran, Carlene S. Kim, Heidi E. Pilpel, Barbara J. Endres, Irene A. Halpin, Marc J. Hertzberg, Denise M. Landers, Lauren C. Mullen, Mark R. Pacioni, Alan J. Reed, or Margaret A. Smith.

SUPPLEMENTARY INFORMATION:

I. Introduction and Summary of New Regulation M

A fundamental goal of the federal securities laws is the prevention of manipulation. Manipulation impedes the securities markets from functioning as independent pricing mechanisms, and undermines the integrity and fairness of those markets. Congress granted the Commission broad rulemaking authority to combat manipulative abuses in whatever form they might take. In exercising its authority, the Commission has focused on the market activities of persons participating in a securities offering, and determined that securities offerings present special opportunities and incentives for manipulation that require specific regulatory attention.

On April 11, 1996, the Commission published for comment a release (''Proposing Release'') proposing Regulation M, and Rules 100 through 105 thereunder, to govern the activities of issuers, underwriters, and other persons participating in a securities offering,[1] and to replace Rules 10b–6, 10b–6A, 10b–7, 10b–8, and 10b–21[2] under the Exchange Act.[3] The Commission received 39 comment letters from 36 commenters in response to the Proposing Release.[4] The commenters generally expressed strong support for proposed Regulation M, although several expressed concerns with specific provisions, and some suggested alternative approaches for addressing particular issues. The Commission is adopting Regulation M substantially as proposed, but with some modifications to clarify provisions or to reflect commenters' views. The new regulation represents the most significant changes to the Commission's anti-manipulation regulation of securities offerings since the adoption of the trading practices rules over 40 years ago.[5]

Regulation M is the culmination of a comprehensive review by the Commission of its anti-manipulation regulation of securities offerings.[6] This review was prompted by ongoing developments and innovations in the securities industry, including: increasing institutionalization of the markets, advances in technology and communications media, enhanced surveillance capabilities, continuing globalization of the securities markets, and new offering techniques. These developments have outpaced the existing structure of anti-manipulation regulation of securities offerings and reduced the need for broad prophylactic restrictions. Moreover, the Commission was informed by market participants that the application of the trading practices rules had become needlessly complex and involved substantial compliance costs.

Regulation M exemplifies the Commission's efforts to relax restrictions in cases where either the risk of manipulation is small or the costs of the restrictions are disproportionate to the purposes they serve. The new regulation continues the anti-manipulation objectives of the trading practices rules, but reflects developments in the securities industry, allows greater flexibility for market participants to engage in activities that enhance competition in the marketplace, and incorporates the recommendations of the Commission's Task Force on Disclosure Simplification for a more streamlined approach to regulating manipulative conduct during offerings.[7] Three of the principal elements that underlie the Commission's decision to provide greater flexibility for market activities during offerings are: securities market transparency, surveillance capabilities of the self-regulatory organizations (''SROs''), and continuing application of the general anti-fraud and anti-manipulation provisions of the federal securities laws, including Section 17(a) of the Securities Act, and Sections 9(a), 10(b), and 15(c) of the Exchange Act, and Rules 10b–5 and 15c1–2 thereunder,[8] to all activities in connection with an offering, whether or not the provisions of Regulation M apply.[9] Like the former trading practices rules, Regulation M proscribes certain activities that offering participants could use to manipulate the price of an offered security. Although some

[1] Securities Exchange Act Release No. 37094 (April 11, 1996), 61 FR 17108.

[2] 17 CFR 240.10b–6, 240.10b–6A, 240.10b–7, 240.10b–8, and 240.10b–21.

[3] 15 U.S.C. 78a *et seq.*

[4] A summary of comments has been prepared by the staff of the Division of Market Regulation. The summary is included, along with the comment letters, in Public File No. S7–11–96, which is available for inspection and copying in the Commission's Public Reference Room, 450 Fifth Street, N.W., Washington, D.C. 20549.

[5] *See* Securities Exchange Act Release No. 5194 (July 5, 1955), 20 FR 5075.

[6] *See* Securities Exchange Act Release No. 33924 (April 19, 1994), 59 FR 21681 (''Concept Release'').

[7] *Report of the Task Force on Disclosure Simplification,* 77–79 (March 1996) (''Task Force Report'').

[8] 15 U.S.C. 77q(a); 15 U.S.C. 78i(a), 78j(b), and 78o(c); and 17 CFR 240.10b–5 and 240.15c1–2.

[9] *See* Proposing Release, 61 FR at 17109. Similarly, Regulation M and the interpretations thereof do not affect the application of the registration and prospectus delivery requirements of the Securities Act to offers and sales of securities.

commenters requested that the rules under Regulation M be formulated as non-exclusive safe harbors from the anti-manipulation provisions of the Exchange Act, the Commission continues to believe that a prophylactic approach to anti-manipulation regulation is the most effective means to protect the integrity of the offering process by precluding activities that could influence artificially the market for the offered security.

Regulation M contains six rules covering the following activities during a securities offering: (1) activities by underwriters or other persons who are participating in a distribution (*i.e.*, distribution participants) and their affiliated purchasers; (2) activities by the issuer or selling security holder and their affiliated purchasers; (3) Nasdaq passive market making; (4) stabilization, transactions to cover syndicate short positions, and penalty bids; and (5) short selling in advance of a public offering.[10] A separate rule under Regulation M, Rule 100, contains definitional provisions. Some of these definitions are new or revised; many are common to more than one rule. The Commission has endeavored to use straightforward and precise language in both the definitions and rule text.

The provisions of Regulation M that are analogous to Rule 10b–6 are contained in Rules 101 and 102, which cover distribution participants, and issuers and selling security holders, respectively. Rules 101 and 102 apply only during a ''restricted period'' that commences one or five business days before the day of the pricing of the offered security and continues until the distribution is over. The restricted periods are based on the trading volume value of the offered security and the public float value of the issuer, rather than the price per share and public float criteria used in Rule 10b–6, and generally are of a shorter duration than the cooling-off periods under Rule 10b–6. Furthermore, the restricted periods of Regulation M focus on the time of pricing. In contrast, Rule 10b–6 imposed restrictions during the entire distribution, which could extend over a lengthy period of time, but excepted certain trading activities prior to a two or nine business day ''cooling-off period.'' The applicable cooling-off period was keyed off the commencement of offers or sales. While Rule 10b–6 was designed to protect the pricing of an offering, certain distribution methods, particularly in connection with foreign offerings, could result in the cooling-off periods commencing after an offering had been priced.

Rule 101 excludes from its coverage more actively-traded securities, nonconvertible and asset backed securities rated investment grade, and Rule 144A transactions. Restrictions on transactions in outstanding debt securities during a distribution of a debt security are narrowed substantially. Further, Rule 101 focuses on the security being distributed and does not cover bids for and purchases of related derivative securities. It permits, among other things, the routine dissemination of research reports, exercises of options and other securities, and transactions in baskets of securities involving the offered security. Also, bids for and purchases of rights during rights offerings are deregulated. Rule 101 deals with ''inadvertent'' violations during the restricted period by excusing *de minimis* transactions, provided that a distribution participant had in place written policies and procedures reasonably designed to achieve compliance with the regulation. Moreover, the scope of persons subject to Rule 101 is narrowed by recognizing ''information barriers'' between the distribution participant and its affiliates.

Rule 102 covers issuers, selling security holders, and related persons. The rule allows issuers and selling security holders to engage in market activities prior to the applicable restricted period. It also gives issuers greater flexibility in conducting their dividend reinvestment and stock purchase plans and odd-lot repurchase programs. During the restricted period, Rule 102 permits bids and purchases of odd-lots, transactions in connection with issuer plans, and exercises of options or convertible securities by the issuer's affiliated purchasers, and transactions in commodity pool or limited partnership interests during distributions of those securities. The rule contains a limited exception for actively-traded ''reference securities.''

Rule 103 replaces Rule 10b–6A and expands the scope of Nasdaq passive market making. The rule covers all Nasdaq securities and nearly all distributions, and permits more distribution participants to engage in passive market making.

Rule 104, which replaces Rule 10b–7, regulates stabilizing and other activities related to a distribution. The rule provides a more flexible framework for stabilizing transactions than Rule 10b–7. Rule 104 allows underwriters to initiate and change stabilizing bids based on the current price in the principal market (whether U.S. or foreign), as long as the bid does not exceed the offering price. Also, by providing for greater disclosure and recordkeeping of transactions that can influence market prices immediately following an offering, Rule 104 addresses the fact that underwriters now engage in substantial syndicate-related market activity, and enforce penalty bids in order to reduce volatility in the market for the offered security.

Rule 105 recodifies Rule 10b–21 governing short selling in connection with a public offering. To harmonize Rule 105 with the provisions of Rules 101 and 102, the period of Rule 105's coverage is narrowed to the five business day period before pricing, rather than the period extending from the time of filing of offering materials to the time when sales may be made.

The Commission believes that separate regulation of rights offerings, as contained in Rule 10b–8, no longer is warranted. Many rights offerings, especially by foreign issuers, involve securities that fall within the exception for actively-traded securities contained in Rule 101. Even for less actively-traded securities, purchases of rights generally are not an efficient way for a distribution participant to facilitate an offering of the underlying security. Therefore, the Commission has decided to rescind Rule 10b–8.

The new regulatory framework relieves market participants of unnecessary burdens and responds effectively to a changing marketplace, while maintaining essential investor protection. The following sections of this release describe the individual provisions of Regulation M and associated rule changes and discuss, where appropriate, how they differ from the rules as proposed and from the former trading practices rules, as well as reasons for these changes.

II. Discussion of Regulation M and Related Amendments

A. Rule 100—Definitions

Rule 100 sets forth the definitions applicable to all of the rules under Regulation M. Most of the definitions are adopted as proposed; some definitions are revised to respond to commenters' suggestions or to add clarity to the rules. Many of these definitions are discussed later in this release in conjunction with the specific

[10] Regulation M is adopted under the Securities Act, particularly Sections 7, 17(a), and 19(a), 15 U.S.C. 77g, 77q(a), and 77s(a); the Exchange Act, particularly Sections 2, 3, 9(a), 10, 11A(c), 12, 13, 14, 15(c), 15(g), 17(a), 23(a), and 30, 15 U.S.C. 78b, 78c, 78i(a), 78j, 78k–1(c), 78*l*, 78m, 78n, 78o(c), 78o(g), 78q(a), 78w(a), and 78dd; and the Investment Company Act of 1940 (''Investment Company Act''), 15 U.S.C. 80a–1 *et seq.*, particularly Sections 23, 30, and 38, 15 U.S.C. 80a–23, 80a–29, and 80a–37.

provisions of Regulation M to which they relate.[11]

B. Rule 101—Activities by Distribution Participants

1. Generally

Rule 101 governs the activities of persons participating in *distributions* of securities, other than issuers or *selling security holders*, and their *affiliated purchasers*. The distribution participants subject to Rule 101 will typically be financial intermediaries that routinely engage in market transactions for their own accounts or for customers as part of their businesses.

In general, Rule 101 prohibits distribution participants and their affiliated purchasers from bidding for, purchasing, or attempting to induce any person to bid for or purchase, a *covered security* during a specified period (*restricted period*). As with Rule 10b–6(c)(5), a distribution of securities under Regulation M is distinguished from ordinary trading transactions by the ''magnitude of the offering'' and the presence of ''special selling efforts and selling methods.'' [12] The restricted period for a particular distribution commences one or five *business days* before the day of the pricing of the offered security and continues until the distribution is over.[13]

Even during the restricted period, Rule 101 permits distribution participants and their affiliated purchasers to engage in a variety of activities, including the following: the routine dissemination of research reports; exercises of options and other securities, including rights received in connection with a rights offering; transactions in baskets of securities involving an offered security; and certain transactions involving Rule 144A securities of foreign and domestic issuers. Rule 101 also excepts *de minimis* transactions that would otherwise violate the rule: bids that are not accepted, and one or more purchases that in the aggregate over the restricted period total less than 2% of the security's average daily trading volume, provided that the person making the unaccepted bids or purchases has maintained and enforced written policies and procedures designed to achieve compliance with the rule.

2. Persons Subject to Rule 101

a. Distribution Participant

A *distribution participant* is defined in Rule 100 as an underwriter, prospective underwriter, broker, dealer, or other person who has agreed to participate or is participating in a distribution. The Commission is adopting the definition as proposed.

Several commenters expressed concern that a distribution participant affiliated with an issuer or selling security holder (*e.g.*, an underwriter that is affiliated with an issuer) would be subject to the more restrictive provisions of Rule 102, rather than those of Rule 101, which they claimed could result in unwarranted adverse business and market consequences.[14] They recommended that such distribution participants be permitted to rely on the provisions of Rule 101. Other commenters recommended that any financial services affiliate of an issuer or selling security holder, whether or not it is acting as a distribution participant in connection with the distribution, should have the benefit of the additional exceptions available under Rule 101.

After considering the commenters' views, the Commission has added a proviso to paragraph (a) of Rules 101 and 102, specifying that any affiliated purchaser of an issuer or selling security holder that also is acting as a distribution participant may comply with the provisions of Rule 101, rather than Rule 102, provided that such affiliated purchaser is not itself the issuer or selling security holder.[15] Thus, during a distribution, an underwriter affiliated with the issuer will be able to comply with the provisions of Rule 101. The Commission is making this revision based upon its experience with Rule 10b–6, and the fact that underwriters affiliated with the issuer are often important market participants that are subject to SRO surveillance.

b. Prospective Underwriter

A prospective underwriter is defined as a person: who has submitted a bid to an issuer or selling security holder, and knows or is reasonably certain that such bid will be accepted, whether or not the terms and conditions of the underwriting have been agreed upon; or who has reached, or is reasonably certain to reach, an understanding with an issuer, selling security holder, or managing underwriter that such person will become an underwriter, whether or not the terms and conditions of the underwriting have been agreed upon.[16] The definition differs from the proposal in that the phrase ''is reasonably certain'' replaces ''reasonably expects.'' Several commenters requested that the proposed definition provide greater certainty as to when a person becomes a prospective underwriter. They believed that, as a practical matter, it may be difficult or even impossible for a broker-dealer to know when it ''reasonably expects'' to have its bid accepted or to reach an understanding with an issuer. Although the definition as adopted does not provide a bright line test, the practical effect should be to reduce the circumstances in which a broker-dealer will be a prospective underwriter. The definition reflects the Commission's view that there is frequently some point prior to when a bid actually has been accepted, or a broker-dealer has been told that it will be an underwriter, when it is reasonably certain that such person will be an underwriter, and that the incentive to facilitate the distribution is present at that point.

c. Completion of Participation in the Distribution

Under Regulation M, a person determines when its *completion of participation in the distribution* occurs based on the person's role in the distribution. An underwriter is deemed to have completed its participation in a distribution when its participation has been distributed, including all other securities of the same class that are acquired in connection with the distribution, and after any stabilization arrangements and trading restrictions in connection with the distribution have been terminated.

The definition contains a proviso that an underwriter's participation is not deemed to be completed, however, if a syndicate overallotment option is exercised in an amount that exceeds the net syndicate short position at the time of such exercise.[17] This proviso comports with a provision of Rule 10b–6 and is intended to assure that the underwriter's selling efforts in

[11] In this release, terms defined in Rule 100 appear in italics when discussed for the first time.

[12] Rule 100 defines distribution as ''an offering of securities, whether or not subject to registration under the Securities Act, that is distinguished from ordinary trading transactions by the magnitude of the offering and the presence of special selling efforts and selling methods.''

[13] Many of the terms and concepts discussed with respect to Rule 101 also are relevant to Rule 102, which proscribes activities by issuers and selling security holders and their affiliated purchasers.

[14] *See infra* Section II.C., discussing Rule 102.

[15] The exception for actively-traded securities is not available for securities that are issued by a distribution participant or an affiliate of the distribution participant. *See infra* Sections II.C.2. and II.C.5.

[16] If a broker-dealer has entered into a continuing agreement with an issuer or selling security holder regarding takedowns of securities off a shelf, such agreement typically would make the broker-dealer reasonably certain that it would participate in a distribution off the shelf.

[17] *See Letter regarding Overallotment Options* (November 27, 1996), 1996 SEC No-Act. LEXIS 868.

connection with the distribution have in fact ceased before trading prohibitions are lifted. Consistent with Rule 10b–6 interpretation, if an overallotment option is exercised for an amount of securities that exceeds the net syndicate short position (*i.e.,* taking into account shares purchased in stabilizing or syndicate short covering transactions), the distribution will not be deemed completed and purchases made prior to the exercise of the option would constitute a violation of Regulation M.[18] Any other distribution participant will have completed its participation when its allotment has been distributed.[19] Several commenters asked the Commission to clarify that securities acquired for investment by persons participating in a distribution would be considered to be distributed. Consistent with an interpretation of Rule 10b–6, securities acquired in a distribution for investment purposes by anyone participating in the distribution, or any affiliated purchaser, are considered to be distributed.[20]

d. Affiliated Purchaser

The Commission proposed to define *affiliated purchaser* for Rules 101 and 102 as: (1) a person acting in concert with a distribution participant, issuer, or selling security holder in connection with the acquisition or distribution of a covered security; (2) an affiliate who controls the purchase of such securities by a distribution participant, issuer, or selling security holder, or whose purchases are controlled by such persons, or whose purchases are under common control with those of such persons; or (3) an affiliate of a distribution participant, issuer, or selling security holder who regularly purchases securities for its own account or for the account of others, or who recommends or exercises investment discretion with respect to the purchase or sale of securities (''financial services affiliates'').

The Commission proposed excluding a financial services affiliate of a distribution participant, but not that of an issuer or selling security holder, from the definition if: (1) the affiliate was a separate and distinct organizational entity from, having no officers or employees in common with, the distribution participant; (2) the affiliate's bids for, purchases of, and inducements to purchase securities in distribution were made in the ordinary course of its business; and (3) the distribution participant maintained and enforced written policies and procedures designed to segregate the flow of information between the distribution participant and its affiliates (''information barriers''), and obtained an annual independent assessment of the operation of its information barriers.

Although commenters generally supported the Commission's efforts to revise the affiliated purchaser definition, several recommended that financial services affiliates of issuers and selling security holders also be excluded from this definition. Moreover, many commenters stated that precluding common officers and employees and requiring that the distribution participant and affiliate be separate and distinct organizational entities would prevent a large number of multi-service financial institutions from relying on this exception. Noting that large financial services providers frequently have at least some officers or employees with overlapping responsibilities, many commenters argued that the presence of common officers or employees should not preclude an affiliate from availing itself of the exclusion where the affiliate's purchases are made in the ordinary course of its business and the distribution participant has maintained and enforces appropriate information barriers.

The Commission is adopting the first two prongs of the definition substantially as proposed.[21] In response to several commenters' concerns, the Commission has determined to modify the third prong of the definition. As adopted, the exclusion is available to affiliates of distribution participants, issuers, and selling security holders. Moreover, the condition prohibiting common officers (or persons performing similar functions) or employees (other than clerical, ministerial, or support personnel) has been narrowed to preclude commonality only with respect to those officers or employees that direct, effect, or recommend transactions in securities.[22]

A number of commenters argued that information barriers would not deter manipulative activity because general information regarding a distribution is public. The Commission nevertheless is of the view that information barriers can serve to restrict the flow of non-public information that might inappropriately influence an affiliate's transactions in covered securities. For example, appropriate information barriers would prevent the communication of the details of pricing discussions with the issuer and prospective purchasers, or knowledge as to the demand for the offering.

As adopted, the information barrier requirements specify that the distribution participant, issuer, or selling security holder must maintain and enforce written policies and procedures to prevent the flow of information to or from the affiliate that might result in a violation of Rules 101, 102, or 104 of Regulation M,[23] and obtain an annual, independent review of the operation of its information barriers. As noted in the Proposing Release, an internal audit group may perform the review if such group is independent of the distribution participant, issuer, or selling security holder's corporate financing, trading, and advisory departments.[24]

The Commission has determined to eliminate the requirement that the affiliate be a separate and distinct organizational entity from the distribution participant, issuer, or selling security holder in the sense of requiring a separate legal entity, because such a condition could result in elevating form over substance. Moreover, in response to comments regarding the growth and complexity of multi-service financial institutions, language providing that an ''affiliate'' may be a separately identifiable department or division of a distribution participant, issuer, or selling security holder has been added to the second and third prongs of the definition. These changes broaden the scope of financial

[18] *See* Securities Exchange Act Release No. 19565 (March 4, 1983), 48 FR 10628, 10640 (''Release 34–19565'').

[19] *See infra* Section II.C.2.a., discussing the definition of completion of participation in the distribution as it relates to issuers and selling security holders.

[20] The definition of completion of participation in the distribution codifies the approach taken by the staff in *Letter regarding VLI Corporation,* [1982–1983] Fed. Sec. L. Rep. (CCH) ¶ 77,625 (October 17, 1983) (''VLI Letter'').

[21] None of the commenters objected to the substance of the first two prongs of the proposed definition, although several commenters believed that these provisions would be sufficient to capture any affiliate with both the means and the incentive to manipulate. As adopted, the first prong of the definition remains unchanged, and the only modification to the second prong is the addition of language providing that an ''affiliate'' may be a separately identifiable department or division of a distribution participant, issuer, or selling security holder.

[22] The Commission believes that this modification will resolve substantially commenters' concerns that sharing one or more senior executives with a distribution participant, issuer, or selling security holder would preclude an affiliate from availing itself of the exclusion. For example, the requirement would not preclude common executives charged with risk management, compliance, or general oversight responsibilities.

[23] The Commission notes that this provision does not require the affiliate to maintain and enforce such information barriers.

[24] Proposing Release, 61 FR at 17117. Several commenters requested that the proposed exclusion clarify that an internal audit group may perform the review.

services affiliates that may be eligible for the exclusion.

The Commission believes, however, that affiliates should be restricted from engaging in certain types of activities that present the greatest potential for manipulation during the course of a distribution. As adopted, the definition provides that any affiliate that, during the applicable restricted period, acts as a market maker (other than as a specialist in compliance with the rules of a national securities exchange), or engages, as a broker or a dealer, in solicited transactions or proprietary trading activities, in covered securities is an affiliated purchaser. An affiliate (whether an internal unit or a separate legal entity) engaged in these activities is not eligible for the exclusion to the affiliated purchaser definition.[25] In contrast, an affiliate acting as an investment company or investment adviser, or in some other non-broker-dealer capacity, would be eligible for the exclusion.[26]

The Commission believes that these modifications to the definition of affiliated purchaser will resolve many of the commenters' concerns and avoid unnecessary burdens on multi-service financial organizations with affiliates engaged in financial advisory and other services.[27]

3. Securities Subject to Rule 101

The Commission proposed applying the trading restrictions of Rule 101 to covered securities, which would include the security that is the subject of a distribution (*subject security*) and *reference securities.* The Commission is adopting the definition of covered security as proposed, but at the suggestion of some commenters has revised the definition of reference security to describe more specifically the situations when the term applies. The term reference security is defined as a security into which a subject security may be converted, exchanged, or exercised, or which, under the terms of the subject security, may in whole or in significant part determine the value of the subject security.

Several commenters supported the proposed definitions. In general, these commenters believed that the proposed coverage of securities represented a significant improvement from the approach under Rule 10b–6, which extended trading restrictions to any security of the ''same class and series'' as the security being distributed and any ''right to purchase'' such security.[28] One commenter additionally noted that the elimination of the same class and series analysis would ease greatly the task of identifying securities that are subject to trading restrictions during debt offerings. Other commenters indicated uncertainty regarding the applicability of Regulation M to debt offerings and requested clarification on the coverage of debt securities that are ''identical in principal features.''

The elimination of the same class and series concept will reduce significantly the application of trading restrictions to nonconvertible debt securities that are not rated investment grade.[29] Bids for and purchases of outstanding nonconvertible debt securities are not restricted unless the security being purchased is identical in all of its terms to the security being distributed. For example, Rule 101 does not apply to a security if there is a single basis point difference in coupon rates or a single day's difference in maturity dates, as compared to the security in distribution.[30] In the rare situations in which Rule 101 will apply to outstanding debt, the restricted period will generally be five business days.

In addition, derivative securities (*i.e.*, those that derive all or part of their value from a security being distributed) are not subject to the trading prohibition of Rule 101. Thus, for example, bids for or purchases of options, warrants, rights, convertible securities, or equity-linked securities are not restricted during a distribution of the related common stock because, while they derive their value from the security being distributed, they do not by their terms affect the value of the security in distribution. The National Association of Securities Dealers, Inc. (''NASD'') expressed concern about permitting bids for and purchases of derivative securities in the case of a distribution of an underlying security, because trading in derivative securities can have a significant impact on the underlying security.[31] The NASD recommended that the Commission consider limiting the exclusion to those derivative securities that are not likely to present manipulative risk, such as ''out-of-the-money'' options. The Commission recognizes that derivative securities, even those that are out-of-the-money, can be used to manipulate the price of an underlying security through inducing arbitrage and other transactions involving the underlying security. It is the Commission's intention, however, to focus trading restrictions on those securities that present the greatest manipulative potential. Moreover, any attempt to manipulate a security in distribution by transactions involving derivative securities will continue to be addressed by the general anti-manipulation provisions, including Sections 9(a)(2) and 10(b) of, and Rule 10b–5 under, the Exchange Act.

Regulation M does apply to reference securities, such as common stock underlying an exercisable, exchangeable, or convertible security that is being distributed. The Commission believes that transactions in reference securities can have a direct and substantial effect on the pricing and terms of the security in distribution.

The definition of reference security also encompasses a security underlying an instrument, such as an equity-linked security, that does not give the holder the right to acquire the security, but whose value is or may be derived from such security.[32] A security will be a

[25] This means, for example, that a broker-dealer that does not make a market in a covered security, or that ceases market maker activity in covered securities during the applicable restricted period, would not fall within the definition of affiliated purchaser. Accordingly, an issuer affiliate that engages only in unsolicited brokerage transactions in covered securities would not fall within the definition.

[26] For example, a trustee or other pension plan administrator may avail itself of the exclusion, provided such entity satisfies the remaining conditions of the exclusion.

A multi-service financial institution may engage in both investment advisory services and trading activities. To the extent that the institution's investment advisory services are performed by a separately identifiable department, with no officers or employees that direct, effect, or recommend transactions in securities in common with the trading department, then the investment advisory department may avail itself of the exclusion, provided the remaining conditions of the definition are satisfied. If the same individuals provide investment advisory services and engage in trading activities for the institution, however, it would be difficult, if not impossible, to attribute those functions to ''separately identifiable'' departments. Similarly, where the same individuals direct, effect, or recommend securities transactions for two separately organized affiliates, one providing investment advisory services and the other engaging in solicited activities, such persons could not avail themselves of the exclusion by simply attributing their solicited transactions to their investment advisory role.

[27] The variety and complexity of organizational structures means that Regulation M may apply to some affiliates that it may be appropriate to exclude. In such cases, the Commission, through the Division of Market Regulation, will entertain exemption requests.

[28] *See* Proposing Release, text accompanying notes 29 and 30, 61 FR 17114.

[29] Nonconvertible debt and certain other securities that are rated investment grade are excluded from Rule 101. *See infra* Section II.B.6.b.

[30] In a distribution of equity securities, however, outstanding classes of securities that differ only in voting rights from the distributed security will be deemed to be the same security for purposes of Regulation M.

[31] *See* Letter from Mary L. Schapiro, President, NASD Regulation, Inc. and Alfred R. Berkeley, III, President, Nasdaq, to Jonathan G. Katz, Secretary, SEC (July 23, 1996) (''NASD Comment Letter'').

[32] Rule 10b–6 by its terms did not apply to the underlying security in these circumstances. The Commission believes, however, that Regulation M

reference security only when it, or an index of which it is a component, is referred to in the terms of a subject security. A security of the same or similar issuer will not be deemed a reference security merely because its price is used as a factor in determining the offering price of a security in distribution.

Commenters sought clarification concerning whether an issuer or distribution participant would be permitted to write a put or maintain a ''short put'' position during a distribution of an underlying security.[33] Transactions in derivative securities, including put options, are not subject to Rule 101 during an offering of the underlying security. In addition, maintaining a short put position is not deemed to be a continuing bid for the underlying security for purposes of Regulation M.

4. Restricted Periods of Rule 101

a. Duration. As discussed below, the Commission is adopting the exclusion from Rule 101 for actively-traded securities.[34] This provision removes from Rule 101 securities with an ADTV value of at least $1 million where the issuer's common equity securities have a public float value of at least $150 million. For the remaining securities, Rule 101 restricts transactions by distribution participants in covered securities, unless an exception applies, for the following periods:

- in a distribution of a security with an average daily trading volume (*ADTV*) value of at least $100,000, whose issuer has outstanding common equity securities having a *public float value* of at least $25 million, the restricted period begins on the later of one business day prior to the date on which the subject security's price is determined or the date on which the person becomes a distribution participant, and ends upon that person's completion of participation in the distribution; and
- in a distribution of any other security, the restricted period begins on the later of five business days prior to the date on which the subject security's price is determined or the date on which the person becomes a distribution participant, and ends upon that person's completion of participation in the distribution.

The Commission proposed that the restricted periods for an offering would begin one or five business days prior to the pricing of the offering, depending upon the security's ADTV value alone.[35] In addition, rather than using the date of commencement of offers or sales as a reference, the Commission proposed to determine the restricted period with reference to the date on which the offering is priced. Commenters generally supported shortening the restricted periods, and favored the one and five business days periods keyed off the offering's pricing.

The Commission believes that the ADTV standard is most relevant for determining which securities are more difficult to manipulate. Nevertheless, the use of a trading volume standard alone could skew the application of Rule 101 based on short-term, aberrational increases in trading volume. To prevent this result, the Commission has added a public float component to the test for determining the applicable restricted period.[36] The public float component is intended to capture within Rule 101 those securities that experience unusual trading volume relative to their public float value. While the use of a two-part test requires distribution participants to make an additional calculation, the Commission believes that the combination of these components better identifies securities that are more likely to be resistant to manipulation.

Rule 10b–6 contained restrictions that principally applied during a two or nine day ''cooling-off period.'' Many securities that had a two day cooling-off period under Rule 10b–6 will now have a one day restricted period under Regulation M, or will be free from the restrictions of Rule 101 because they are actively-traded securities.[37] Even some nine day securities under Rule 10b–6 will now have a one day restricted period under Regulation M.[38] Approximately one-quarter of the securities that qualified for a two day cooling-off period under Rule 10b–6 are now subject to a five day restricted period because of the different criteria used in Regulation M and Rule 10b–6 for distinguishing securities. While the restricted periods under Regulation M are increased for some securities, other provisions of Regulation M, such as Rule 103 (permitting passive market making for all Nasdaq securities), will address liquidity concerns with respect to many of these securities.

b. Calculation of ADTV and Public Float Value.

The ADTV of a covered security is defined on the basis of reported worldwide average daily trading volume during a specified period prior to the filing of the registration statement or prior to the pricing of the offering, depending on the circumstances. Some commenters questioned whether ADTV can be measured uniformly across markets. The NYSE and the Amex requested that the Commission adopt different standards for determining trading volume on auction and dealer markets.[39] These exchanges asserted that the Commission's reliance on reported trading volume to determine this exclusion's availability is discriminatory and anti-competitive, because such a standard allegedly favors dealer markets where dealer interpositioning increases volume as compared with auction markets. The Commission does not believe that it is necessary or appropriate to make distinctions based on the type of market on which the security is traded.[40] The Commission proposed a three-month calendar period for calculating ADTV. The NASD recommended a rolling 60 day period, calculated as of a date within 10 business days prior to pricing, for determining ADTV.[41] Commenters also requested guidance regarding what

should apply to a security whenever it has a price relationship to a subject security as a result of the terms of that security.

In some cases, a reference security may have an extremely attenuated relationship to the security in distribution. While the Commission does not believe that a specific percentage test is a workable means to identify these cases, the staff will provide appropriate guidance in response to specific inquiries.

[33] *Cf. Letter regarding The Chicago Board Options Exchange*, [1990–1991] Fed. Sec. L. Rep. (CCH) ¶ 79,665 (February 22, 1991).

[34] *See infra* Section II.B.6.a., discussing the actively-traded securities exception, which excludes from Rule 101 securities having an ADTV value of at least $1 million and whose issuer's common equity securities have a public float value of at least $150 million.

[35] Proposing Release, 61 FR at 17113.

[36] The Commission has determined that using a public float value component alone would not differentiate securities sufficiently with respect to the likelihood of manipulation because of the wide variations in ADTV value for securities with similar public float value.

[37] Based on 1995 volume and price data analyzed by the Commission's Office of Economic Analysis (''OEA''), the Commission estimates that 6,156 securities (out of a total of 7,822 securities listed on the New York Stock Exchange, Inc. (''NYSE''), the American Stock Exchange, Inc. (''Amex''), and (Nasdaq) were subject to a two day cooling-off period under Rule 10b–6. Under Regulation M, of those securities approximately 1,901, or 30.9%, are excluded from the rule; 2,693, or 43.7%, are subject to a one day restricted period; and 1,562, or 25.4%, are subject to a five day restricted period.

[38] Based on 1995 volume and price data analyzed by OEA, the Commission estimates that 1,666 securities (out of a total of 7,822 NYSE, Amex, and Nasdaq-listed securities) were subject to a nine day cooling-off period under Rule 10b–6. Under Regulation M, of those securities, 11, or 0.7%, are excluded from the rule; 278, or 16.7%, are subject to a one day restricted period; and 1,377, or 82.6%, are subject to a five-day restricted period.

[39] Letter from James E. Buck, Senior Vice President and Secretary, NYSE, to Jonathan G. Katz, Secretary, SEC (May 31, 1996); Letter from James F. Duffy, Executive Vice President and General Counsel, Amex, to Jonathan G. Katz, Secretary, SEC (June 25, 1996).

[40] *See infra* Section IV., discussing in greater detail the anti-competitive concerns raised by the NYSE and the Amex.

[41] *See* NASD Comment Letter, at p. 3.

information sources may be used to calculate ADTV, and suggested that the Commission designate the types of information that are acceptable for determining ADTV.

The Commission believes that, with the addition of a test based on public float value that will tend to correct for volume aberrations, a 60 day rolling period provides a sufficient length of time to measure the trading volume of a security. Therefore, the rule permits distribution participants to use a two calendar month *or* a 60 day rolling period. The 60 day rolling period for calculating ADTV must end within 10 calendar days of the filing of a registration statement, or, if there is no registration statement or if the distribution is a shelf distribution, within 10 calendar days of the offering's pricing. The 10 day period will allow distribution participants in any type of distribution sufficient time to conform to the applicable restricted period. The Commission has decided not to designate acceptable information sources for determining ADTV; rather, a distribution participant should have flexibility in determining a security's ADTV value from information that is publicly available, if such participant has a reasonable basis for believing that the information is reliable.[42] Furthermore, in calculating the dollar value of ADTV, any reasonable and verifiable method may be used. For example, it may be derived from multiplying the number of shares by the price in each trade, or from multiplying each day's total volume of shares by the closing price on that day.

As for public float value, the Commission is adopting a definition that reflects its usage in Form 10–K (*i.e.*, the aggregate amount of common equity securities held by non-affiliates).[43] For example, for reporting issuers the public float value should be taken from the issuer's most recent Form 10–K or based upon more recent information made available by the issuer.

5. Offerings Subject to Rule 101

a. Generally. The provisions of Rule 101 apply in connection with a distribution of securities.[44] The same types of offerings or other transactions that satisfied the distribution criteria under Rule 10b–6 (*i.e.*, the magnitude of the offering/selling efforts test) also are subject to Rule 101. These include public offerings, private placements, shelf offerings, mergers and other acquisitions, exchange offers, forced conversions of securities, warrant solicitations, and at-the-market offerings.

b. Shelf Offerings. The Commission is modifying its approach to shelf-registered distributions by replacing the ''single distribution position'' taken under Rule 10b–6.[45] Under Regulation M, each takedown off a shelf is to be individually examined to determine whether such offering constitutes a distribution (*i.e.*, whether it satisfies the ''magnitude'' of the offering and ''special selling efforts and selling methods'' criteria of a distribution). Under prior Commission interpretation, if the aggregate amount of securities registered on a shelf constituted a Rule 10b–6 distribution, each takedown was deemed to be part of that single distribution for purposes of the rule, regardless of its individual magnitude.[46]

The Commission's modified approach means that a broker-dealer participating in a takedown off a shelf must determine whether it is participating in a distribution.[47] In those situations where a broker-dealer sells shares on behalf of an issuer or selling security holder in ordinary trading transactions into an independent market (*i.e.*, without any special selling efforts) the offering will not be considered a distribution and the broker-dealer will not be subject to Rule 101.[48] A broker-dealer likely would be subject to Rule 101, however, if it enters into a sales agency agreement that provides for unusual transaction-based compensation for the sales, even if the securities are sold in ordinary trading transactions.

c. Mergers, Acquisitions, and Exchange Offers. Many commenters questioned the application of Rule 101's restricted periods to mergers, acquisitions, and exchange offers. These commenters noted that during merger distributions subject to Rule 10b–6, trading restrictions were imposed during the applicable two or nine day period prior to the mailing of proxy solicitation materials and for the duration of the proxy solicitation.[49] Similarly, the Commission also considered the commencement of any valuation period or any election period as the equivalent of the ''commencement of offers or sales,'' requiring bids and purchases to cease during the applicable two or nine day period and for the duration of the valuation or election period.[50] Several commenters stated that by requiring the restricted period to commence one or five days prior to pricing, it is possible that the restricted period for a merger distribution could begin several months prior to the mailing of the proxy materials. These commenters noted that in such situations the restricted period could be much lengthier under Regulation M, as compared to the practice under Rule 10b–6.

The Commission believes that mergers, acquisitions, and exchange offers involve distributions in which interested persons have considerable incentive to manipulate. The Commission agrees with the commenters that the Regulation M restricted periods should reflect the characteristics of these types of distributions. Accordingly, as adopted the restrictions of Regulation M begin on the day when proxy solicitation or offering materials first are disseminated to security holders and end with the completion of the distribution (*i.e.*, the time of the shareholder vote or the expiration of the exchange offer).[51]

[42] *Cf.* Securities Exchange Act Release No. 27247 (September 14, 1989), 54 FR 39194, 39197–98 (discussing the standard under Rule 15c2–11 under the Exchange Act, 17 CFR 240.15c2–11, for a broker-dealer to have a reasonable basis that certain information is true and accurate). For instance, a distribution participant may rely on trading volume as reported by an SRO or comparable entity, or any other source believed to be reliable. Electronic information systems that provide information regarding securities in markets around the world could provide an easy means to determine worldwide trading volume in a particular security.

[43] 17 CFR 249.310. *See also* Securities Act Release No. 7326 (August 30, 1996), 61 FR 47706 (proposing the expansion of short-form registration to include companies with non-voting common equity). Form 20–F (17 CFR 249.220f), the annual report form used by foreign private issuers under the Exchange Act, does not require disclosure of public float information. Nonetheless, the public float value of such issuer should be determined in the same manner as provided in Form 10–K.

[44] *See supra* Section II.B.1., discussing the definition of distribution.

[45] *See* Release 34–19565, 48 FR at 10631.

[46] *See* Proposing Release, 61 FR at 17115, and Release 34–19565, 48 FR at 10631. *See also* Securities Exchange Act Release No. 23611 (September 11, 1986), 51 FR 33242, 33244 (''Release 34–23611'').

[47] An issuer's description in a shelf registration statement of a variety of potential selling methods will not cause, by itself, any sales off the shelf to be treated as a distribution, unless the broker-dealer in fact uses special selling efforts or selling methods in connection with particular sales off the shelf, and the sales are of a magnitude sufficient to demonstrate the existence of a distribution. *Cf.* Securities Exchange Act Release No. 18528 (March 3, 1982), 47 FR 11482, 11485.

[48] This approach assumes that the broker-dealer is disposing of shares in ordinary trading transactions into an independent market (*i.e.*, one not dominated or controlled by the broker-dealer, and where the price is not manipulated by the broker-dealer or others acting in concert with the broker-dealer). Release 34–23611, 51 FR at 33247.

[49] *See* Release 34–19565, 48 FR at 10638–39.

[50] *Id.* at 10639.

[51] In addition, Rule 10b–13 under the Exchange Act continues to prohibit any purchases or arrangements to purchase securities that are the subject of an exchange offer, or a security immediately convertible into or exchangeable for those securities, from the time of public

Consistent with an interpretation under Rule 10b–6, a restricted period also will apply during any period where the market price of the offered security will be a factor in determining the consideration to be paid pursuant to a merger, acquisition, or exchange offer. Thus, activity proscribed by Rules 101 and 102 must cease one or five business days before the commencement of any valuation period and for the duration of such period.[52]

d. At-the-market Offerings. In an *at-the-market offering,* sales prices are established during the course of the offering based upon market conditions at the time of individual sales.[53] Accordingly, the restricted period for such an offering would commence one or five business days before the pricing of each sale and continue until the person's participation in the distribution is completed. In practice, the application of Rule 101 will essentially be the same as in the case of a fixed price offering, where one price is established for the entire distribution, because the activities of distribution participants are restricted during the entire course of offers and sales, whether the securities are sold at fixed or varying prices.

6. Securities Excepted from Rule 101

a. Exception for Actively-traded Securities. The Commission proposed excluding from Rule 101 all securities with a published ADTV value of at least $1 million, and requested comment on whether another test, such as a public float test, should be used to determine which securities should be excluded from the rule. Commenters supported an exclusion for actively-traded securities, with two commenters suggesting a lower threshold and one recommending a threshold of $10 million. The Commission is adopting an exception for those securities that have an ADTV value of at least $1 million that are issued by an issuer whose common equity securities have a public float value of at least $150 million.

The Commission continues to believe that an exclusion for actively-traded securities is appropriate. The costs of manipulating such securities generally are high. In addition, because actively-traded securities are widely followed by the investment community, aberrations in price are more likely to be discovered and quickly corrected. Moreover, actively-traded securities are generally traded on exchanges or other organized markets with high levels of transparency and surveillance.

The reasons for incorporating a dual ADTV value/public float value test for the restricted periods similarly apply to determining whether securities qualify for the actively-traded securities exception.[54] The Commission selected $150 million for the public float value test because it believes that the securities of issuers with a public float value at or above this threshold, and that also have an ADTV value of at least $1 million, have a sufficient market presence to make them less likely to be manipulated. As discussed above, the $150 million public float value test is intended in part to exclude issuers from the actively-traded securities exception where a high trading volume level is an aberration.

The combined minimums of $1 million ADTV value for the securities and $150 million public float value removes from Rule 101 the equity securities of approximately 1,900 domestic issuers, as well as those of a substantial number of foreign issuers.[55] The Commission estimates that the addition of a public float test reduces by approximately 9% the number of domestic issuers whose common stock would be excepted from Rule 101 based solely on an ADTV test.[56]

b. Investment Grade Securities. The Commission is adopting an exception to Rule 101 for nonconvertible debt securities, nonconvertible preferred securities, and *asset-backed securities,* provided that the security being distributed is rated investment grade by at least one *nationally recognized statistical rating organization*.[57] The Proposing Release recommended excepting investment grade nonconvertible debt and preferred securities and noted that the comparable Rule 10b–6 exception was based on the premise that these securities are traded on the basis of their yields and credit ratings, are largely fungible and, therefore, are less likely to be subject to manipulation. The Commission solicited comment on whether investment grade asset-backed securities have the same characteristics with respect to trading as nonconvertible investment grade debt of corporate issuers, and whether such securities should be excepted from the rule.

Several commenters stated that investment grade asset-backed securities should be excepted from Rule 101 because they are the functional equivalent of investment grade debt. One commenter suggested using the definition of asset-backed security contained in the Instruction to Form S–3 for purposes of Rule 101. Another commenter, although not proposing a definition of asset-backed security, recommended an exception for investment grade asset-backed securities backed by a fixed pool of receivables.

Asset-backed securities are excluded from Rule 101 because such securities trade primarily on the basis of yield and credit rating. The principal focus of investors in the asset-backed securities market is on the structure of a class of securities and the nature of the assets pooled to serve as collateral for those securities, rather than the identity of a particular issuer. Investment grade asset-backed securities also are similar to investment grade nonconvertible debt and preferred securities. Therefore, Rule 101 excepts securities that are ''primarily serviced by the cashflows of a discrete pool of receivables or other financial assets, either fixed or revolving, that by their terms convert into cash within a finite time period plus any rights or other assets designed to assure the servicing or timely distribution of proceeds to the security holders''[58] and that are rated investment grade.

A few commenters also proposed that an even broader exception for debt and preferred securities be adopted, suggesting that high-yield debt securities be excepted from Rule 101 when those securities satisfy certain criteria. One commenter proposed that all debt be excluded from coverage of

announcement until the expiration of the exchange offer. 17 CFR 240.10b–13.

[52] Release 34–19565, 48 FR at 10639.

[53] The term at-the-market offering is defined as an offering of securities at other than a fixed price.

[54] For example, the Commission considered using the $75 million public float value measure included in the eligibility criteria for Forms S–3 and F–3 under the Securities Act. However, the Commission adopted that threshold for different reasons, *i.e.,* information regarding companies with a public float value of at least $75 million is efficiently assimilated by the market because they are likely to be followed by multiple analysts. *See* Securities Act Release No. 7053 (April 19, 1994), 59 FR 21644; Securities Act Release No. 7029 (November 3, 1993), 58 FR 60307. Therefore, it was appropriate to permit incorporation of Exchange Act filings in registration statements filed by such issuers.

[55] Based on transaction information for 1995 analyzed by OEA, approximately 1,106 securities listed on the NYSE, 770 securities quoted on Nasdaq, and 36 securities listed on the Amex would be excluded from Rule 101. The general increase in security prices and trading volume since year-end 1995 likely will increase the number of securities satisfying the ADTV minimum.

[56] Based on 1995 volume and price data analyzed by OEA, 2,103 securities have an ADTV value of at least $1 million; 1,912 securities have an ADTV value of at least $1 million and a market capitalization of at least $150 million.

[57] The term nationally recognized statistical rating organization in paragraph (c)(2) of Rule 101 has the same meaning as that term is used in 17 CFR 240.15c3–1(c)(2)(vi).

[58] This definition is identical to the definition of asset-backed security contained in General Instruction I.B.5. to Form S–3, 17 CFR 239.13(b).

Rule 101. The Commission believes that, as a practical matter, Rule 101 and Rule 102 will have very limited impact on debt securities, except for the rare situations where selling efforts continue over a period of time.[59] In those circumstances, where the incentive to manipulate can escalate, the Commission believes that the application of Regulation M is appropriate.

c. Exempted Securities. The Commission is adopting the proposed exception to Rule 101 for ''exempted securities'' as defined in Section 3(a)(12) of the Exchange Act.[60] Transactions in these securities are not restricted by Rule 101. This exception is similar to a provision contained in Rule 10b–6.

d. Face-amount Certificates or Securities Issued by an Open-end Management Investment Company or Unit Investment Trust. The exception to Rule 101 for face-amount certificates issued by a face-amount certificate company, or redeemable securities issued by an open-end management investment company or a unit investment trust, is adopted as proposed. Transactions in these securities are not covered by Rule 101. An identical provision existed in Rule 10b-6.

17. Activities Excepted from Rule 101

a. Exception 1—Research. The Commission is adopting exception 1 to Rule 101, which permits the publication or dissemination of any information, opinion, or recommendation relating to a covered security if the conditions of either Rule 138 or Rule 139 under the Securities Act are satisfied.[61] This exception more closely aligns Rule 101 with the Securities Act rules governing permissible research activities by broker-dealers participating in offerings of securities.[62]

As proposed, the exception required the research to be published or disseminated ''in the ordinary course of business.'' Several commenters found this phrase to be confusing because Rule 138 requires that research be published or distributed in the ''regular course of business,''[63] and Rule 139 requires that information, opinions, or recommendations be contained in a publication that is distributed with ''reasonable regularity in the normal course of business.''[64] The Commission has deleted as redundant the phrase ''in the ordinary course of business'' from exception 1.

Commenters also were uncertain about the application of this exception to electronically disseminated research. The Commission believes that if a distribution participant, in the normal course of its business, provides research reports to independent research services that make such reports available to their subscribers electronically, whether or not the subscribers are customers of or have previously received research from the broker-dealer, such research is excepted from Rule 101.[65] Similarly, a distribution participant may update its mailing list (*i.e.*, new persons may be added) where it is intended that they receive all future research sent to others on the list, and not just the research related to the security in distribution.

Some commenters inquired whether the exception would be available to unregistered offerings, because Rules 138 and 139 pertain to the dissemination of research during registered offerings. In the Commission's view, for purposes of Rule 101, exception 1 is available during distributions that are not registered under the Securities Act, as long as the conditions of either Rule 138 or Rule 139 are satisfied, other than those pertaining to the filing of a registration statement. A few commenters further recommended that research disseminated outside of the United States during a global offering be excepted from Rule 101's coverage, if such research is disseminated in conformity with local rule or custom. The Commission has determined that the conditions of Rules 138 and 139 (other than registration) define the appropriate parameters for research activities involving securities distributed in the United States because research activities outside the United States in connection with a distribution subject to the rule could be used to facilitate the distribution in the United States. The Commission notes, however, that many of the securities distributed in global offerings will be subject to the rule's actively-traded securities exception and, therefore, not subject to Rule 101's provisions.[66]

b. Exception 2—Transactions Complying with Certain Other Sections. Exception 2, which allows passive market making transactions and stabilizing transactions complying with Rules 103 or 104, respectively, is adopted as proposed.

c. Exception 3—Odd-Lot Transactions. Exception 3, permitting distribution participants to bid for or purchase odd-lots during the restricted period, is adopted as proposed. Accordingly, a distribution participant may purchase odd-lots during a distribution. Among other things, this exception permits distribution participants to engage in activities in connection with issuer odd-lot tender offers conducted pursuant to Rule 13e-4(h)(5) under the Exchange Act, including effecting purchases necessary to permit odd-lot holders to ''round-up'' their holdings to 100 shares.

d. Exception 4—Exercises of Securities. Exception 4 permits distribution participants to exercise any option, warrant, right, or any conversion privileges set forth in the instrument governing a security. This exception does not distinguish call options acquired before the person became a distribution participant from those acquired afterwards. In addition, the exception covers exercises of non-standardized call options.

Supporters of this exception noted that option exercises do not involve significant manipulative potential because of the unpredictability of the timing and the extent of purchases by persons writing call options. As noted earlier, the NASD expressed more general concerns about Regulation M's limited coverage of derivative securities.[67] The Commission believes that exercises or conversions of derivative securities generally have an uncertain and attenuated manipulative potential and, for that reason, has adopted the exception as proposed.[68]

In light of the treatment of derivative securities under Regulation M, the Commission is rescinding Rule 10b-8,

[59] *See supra* Section II.B.3., discussing covered securities.

[60] 15 U.S.C. 78c(a)(12).

[61] 17 CFR 230.138, 230.139.

[62] Exception 1 differs from a previous staff position that certain research reports were not prohibited inducements to purchase if such research was issued by a broker-dealer in the ordinary course of business, and satisfied either Rule 138 or Rule 139(b), or satisfied Rule 139(a) and did not contain a recommendation or earnings forecast more favorable than that previously disseminated by the firm. Securities Exchange Act Release No. 21332 (September 19, 1984), 49 FR 37569, 37572 n.25.

[63] 17 CFR 230.138 (a) and (b).

[64] 17 CFR 230.139(b)(1)(i).

[65] Also, a broker-dealer may deliver research reports to its customers via electronic means as a substitute for paper delivery. *See* Securities Exchange Act Release No. 37182 (May 9, 1996), 61 FR 24644.

[66] Nevertheless, there may be other circumstances in which the dissemination of research that does not meet the conditions of Rules 138 or 139 outside the United States may be appropriate during a global offering. The staff will provide guidance on a case-by-case basis.

[67] *See supra* text accompanying note 31.

[68] The Commission cautions that in connection with exercises of non-standardized options and other securities that are privately negotiated between the parties, there may be circumstances when the exercise of a call option, for example, could be made for the purpose of requiring the other party to acquire the security. In such a case, the purchase by the party exercised against may be deemed to be a purchase by the exercising party.

which pertained to distributions through rights. This rule contained overly rigid and complex restrictions on purchases of rights and regulated sales of offered securities. Bids for and purchases of rights are not subject to Rules 101 and 102, although bids for and purchases of a security that is the subject of a rights distribution are restricted by these rules.

e. Exception 5—Unsolicited Transactions. The Commission is adopting an exception to Rule 101 for unsolicited brokerage transactions, and for certain unsolicited purchases as principal. This exception incorporates the provision contained in exception (xi)(D) to Rule 10b-6 for unsolicited principal transactions, and, similar to exception (ii) to Rule 10b-6, permits unsolicited purchases that are not effected from or through a broker or dealer, on a securities exchange, or through an inter-dealer quotation system or *electronic communications network* (''ECN'') as defined in Rule 11Ac1–1(a)(8) under the Exchange Act.[69]

This exception places no restrictions on distribution participants effecting unsolicited brokerage transactions during a distribution. [70] In addition, unsolicited purchases as principal are also unrestricted. Although the Commission did not propose an exception to Rule 101 for unsolicited principal purchases, many commenters asserted that exception (ii) to Rule 10b-6 pertaining to such purchases was, in fact, widely used. The Rule 101 exception for unsolicited purchases differs from the analogous Rule 10b-6 exception, however, because it does not require that purchases be of ''block'' size.[71]

Furthermore, the exception applies to purchases effected otherwise than through a broker-dealer, on a securities exchange, or through an inter-dealer quotation system or ECN, because those purchases are less likely to be used to influence the price of a security that is the subject of a distribution. This clause of the exception permits distribution participants and affiliated purchasers to purchase covered securities from persons, other than broker-dealers, who were not solicited by the distribution participant or its affiliated purchasers and precludes purchases through an exchange, Nasdaq, or alternative trading system.

This exception reflects the view that unsolicited purchases, regardless of their size, generally do not raise the concerns at which Rule 101 is directed when those purchases are not effected through market mechanisms. In such circumstances, those purchases are less likely to affect the offered security's price.

f. Exception 6—Basket Transactions. Exception 6 relates to purchases of covered securities made in connection with basket transactions. This exception permits transactions in covered securities when the aggregate dollar value of any bids for or purchases of a covered security constitutes 5% or less of the total dollar value of the basket being purchased, and the basket contains at least 20 stocks.

The exception is available with respect to both index-related baskets and customized baskets. To qualify for the exception, the basket transaction must be a *bona fide* transaction effected in the ordinary course of business (*i.e.*, the decision to include the security in distribution in the basket must be independent of the existence of the distribution).[72] The exception also permits bids and purchases for the purpose of adjusting an existing basket position related to a standardized index when made in the ordinary course of business to the extent necessary to reflect a change in the composition of the index. For example, a basket could be adjusted to reflect substitutions of securities in a standardized index.

While supporting the flexibility of the basket transaction exception, some commenters suggested alternatives, including using either a single percentage test of 5% or 10%, or a 10%/10 stock or 10%/15 stock standard. The Commission believes that the majority of stocks contained in baskets will be excepted under the actively-traded securities exception and that the 5%/20 stock standard allows trading in most basket transactions while ensuring that such transactions are not easily used to influence the price of a security. The Commission is concerned that, given the possibility that a distribution participant could time its basket transactions for maximum price effect, a less rigorous standard could lead to abuse. Further, the inclusion of the 20 stock criterion provides an objective indication of the *bona fide* nature of the basket transaction.

Commenters also stated that this exception should allow for rebalancing any customized basket covered by the exception, or for rebalancing in a covered security that is consistent with rebalancing activity in other stocks contained in the basket. In the Commission's view, allowing distribution participants to make adjustments in customized baskets may give a distribution participant the means to effect significant transactions in covered securities (*e.g.*, by deciding to include a security in distribution in a basket without a reason independent of the distribution), thereby raising manipulative concerns. Accordingly, the Commission is not permitting adjustments to rebalance customized baskets, unless the adjustments themselves qualify under the 5%/20 stock test.

g. Exception 7—*De Minimis* Transactions. The Commission is adopting exception 7 for *de minimis* transactions. As proposed, the exception applied to unaccepted bids and aggregate purchases of 1% of a security's ADTV. Several commenters stated that a 1% level was too limited to be useful. For this reason, a few commenters proposed raising the *de minimis* threshold to 5% of the security's ADTV. Commenters also requested clarification that the *de minimis* test could be applied to more than one transaction. In addition, some commenters suggested that any bid or purchase not exceeding a *de minimis* amount should be eligible for the exception.

Because the Commission believes that an exception for small, inadvertent transactions lacking market impact is appropriate, it is adopting an exception for *de minimis* transactions. The purchasing level has been increased to 2% to give distribution participants greater margin for error, while retaining the exception's *de minimis* nature. Unaccepted bids, and purchases during the restricted period that in the aggregate do not exceed 2% of the ADTV of the security in distribution, are excepted from the rule, if the person has maintained and enforces written policies and procedures reasonably designed to achieve compliance with the rule. Once inadvertent transaction(s) are discovered, subsequent transaction(s) would not be covered by this exception. Also, this *de minimis* exception does not apply to Nasdaq passive market making transactions.

Commenters recommended that the exception be extended to include solicited brokerage transactions and

[69] 17 CFR 240.11Ac1–1(a)(8). *See* Securities Exchange Act Release No. 37619A (September 6, 1996), 61 FR 48289 (''Release 34–37619A''), for a discussion of ECNs. A purchase in response to an order or quote displayed on an ECN would not constitute an unsolicited transaction.

[70] This exception incorporates the provisions of Rule 10b-6(a)(5)(B). In addition, consistent with an interpretation under Rule 10b-6, a broker-dealer who receives an unsolicited order to sell may solicit purchasers in executing the transaction as broker for the seller.

[71] Also, the exception as adopted does not incorporate the phrase ''privately negotiated'' because it is unnecessary in light of the other terms of the exception.

[72] Proposing Release, 61 FR at 17118.

bids that are accepted, but that do not result in a purchase because the trade is broken. The Commission clarifies that the exception is available to transactions resulting from solicited brokerage provided that the conditions of the exception are satisfied. However, any purchase, even if the trade subsequently is broken, must be considered a purchase for purposes of this exception.

One commenter asserted that the proviso requiring written policies and procedures is unnecessary. This requirement is adopted as proposed, however, because the Commission believes that the presence of compliance procedures buttresses the inadvertent character of excepted *de minimis* transactions. The Commission notes that repeated reliance on the exception would raise questions about the adequacy and effectiveness of a firm's procedures. Therefore, upon the occurrence of any violation, a broker-dealer is expected to review its policies and procedures and modify them as appropriate.

h. Exception 8—Transactions in Connection with a Distribution. The Commission is adopting the exception for transactions in connection with a distribution substantially as proposed. Exception 8 permits transactions among distribution participants in connection with the distribution and purchases from an issuer or selling security holder in connection with the distribution that are not effected on a securities exchange or through an inter-dealer quotation system, or through an ECN. Based on commenters' views, the portion of the proposed exception relating to offers to sell or the solicitation of offers to buy the securities being distributed or offered as principal is now contained in exception 9.[73]

i. Exception 9—Offers to Sell or the Solicitation of Offers to Buy. The Commission is adopting the exception for offers to sell or the solicitation of offers to buy the securities being distributed (including securities acquired in stabilizing), or securities offered as principal by the person making such offer or solicitation.

j. Exception 10—Transactions in Rule 144A Securities. The Commission is adopting the exception for transactions in securities eligible for resale under Rule 144A(d)(3) (''Rule 144A securities'') substantially as proposed.[74] As adopted, the exception permits transactions in Rule 144A securities during a distribution of such securities, provided that sales of such securities within the United States are made solely to: qualified institutional buyers (''QIBs''), or persons reasonably believed to be QIBs, in transactions exempt from registration under the Securities Act (''Rule 144A distributions''); or persons not deemed to be ''U.S. persons'' for purposes of Rule 902(o)(2) or (o)(7) of Regulation S under the Securities Act, during a concurrent Rule 144A distribution to QIBs.[75] The exception covers both the Rule 144A security being distributed and any reference security.

In the Proposing Release, the Commission noted that an exception based on the categories of persons to whom the securities are distributed may be viewed as a departure from the anti-manipulation approach of Regulation M, because no class of investors, including large institutions, is immune to injury from securities fraud or manipulation.[76] Nevertheless, the Commission considers it appropriate to reduce the scope of Rule 101's prophylactic protections in the case of QIBs, because QIBs have considerable ability to obtain, consider, and analyze market information, and the Commission is not aware of complaints of manipulation in this context.[77] Moreover, in light of the characteristics of Rule 144A securities (*e.g.*, eligible securities are not listed on a U.S. exchange or quoted on Nasdaq), the exception does not distinguish between Rule 144A distributions to QIBs of foreign and domestic securities.[78]

Several commenters recommended broadening the proposed exception to include contemporaneous sales within the United States to certain institutional accredited investors. Some of these commenters suggested that the exception permit sales to institutional accredited investors where sales to QIBs exceeded a certain percentage of the total distribution.[79] The Commission is not adopting these recommendations because institutional accredited investors encompass a much broader category of persons, a large segment of which do not have characteristics comparable to those of QIBs which underlie this exception.

8. Exemptive Authority

The Commission proposed to include within Rule 101 a provision permitting the Commission to exempt any transaction or transactions from the rule on a case-by-case basis. Two commenters recommended that the exemptive authority provision be expanded to permit exemptions for securities or classes of securities. To increase flexibility in the exemption process, the Commission is adopting this suggested addition. An exemption may be granted either unconditionally or on specified terms and conditions.[80]

C. Rule 102—Activities by Issuers and Selling Security Holders

1. Generally

Rule 102 covers certain activities of issuers and selling security holders, and their affiliated purchasers, during a distribution of securities. Rule 102 is similar in format to Rule 101: issuers and selling security holders, and their affiliated purchasers, must refrain from bidding for, purchasing, or attempting to induce any person to bid for or purchase a covered security during the applicable restricted period, unless an exception permits the activity.

Rule 102 contains fewer exceptions than Rule 101 because issuers and selling security holders have the greatest interest in an offering's outcome and generally do not have the same market access needs as underwriters. The exceptions in Rule 102 permit: transactions in nonconvertible investment grade securities and transactions during Rule 144A distributions; exercises of options and other securities, including rights; and odd-lot transactions and associated round-up transactions during an issuer odd-lot tender offer. Closed-end investment companies that engage in continuous offerings of securities also may conduct certain tender offers for those securities during such distributions. There is no general exception for actively-traded securities, although a limited exception is included

[73] A distribution participant relying on this exception must be prepared to sell the securities if the offer is accepted.

[74] *See* 17 CFR 230.144A(d)(3).

[75] 17 CFR 230.902(o)(2) and (o)(7). This follows the position taken under Rule 10b–6 in *Letter regarding Regulation S Transactions during Distributions of Foreign Securities to Qualified Institutional Buyers*, [1993–1994] Fed. Sec. L. Rep. (CCH) ¶ 76,851 (February 22, 1994), as modified by *Letter regarding Regulation S Transactions during Distributions of Foreign Securities to Qualified Institutional Buyers* (March 9, 1995).

[76] Proposing Release, 61 FR at 17119 n.61.

[77] The Commission wishes to emphasize that QIBs will continue to be protected by the general anti-manipulation and anti-fraud provisions, including Section 17(a) of the Securities Act, and Sections 9(a) and 10(b) of the Exchange Act, and Rule 10b–5 thereunder.

[78] *See* Proposing Release, 61 FR at 17119.

[79] The percentages recommended by commenters ranged from 50% to 80%.

[80] The Commission is revising its Rules of Practice and Investigations to provide that exemptions may be granted by designated persons in the Division of Market Regulation pursuant to authority delegated by the Commission. *See* 17 CFR 200.30–3 of this chapter, as amended. Rules 102, 104, and 105 include similar provisions authorizing the Commission to grant exemptions from those rules, and this authority also will be delegated to designated persons in the Division of Market Regulation.

for certain actively-traded reference securities.

Furthermore, most transactions in connection with dividend reinvestment and stock purchase plans are excluded from Rule 102. Only plan distributions involving securities obtained directly from the issuer are subject to Rule 102. Several commenters asked that the Commission further explain the treatment of plans under Rule 102. This release provides guidance on the types of plan activities that may be engaged in without constituting special selling efforts and selling methods within the meaning of the definition of distribution, and clarifies that certain dividend reinvestment and stock purchase plans offered by bank-registered transfer agents and registered broker-dealers qualify for the plan exception.

2. Persons Subject to Rule 102

a. Generally. Rule 102 applies to issuers, selling security holders, and their affiliated purchasers. Several commenters sought clarification as to whether an issuer's transactions in a covered security would be restricted during a distribution effected solely by or on behalf of a selling security holder not affiliated with the issuer. The Commission does not intend to limit an issuer's activities during a distribution effected solely by or on behalf of a selling security holder if the issuer is not an affiliated purchaser of the selling security holder, and has modified paragraph (a) of Rule 102 accordingly.[81] An issuer will be deemed to have completed its participation in a distribution when the entire distribution is completed.[82]

b. Affiliated Purchaser. As discussed earlier, several commenters recommended excepting financial services affiliates of issuers and selling security holders from the definition of ''affiliated purchaser.''[83] As adopted, the definition of affiliated purchaser excludes financial services affiliates of an issuer or selling security holder if the issuer or selling security holder maintains and enforces information barriers between itself and such affiliates. In addition, a proviso has been added to paragraph (a) of Rule 102 that provides that any affiliated purchaser of an issuer or selling security holder that is acting as a distribution participant may comply with Rule 101, rather than Rule 102.[84] This accommodates the ordinary market activities of broker-dealers and other financial institutions participating in a distribution because they are subject to SRO surveillance.

3. Securities Subject to Rule 102

The restrictions of Rule 102 apply to covered securities in the same manner as Rule 101.[85] Thus, persons subject to Rule 102 are precluded during the restricted period from bidding for or purchasing the subject security or any reference security.

4. Offerings Subject to Rule 102

a. Generally. As with Rule 101, Rule 102 applies only when there is a distribution of securities.[86]

b. Shelf Offerings. In the case of an offering of securities pursuant to a shelf registration statement, the Commission will apply Regulation M in a manner consistent with interpretations under Rule 10b–6 regarding the restrictions on issuers and selling security holders during shelf offerings.[87] Thus, an issuer and all of its affiliated purchasers are subject to the applicable restricted period of Rule 102 when sales off a shelf by an issuer, or by any affiliated purchaser, constitute a distribution of securities. Similarly, when a selling security holder sells off the shelf and such sales constitute a distribution, all other shelf security holders who are affiliated purchasers of the selling security holder are subject to the applicable restricted period of Rule 102.

5. Securities Excepted from Rule 102

a. Actively-traded Reference Securities. Many commenters maintained that issuers, selling security holders, and their affiliated purchasers should have the benefit of an actively-traded securities exception similar to that in Rule 101. The Commission believes that persons subject to Rule 102 should not be able to trade in their securities, whether or not they are actively traded. The Commission's view is based on issuers' and selling security holders' stake in the proceeds of the offering, and their generally lesser need to engage in securities transactions.

Certain commenters noted that, as proposed, Regulation M would have prevented an issuer of equity-linked securities, or its affiliated purchasers, from engaging in hedging activity in the associated reference security, even when that security was actively traded. According to these commenters, the ability to conduct such hedging activity immediately prior to the pricing of an equity-linked security is critical to the structure of such distributions.

In response to these comments, the Commission has determined to provide a limited exception from Rule 102 for actively-traded reference securities that are not issued by the issuer of the security in distribution, or by any affiliate of the issuer. This exception permits the type of hedging activity that was not previously subject to Rule 10b–6. Thus, the issuer of an equity linked security, or a security holder selling an equity-linked security, can purchase in a hedging transaction an actively-traded reference security issued by an unaffiliated entity. However, the issuer or selling security holder of an equity-linked security is prohibited from purchasing any reference security for which it, or any of its affiliates, is the issuer. Of course, the general anti-fraud and anti-manipulation provisions of the federal securities laws are applicable to any transactions associated with distributions of equity-linked securities.

b. Other Excepted Securities. The Commission is adopting as proposed the exceptions in Rule 102 for ''exempted securities'' as defined in Section 3(a)(12) of the Exchange Act, and face-amount certificates or securities issued by an open-end management investment company or unit investment trust. In addition, the Commission has determined to include in Rule 102 an exception for investment grade nonconvertible debt, nonconvertible preferred securities, and asset-backed securities, based on commenters' views and the rationales indicated above for an identical exception to Rule 101.[88]

6. Activities Excepted from Rule 102

a. Exception 1—Odd-Lot Transactions. Rule 102 contains an exception for odd-lot transactions, which permits issuer odd-lot tender offers. This exception, which is identical to exception 3 to Rule 101, will provide greater flexibility to issuers conducting odd-lot tender offers during a distribution.[89] Moreover, as modified from the proposal, this exception permits an issuer conducting an odd-lot tender offer to engage in transactions

[81] The interpretations contained in Release 34–23611 regarding shelf distributions by selling security holders will continue to have relevance. *See infra* Section II.C.4.b.

[82] *Cf. supra* Section II.B.2.c., discussing when distribution participants are considered to complete their participation in a distribution. *See also* the definition of ''completion of participation in a distribution.''

[83] *See supra* Section II.B.2.d.

[84] The proviso to Rule 101 specifies that, where a distribution participant or an affiliated purchaser of a distribution participant is itself the issuer or selling security holder, Rule 102 applies. *See supra* Section II.B.2.a.

[85] *See supra* Section II.B.3.

[86] *See supra* Section II.B.5., discussing the types of offerings and other transactions that are subject to Rule 101.

[87] *See* Release 34–23611, 51 FR at 33242.

[88] *See supra* Section II.B.6.c.

[89] *See supra* Section II.B.7.c.

necessary to enable shareholders to round-up their holdings to 100 shares.[90]

b. Exception 2—Transactions by Closed-end Investment Companies. Exception 2, as it relates to transactions complying with Rule 23c–3 under the Investment Company Act,[91] is adopted as proposed. Accordingly, repurchases by closed-end investment companies that are conducted in compliance with Rule 23c–3 will not violate Rule 102.

Unlike so-called ''interval'' funds, which buy back their securities pursuant to Rule 23c–3, other closed-end funds are more circumscribed as to their repurchases.[92] Many of these closed-end funds advise investors in their prospectuses that investments in the funds should be considered illiquid, particularly as the fund does not intend to seek a public trading market for its securities. To provide their investors with an opportunity to sell their securities, these funds often disclose that they may consider conducting periodic tender offers to repurchase all or a portion of their outstanding securities at the then current net asset value. A few commenters raised issues about the continuation of Rule 10b–6 exemptions granted to those closed-end funds that conduct periodic tender offers for their securities pursuant to Rule 13e–4 under the Exchange Act,[93] when the funds are engaged in continuous offerings pursuant to Rule 415 under the Securities Act.[94]

Exception 2 is available to a registered closed-end investment company that engages in a continuous offering of its securities pursuant to Rule 415 and repurchases, at net asset value, securities of the same class in a tender offer conducted pursuant to Rule 13e–4, provided that there is no widely available alternative transaction mechanism for its securities (*i.e.*, the securities are not traded on a securities exchange or through an inter-dealer quotation system or ECN). This exception accommodates those closed-end funds that currently have Rule 10b–6 exemptions, and benefits additional closed-end funds with similar distribution and repurchase features, because they will not need to seek exemptive relief under Regulation M.

c. Exception 3—Redemptions by Commodity Pools or Limited Partnerships. The Commission is incorporating exception 3 to permit redemptions by commodity pools or limited partnerships that are effected at a price based on the securities' net asset value in accordance with the terms and conditions of the governing instruments, as long as the securities are not traded on an exchange, or through an inter-dealer quotation system or ECN. This exception is being adopted in response to commenter concerns, and permits commodity pools and limited partnerships to effect redemptions of their securities without seeking exemptive relief under Regulation M. Redemptions of such securities pursuant to their governing instruments at a price based on net asset value are unlikely to raise manipulative concerns.

d. Exception 4—Exercises of Securities. The Commission is adopting exception 4 relating to the exercises of call options and other securities as proposed. This exception is identical to exception 4 to Rule 101, and permits the exercise of rights in connection with convertible, exchangeable, or exercisable securities, including options received in connection with employee benefit plans.

e. Exception 5—Transactions in Connection with the Distribution. Exception 5 is adopted as proposed. This exception permits offers to sell and the solicitation of offers to buy the securities being distributed, and enables an issuer or selling security holder to conduct an offering on its own behalf.[95]

f. Exception 6—Unsolicited Purchases

In the Proposing Release, the Commission solicited comment on an exception similar to that contained in Rule 10b-6 for unsolicited privately negotiated purchases. This exception from Rule 102 is identical to the unsolicited purchases exception from Rule 101.[96]

g. Exception 7—Transactions in Rule 144A Securities

Based on commenters' views and the basis discussed above for excepting transactions in Rule 144A securities from Rule 101, the Commission has determined to include an identical exception in Rule 102.

7. Plans

a. Generally

The Commission is adopting the dividend (or interest) reinvestment and stock purchase plan provisions of Rule 102 substantially as proposed.[97] The treatment of plans under Regulation M reflects a continuation of the Commission's efforts to facilitate the use of plans as an alternative means for investors to purchase and sell securities, while maintaining essential investor protections.[98]

Paragraph (c)(1) of Rule 102 excepts most distributions of securities pursuant to plans.[99] The Commission has modified the introductory text of this paragraph to clarify that this exception includes plans operated by registered bank transfer agents or registered broker-dealers (''investor services plans''), as well as those plans operated by or on behalf of an issuer.[100]

The rule divides plans into three categories: (1) plans that are available only to employees and shareholders (''employee-shareholder plans''); (2) plans, including investor services plans, that are available to persons other than, or in addition to, employees and shareholders, where securities for the plan are purchased from a source other than the issuer or an affiliated purchaser of the issuer (i.e., in the open market or in privately negotiated transactions) by an agent independent of the issuer (''open market plans''); and (3) plans that are available to persons other than, or in addition to, employees and shareholders where securities for the

[90] Today, the Commission also is adopting an amendment to Rule 13e–4(h)(5) to permit issuers to conduct odd-lot offers, including continuous, periodic, or extended odd-lot offers, for their equity securities without establishing a record date of ownership for shareholder eligibility to participate in the offer. Securities Exchange Act Release No. 38068 (December 20, 1996).

[91] 17 CFR 270.23c–3.

[92] *Cf.* 15 U.S.C. 80a–23(c).

[93] 17 CFR 240.13e–4.

[94] 17 CFR 230.415. *See, e.g., Letter regarding Brazilian Investment Fund, Inc.*, [1993] Fed. Sec. L. Rep. (CCH) ¶ 76,712 (August 6, 1993).

[95] Regulation M does not preclude affiliates of an issuer (*e.g.*, officers or directors) from purchasing securities in the offering. *See also supra* Section II.C.2.a., regarding a person's completion of participation in the distribution.

[96] *See supra* Section II.B.7.e., discussing exception 5 to Rule 101.

[97] The term *plan* is defined in Rule 100 as any bonus, profit-sharing, pension, retirement, thrift, savings, incentive, stock purchase, stock option, stock ownership, stock appreciation, dividend reinvestment, or similar plan; or any dividend or interest reinvestment plan or employee benefit plan as defined in 17 CFR 230.405.

[98] *See, e.g.*, Securities Exchange Act Release No. 35041 (December 1, 1994), 59 FR 63393 (''1994 STA Letter''), as modified by *Letter regarding Dividend Reinvestment and Stock Purchase Plans*, [1995] Fed. Sec. L. Rep. (CCH) ¶ 77,110 (May 12, 1995); *Letter regarding First Chicago Trust Company of New York*, [1994] Fed. Sec. L. Rep. (CCH) ¶ 76,939 (December 1, 1994) (''First Chicago Letter''); *Letter regarding Bank-Sponsored Investor Services Programs*, [1995] Fed. Sec. L. Rep. (CCH) ¶ 77,122 (September 14, 1995) (''*Bank Sponsored Programs Letter*'') (collectively, ''Plan Letters'').

[99] Of course, where an issuer plan does not involve a distribution (because there is insufficient magnitude, or because special selling efforts and selling methods are not used to sell the securities), Rules 101 and 102 do not apply.

[100] Although Regulation M supersedes the Plan Letters as they relate to Rule 10b–6, the staff positions taken in the Plan Letters on the application of other securities law provisions (*i.e.*, Section 5 of the Securities Act, 15 U.S.C. 77e, and Sections 13(e), 14(d), 14(e), 15(a), and 17A of, and Rule 10b–13 under, the Exchange Act, 15 U.S.C. 78m(e), 78n(d), 78n(e), and 17 CFR 240.10b–13, respectively) remain in effect.

plan are purchased directly from the issuer or an affiliated purchaser of the issuer (''direct issuance plans'').

b. Employee-shareholder Plans

Rule 102(c)(1)(i) covers employee-shareholder plans, and excludes any distribution pursuant to a plan by or on behalf of an issuer or a subsidiary of an issuer, when the distribution is made solely to *employees* or shareholders of the issuer or its subsidiaries, or to a trustee or other person acquiring the securities for the accounts of such persons. This means that Rule 102 imposes no restrictions on transactions in the subject securities by the issuer or its affiliated purchasers during employee-shareholder plan distributions.[101] The scope of eligible employees, and therefore the scope of the exception, is broader under this provision than under Rule 10b–6.

c. Open Market Plans

Rule 102(c)(1)(ii) excepts from the rule's coverage distributions involving open market plans, including investor services plans, where purchases for the plan are made by an *agent independent of the issuer* from sources other than the issuer or an affiliated purchaser of the issuer (*i.e.*, in the open market or in privately negotiated transactions).

Several commenters suggested revising the definition of agent independent of the issuer, including permitting the issuer to specify the broker or dealer who would make purchases for the plan and to change the source of securities for its plan more than once in any three month period. The Commission has determined not to make such changes at this time, because the definition has implications beyond Regulation M (*i.e.*, it also relates to issuer repurchase programs conducted pursuant to Rule 10b–18 under the Exchange Act).[102] Nevertheless, the Commission will examine this definition in connection with its anticipated review of Rule 10b–18, and will reconsider these comments in that process.

The definition of agent independent of the issuer specifies, among other things, that an issuer may not control, directly or indirectly, the timing of purchases by the agent. The Proposing Release stated that an agent would not be considered independent if the issuer directs the timing of purchases of securities by the agent, including a requirement that securities to fund the plan must be purchased on the plan's investment date. The release provided, however, that an issuer may establish general conditions for the operation of its plan, including, for example, requirements concerning the return of uninvested funds to plan participants, or requirements that optional cash payments be invested within 35 days of receipt.[103] A number of commenters requested additional guidance on the timing element for plan purchases. The Commission notes that, although an issuer may not specify a particular time for such purchases, the issuer may specify a range of days for plan purchases based on a particular event (*e.g.*, that plan purchases will be made within five days of the plan's investment date, or the stock's dividend date), or may specify that plan purchases will be made on or as soon as practicable after the plan's investment date, or the stock's dividend date. Moreover, the plan's agent could be deemed an agent independent of the issuer for purposes of Rule 102 if the plan's formula specifies the date, but not the times, of purchases pursuant to the plan, provided that the plan provisions regarding the purchase date are not changed more than once in any three-month period.[104]

d. Direct Issuance Plans

Distributions pursuant to direct issuance plans (*i.e.*, a plan that is available to persons other than, or in addition to, employees and shareholders where the issuer or affiliated purchaser of the issuer provides the shares for the plan) are not excepted from Rule 102. In the Commission's view, if the magnitude of securities offered through such plan, and the selling efforts and selling methods used to distribute such securities would constitute a distribution as defined in Rule 100, this type of offering raises the manipulative concerns underlying Regulation M.[105] Because the issuer is receiving the proceeds of the offering, this kind of plan bears a close resemblance to a public offering. Consistent with prior interpretations concerning valuation periods for plans, Rule 102 applies during any valuation period for a direct issuance plan.

To determine the magnitude of a direct issuance plan, only those persons to whom plan communications are directed at a particular time (rather than all current plan participants) should be considered. Moreover, the Commission will not deem special selling efforts and selling methods to be present in a direct issuance plan where only one or a combination of announcements, newspaper advertisements, circulars, notices, investor fairs, or Internet home pages are used to disseminate information about the availability of the plan to the public, or the issuer provides information about the plan to persons with whom the issuer has a pre-existing, continuing relationship involving the receipt of written communications by existing means of communication (*e.g.*, a bill, annual report, or payroll stub).[106] The information contained in such materials distributed by an issuer or its agent may include no more than the information allowed, nor less than that required, under Rule 134 under the Securities Act (*i.e.*, ''tombstone advertisements''): [107] generally, the issuer's name, the issuer's type of business, the type of security being offered in the direct issuance plan (*i.e.*, common or preferred stock), the price of the security or the method of price determination, and information on how and where a prospectus may be obtained.

8. Exemptive Authority

Consistent with the expansion of the exemptive authority provision in Rule 101, the Commission is adopting a provision in Rule 102 pursuant to which it may grant an exemption from Rule 102 to any transaction or class of transactions, or any security or class of securities. Such exemptions may be granted either unconditionally or on specified terms and conditions.

9. Rule 10b–18

Rule 10b–18 under the Exchange Act provides that an issuer and its affiliated

[101] However, such activity may be subject to Rule 102 if the issuer is engaged in another distribution, and the transactions for the plan are attributable to the issuer. Rule 102 provides that plan transactions will not be attributable to the issuer if they are effected by an agent independent of the issuer.

[102] 17 CFR 240.10b–18.

[103] Proposing Release, 61 FR at 17121 n.71, *citing* 1994 STA Letter (modifying *Letter regarding Lucky Stores, Inc.*, [1974–1975] Fed. Sec. L. Rep. (CCH) ¶79,903 (June 5, 1974)).

[104] Purchases by an independent agent for a plan can involve a certain magnitude, frequency, and duration that are known to the issuer. If an issuer schedules a non-plan distribution to coincide with such plan purchases, questions may be raised under the general anti-fraud and anti-manipulation provisions of the federal securities laws.

[105] Where a plan provides that securities for the plan may be purchased either in the open market or provided directly by the issuer, paragraph (c)(1)(ii) is only available when the plan securities are purchased in the open market. If the plan securities are obtained directly from the issuer, the plan must be treated as a direct issuance plan.

[106] This includes communications to shareholders, employees, customers, and other persons with a pre-existing relationship with the issuer, such as independent contractors, franchisees, and suppliers. *See* Securities Exchange Act Release No. 37182 (May 15, 1996), 61 FR 24644, 24650 (providing guidance for use of electronic media for delivery of information). *See also* Securities Exchange Act Release No. 36345 (October 13, 1995), 60 FR 53458.

[107] 17 CFR 230.134.

purchasers will not incur liability under the anti-manipulation provisions of Section 9(a)(2) of the Exchange Act or Rule 10b–5 under the Exchange Act, if the issuer purchases common stock in compliance with the rule's conditions concerning the time, price, volume, and manner of purchases.[108] The Commission proposed to amend Rule 10b–18 to preclude an issuer from relying on this safe harbor when the issuer or its affiliated purchasers were engaged in a distribution for purposes of Rule 102.

The few comments received on this proposal were negative. The Commission has determined that significant revisions to Rule 10b–18 should be considered in connection with a comprehensive review of Rule 10b–18 to be conducted in the near future. However, the Commission is adopting an amendment to Rule 10b–18 precluding reliance on the safe harbor during the Rule 102 restricted period, when the issuer or any affiliated purchaser is distributing the issuer's common stock or any other security for which the common stock is a reference security.[109]

D. Rule 103—Passive Market Making

The Commission is adopting Rule 103 to replace Rule 10b–6A. Rule 103 and related exception 2 to Rule 101 permit, in connection with a distribution of a Nasdaq security, passive market making on Nasdaq during the restricted period of Rule 101, when market making by distribution participants otherwise is prohibited. The purpose of Rule 103 is to alleviate special liquidity problems that could exist for a Nasdaq security in distribution, if distribution participants or their affiliates who are Nasdaq market makers were required to withdraw as market makers during the restricted period. Exchange-traded securities usually do not experience this problem because specialists in most cases are not affiliated with distribution participants.

Rule 103 retains the core provisions of Rule 10b-6A with respect to the price levels of bids and purchases that can be made by a Nasdaq *passive market maker*. Rule 103 generally limits a passive market maker's bids and purchases to the highest current *independent bid* (*i.e.*, a bid of a Nasdaq market maker who is not participating in the distribution). The Commission believes that this condition is fundamental to the concept of passive market making. Additionally, the rule limits the amount of *net purchases* that a passive market maker can make on any day to 30% of its ADTV, although an initial ADTV limit of 200 shares is now available for less active market makers. The *30% ADTV limitation* is designed to prevent an amount of purchasing activity that could produce the price effects of stabilization, while generally permitting a level of activity associated with normal market making. The rule also contains a provision limiting the bid size a passive market maker may display and requirements relating to notification, identification, and disclosure of passive market making.

Rule 103 incorporates several new provisions that add significant flexibility to passive market making and permit this activity in a far greater number of contexts. The rule eliminates the offering eligibility criteria that were contained in Rule 10b-6A, except that best efforts and at-the-market offerings remain ineligible for passive market making.[110] Moreover, all Nasdaq securities qualify for passive market making, including Nasdaq reference securities. The requirement that underwriters or prospective underwriters account for at least 30% of total trading volume is eliminated because the Commission believes that passive market making could enhance liquidity, even where the syndicate accounts for a minor portion of normal market making activity. Rule 103 also permits passive market making throughout the entire applicable restricted period, rather than requiring that it cease with the commencement of offers or sales, because passive market making is now available for many more kinds of distributions, including those that can extend over a significant period of time. Passive market making is prohibited, however, when a stabilizing bid pursuant to Rule 104 is in effect.

The NASD and other commenters proposed either eliminating the 30% ADTV limitation entirely, or, alternatively, increasing it to at least 50%. Commenters did not provide any empirical evidence or other objective information supporting a different standard or demonstrating that the 30% ADTV limitation significantly decreases the liquidity of securities subject to passive market making. As with Rule 10b-6A, the 30% ADTV limitation is applicable only to *net* purchases (*i.e.*, total purchases minus total sales). Accordingly, as long as sufficient sales are made, there is no limit on total purchases. The Commission continues to believe that a purchasing limitation is fundamental to the concept of passive market making, and that the 30% ADTV limitation permits a normal level of market making activity. In addition, the Commission believes that the adjustment discussed below allowing all passive market makers to have an initial ADTV limit of at least 200 shares will enable less active market makers to participate in passive market making. Of even greater significance is the fact that actively-traded Nasdaq securities are not subject to the requirements of Rule 103 at all, and nearly all other Nasdaq securities will have shorter restricted periods. These features of Regulation M should substantially enhance liquidity for these securities.

As proposed, passive market makers would have been allowed to bid for one round lot (*i.e.*, 100 shares) if they had an initial or remaining net purchasing capacity of between one and 99 shares. This provision was intended to permit less active or smaller market makers who are syndicate members to be passive market makers. The NASD supported providing passive market makers with the ability to bid for and purchase at least 1,000 shares, irrespective of a lower ADTV limitation. The NASD argued that the ADTV limitations of many market makers are too small to make passive market making viable for them. The Commission believes that giving all passive market makers an ADTV limit of 1,000 shares largely would override the 30% ADTV limitation and unduly advantage market makers with historically small trading volumes in the security, who would be able to make net purchases several times larger than their routine market making activity. As adopted, Rule 103 provides that all passive market makers whose initial ADTV limit is between 1 and 199 shares are allowed a net purchasing capacity of 200 shares. Rule 103 also permits bids for a round lot if a passive market maker's remaining net purchasing capacity is between 1 and 99 shares.[111]

[108] 17 CFR 240.10b–18.

[109] To reflect the use in Rule 10b–18 of the Regulation M definition of plan, the Commission is adopting technical amendments to paragraphs (a)(3), (a)(5), and (a)(6) of Rule 10b–18 to change the term ''issuer plan'' to ''plan.'' In addition, the term agent independent of the issuer for purposes of Rule 10b–18 is now defined in Rule 100 of Regulation M. This differs from the proposal which would have removed the safe harbor during the entire distribution period.

[110] The Commission previously noted that the NASD surveillance system, with respect to passive market making, does not easily accommodate at-the-market offerings. Securities Exchange Act Release No. 32117 (April 14, 1993), 58 FR 19598, 19600 (''Release 34–32117''). The Commission believes that NASD surveillance is an essential consideration in expanding the contexts in which passive market making is permitted.

[111] For example, a passive market maker whose 30% ADTV limitation is 743 shares and who made net purchases of 700 shares can still bid for 100 shares.

Rule 103 allows passive market makers to make bids or purchases at a price above the highest independent bid where necessary to comply with any Commission or NASD rule relating to the execution of customer orders. For example, a passive market maker acting in accordance with the new Commission rules regarding order handling obligations is permitted to display customer bids and to execute customer orders in compliance with the new rules even if the transactions would otherwise violate Rule 103.[112] In addition, the Commission is retaining its interpretation regarding the application of passive market making in the context of NASD members' obligation not to trade ahead of customer limit orders. When a passive market maker is complying with Commission or NASD rules governing the handling of customer limit orders, it cannot initiate any transaction on the sell-side of the market that would create, directly or indirectly, an obligation to purchase a covered security at a price above that security's highest independent bid price.[113]

The NASD supported permitting the execution of riskless principal purchases (other than bids disseminated on Nasdaq) at a price higher than Rule 103 allows, as long as the passive market maker does not thereafter adjust its bids above the prevailing highest independent bid. The Commission believes, however, that market maker purchases above the highest independent bid (except as specifically permitted) are not consistent with the rule's passive structure.[114]

In response to the NASD's comment, the Commission is retaining a modified version of the interpretation regarding contemporaneous transactions, which provides that if a passive market maker is involved in a contemporaneous purchase and sale of a security, the passive market maker can ''net'' the transactions for purposes of the ADTV calculation as long as the two transactions are reported within 30 seconds of each other.[115]

The NASD also requested that the *de minimis* exception in Rule 101 apply to passive market making transactions. The Commission believes that permitting passive market makers to have the benefit of the *de minimis* exception would undermine efforts to achieve more rigorous compliance with passive market making restrictions. Therefore, the *de minimis* exception in Rule 101 does not apply to unaccepted bids or to purchases made by a passive market maker.

E. Rule 104—Stabilization and Other Syndicate Activities

1. Generally

Rule 104, which replaces Rule 10b–7, governs stabilizing and certain aftermarket syndicate activities in connection with an offering, and makes it unlawful for any person to stabilize, to effect any syndicate covering transaction, or to impose a penalty bid in contravention of the rule's provisions.[116] Rule 104 improves the regulation of stabilization by creating a more flexible framework for managing the offering process and eliminating much of the complexity that characterized Rule 10b-7. The Commission is adopting Rule 104 substantially as proposed, but has added provisions to address issues raised by commenters and has clarified other provisions. Related amendments to Exchange Act Rule 17a-2, governing the recordkeeping of stabilizing and certain post-offering syndicate transactions, and to Items 502(d) and 508 of Regulations S-B and S-K, governing prospectus disclosure of these activities, are adopted as proposed.

The purpose of Rule 104 is to permit underwriters and syndicate members to conduct stabilizing transactions in compliance with the rule's pricing and other terms for the purpose of preventing or retarding a decline in the market price of a security to facilitate an offering. Although stabilization is price-influencing activity intended to induce others to purchase the offered security, when appropriately regulated it is an effective mechanism for fostering an orderly distribution of securities and promotes the interests of shareholders, underwriters, and issuers.[117] The rule addresses the risk that stabilization will create a false or misleading appearance with respect to the trading market for the offered security.[118]

Rule 104 introduces several major features that are different from Rule 10b-7: a stabilizing bid may be made with reference to the principal market for the security, wherever located (rather than focusing only on U.S. markets); a stabilizing bid may be raised to match independent bids in the market; and a stabilizing bid that has not been discontinued may be carried over to another market. Rule 104 also accommodates multinational offerings by permitting stabilizing bids to be made in the currency of the market where the bid is placed, and by allowing adjustments to such stabilizing bids to account for fluctuations in the exchange rates between currencies.

Overall, commenters supported efforts to update and simplify the Commission's stabilization rule. Commenters favored the new provisions governing price levels for stabilizing bids, which codify and expand exemptive and no-action relief issued within the last decade by the Commission and its staff for stabilizing activities involving cross-border offerings. Some commenters were critical of the new provisions requiring disclosure, notification, and recordkeeping of syndicate covering transactions and penalty bids. The Commission, however, believes that these offering-related activities can influence aftermarket prices, and has adopted the provisions as an appropriate method to monitor these activities.

2. Discussion of Provisions Relating to Stabilization

As adopted, Rule 104 provides that no person, directly or indirectly, may stabilize, effect any syndicate covering transaction, or impose a penalty bid in connection with an offering of any security in contravention of the rule's provisions. The term *stabilizing* is defined in Rule 100 as the placing of any bid, or the effecting of any purchase, for the purpose of pegging, fixing, or otherwise maintaining the price of a security. Rule 104 prohibits bids or purchases not necessary to prevent or retard a decline in the security's price, and forbids stabilizing

[112] *See* Release 34–37619A, 61 FR 48289.

[113] *See NASD Manual*, Conduct Rules, IM–2110–2.

[114] Rule 103 permits a passive market maker to continue to bid and effect purchases at its bid at a price exceeding the then highest independent bid until the passive market maker purchases an aggregate amount of the covered security that equals or, through the purchase of all securities that are part a single order, exceeds the lesser of two times the minimum quotation size for the security, as determined by NASD rules, or the passive market maker's remaining purchasing capacity under paragraph (b)(2) of Rule 103.

[115] *See* Release 34–32117, 58 FR at 19603. The Commission also is retaining the interpretations in the Rule 10b-6A adopting release discussing appropriate interaction with other market makers and permitting the offset of two customer orders received within 15 minutes of each other without affecting net purchasing capacity. Release 34–32117, 58 FR at 19602–03.

[116] Unlike Rules 101 and 102, which apply to a ''distribution,'' Rule 104 governs stabilizing to facilitate an ''offering,'' a term that is broader in scope. Moreover, there is no exception to Rule 104 for actively-traded securities.

[117] *See* Section 9(a)(6) of the Exchange Act, 15 U.S.C. 78i(a)(6); Concept Release, 59 FR at 21689. *See also* Securities Exchange Act Release No. 2446 (March 18, 1940), 11 FR 10971.

[118] *See* Securities Exchange Act Release No. 28732 (January 8, 1991), 59 FR 814, 815 (''Release 34–28732'').

for manipulative purposes, at a price resulting from unlawful activity, or in an at-the-market offering. Priority must be granted to independent bids regardless of the size of the independent bid, when the market where the stabilizing takes place permits or requires such priority. The placing of more than one stabilizing bid in any one market at the same price at the same time is prohibited. The Commission is adopting these provisions substantially as proposed.

Rule 104 excludes from its provisions offerings of securities eligible for resale under Rule 144A by foreign or domestic issuers made solely to QIBs in transactions exempt under the Securities Act and to non-U.S. persons under Regulation S that are made concurrently with a Rule 144A offering.[119] As with other transactions excluded from Regulations M's coverage, stabilization during these Rule 144A placements will remain subject to the general anti-fraud and anti-manipulation provisions of the federal securities laws.

The provision in Rule 10b–7(m) pertaining to limitation of liability is eliminated. Although one commenter favored retention of this provision, the Commission believes that because lead managers now exert considerably more control over stabilizing transactions than when Rule 10b–7 was adopted, the provision is of marginal utility.

3. Stabilizing Levels

Rule 104 provides considerable flexibility to underwriters effecting stabilizing transactions. Persons stabilizing the price of a security can initiate a stabilizing bid in any market with reference to the independent prices in the *principal market* for the security, wherever located, and then maintain, reduce, or raise that bid to follow the independent market, as long as the bid does not exceed either the stabilizing bid in the principal market (including a stabilizing bid in effect at the previous close) or the *offering price* of the security.[120] Commenters favored using the price in the security's principal market as a basis for initiating a stabilizing bid when that market was open. One commenter also advocated the ability to carry over a stabilizing bid from one market to another market, irrespective of the current independent prices in any market.

Under Rule 104, the appropriate price level for initiating stabilizing is based on the security's principal market.[121] Although the rule as proposed looked to independent bids in the principal market to establish the permissible stabilizing level, the final version of Rule 104 permits a stabilizing bid to reference the last independent transaction price in the principal market. This modification responds to a commenter's concern that the public offering price of an exchange-traded security frequently is set at the last transaction price and, under Rule 10b–7, the security could be stabilized at that price. The rule covers the two possible scenarios for initiating stabilizing: initiating stabilizing in any market when the principal market is open; and initiating stabilizing in any market when the principal market is closed.

When the principal market is open, the permissible stabilizing price level in any market always is established with reference to the last independent transaction price for the security in its principal market if two conditions are met: the security must have been traded in the principal market on the day stabilizing is initiated or on the preceding business day; and the current asked price in the principal market must be equal to or greater than the last independent transaction price. If both conditions are not satisfied, stabilizing may be initiated in any market at a price no higher than the highest current independent bid in the principal market.

When the principal market is closed, but quotations have opened in the market where stabilizing will be initiated, Rule 104 provides that stabilization may be initiated with reference to the lower of: the price at which stabilizing could have been initiated in the principal market at its previous close; or the last independent transaction price in the market where stabilizing is being initiated. The independent transaction must have occurred that day or on the preceding business day and the current asked price in that market must be equal to or greater than the independent transaction price. If these conditions are not met, stabilizing may only begin at a price no higher than the highest current independent bid for the security in the market where the stabilizing is being initiated.

Rule 104 also includes a new provision for initiating a stabilizing bid in any market immediately before the opening of quotations. In this case, stabilizing may be initiated with reference to the lower of: the price at which stabilizing could have been initiated in the principal market at its previous close; or the most recent price at which an independent transaction in the offered security has been effected in any market after the close of the principal market, if the person stabilizing knows or has reason to know of such transaction.[122]

Rule 104 includes maximum caps on the stabilizing price level: no stabilizing bid may be initiated, maintained, or otherwise adjusted in any market at a price higher than the stabilizing bid in the principal market or the security's offering price.

Once a stabilizing bid has been initiated in a market, that bid may be maintained in that market, subject only to the maximum caps. It also may be carried over into another market, irrespective of intervening changes in the independent bids or transaction prices for the security. A stabilizing bid in effect at the market's close may be maintained between trading sessions and used to establish a stabilizing bid just prior to the market's opening of quotations on the next day.[123] A stabilizing bid may be maintained without reduction unless it would exceed the maximum caps. An underwriter may otherwise reduce a stabilizing bid at its discretion. If a stabilizing bid is discontinued (*i.e.*, it is not maintained continuously during a trading session or is not in effect as of the market's close), stabilizing may be resumed only at a level at which it then could be initiated in the particular market, without reference to the earlier stabilizing bid.

In perhaps the most significant change from Rule 10b–7, Rule 104 allows a stabilizing bid to be increased to the level of the highest independent bid in the principal market, or, if the principal market is closed, the highest independent bid in that market at the

[119] Identical exceptions are contained in Rules 101 and 102 of Regulation M.

[120] The term offering price is defined in Rule 100 as the price at which the security is being distributed.

[121] Rule 104, as adopted, uses the term ''initiate,'' rather than the term ''effect,'' to clarify that ''initiating'' a stabilizing bid means the first stabilizing bid made in connection with the offering. Once a stabilizing bid has been initiated, it may be increased, maintained, reduced, or adjusted in accordance with the provisions of the rule.

[122] As proposed, the reference price for initiating a stabilizing bid in any market, including the principal market, immediately before it opened was the lower of: the price at which stabilizing could have been effected at the close of the principal market; or the most current reported price at which independent transactions in the offered security have been effected in any market after the close of the principal market. Rule 104 incorporates a knowledge-based standard to avoid imposition of an undue burden on underwriters to discover the prices of obscure transactions, whether reported or not.

[123] The end of a trading session will not be deemed to discontinue a stabilizing bid in effect at the close.

previous close, provided such bid price does not exceed the maximum caps.

Where an independent market for an offered security does not exist, the maximum stabilizing level is limited only by the offering price. Stabilization may be conducted before an offering is priced, consistent with the conditions of Rule 104. After the offering price is determined, stabilization may be resumed at a price at which stabilizing then could be initiated.

Rule 104 also provides for adjustments to a stabilizing bid when the price of the security being stabilized is adjusted for the payment of dividends, rights, or distributions, or is expressed in a currency other than the currency of the principal market and there are changes in the exchange rate between the two currencies. When securities are being offered as a unit, the component securities shall not be stabilized at prices that, in the aggregate, are higher than the then permissible stabilizing price for the unit.

4. Offerings With No U.S. Stabilizing Activities

To further accommodate cross-border transactions, the Commission is incorporating a new provision, similar to one contained in its 1991 proposing release on stabilizing in the international context,[124] that permits stabilizing outside the United States during an offering in the United States, without complying with Rule 104. The conditions for this provision are that: there be no stabilization in the United States; stabilization is not conducted above the U.S. offering price; and the foreign stabilizing is conducted in a jurisdiction with comparable regulation of stabilization.[125] For purposes of this provision, the Commission recognizes the stabilization regulations of the U.K. Securities and Investments Board.[126] The Commission invites appropriate requests to recognize additional markets as having comparable stabilization regulations for the purposes of this provision.

5. Disclosure, Notification, and Recordkeeping of Stabilizing Transactions, Short Covering Transactions, and Penalty Bids

In the Proposing Release, the Commission expressed its view that syndicate short covering transactions and the imposition of penalty bids by underwriters are activities that can facilitate an offering in a manner similar to stabilization. The Commission did not propose to extend the price conditions of Rule 104 to these aftermarket activities. Instead, the Commission proposed, and has determined to adopt, the provisions relating to disclosure, notification, and recordkeeping of syndicate covering transactions and the imposition of penalty bids.

Rule 104, like Rule 10b–7, requires any person who enters a bid that such person knows is for the purpose of stabilizing the price of any security to notify the market on which the bid is placed, and to disclose the purpose of such bid to the person to whom the bid is entered (*e.g.*, the specialist or executing broker-dealer). In the Commission's view, contemporaneous disclosure of the fact that stabilizing is occurring is beneficial to the market and its participants, because it ensures that transactions in a security are based on all available information. Consistent with this requirement, the NASD requires market makers intending to initiate stabilization to provide it with prior notification.[127] Stabilizing bids are then identified by a symbol on the Nasdaq quotation display. In this way, the person engaged in stabilization satisfies the requirement to inform the market and the person to whom the bid is made of the stabilizing purpose of the bid by notifying the NASD. On the exchanges, underwriters must notify the exchange and must provide disclosure separately to the recipient of the bid (*e.g.*, the specialist).

Rule 104 also requires any person effecting a *syndicate covering transaction*,[128] or placing or transmitting a *penalty bid*,[129] to disclose that fact to the SRO that has direct oversight authority over the principal market in the United States for the security for which the syndicate covering transaction is effected, or the penalty bid is imposed. This information will assist the exchanges and the NASD in carrying out their surveillance responsibilities. Some commenters asserted that the information regarding aftermarket activities should be kept confidential to avoid creating the perception of a weak offering, while a few commenters urged the Commission to facilitate public dissemination of this information in order to preclude an unintended manipulative effect, and to prevent the investing public from unknowingly bearing the cost of these aftermarket activities. The rule, as adopted, requires disclosure to the SRO but does not require public disclosure. Should circumstances indicate that such disclosure is warranted, the Commission may revisit this issue.

Under Rule 104, the stabilizing legend required by Rule 10b–7, and Item 502(d) of Regulations S–B and S–K,[130] would be replaced by a brief legend identifying activity that may affect the offered security's price and directing investors to a discussion in the ''plan of distribution'' section of the prospectus. Item 508 of Regulations S–B and S–K, governing the plan of distribution disclosure, is amended to require a brief description of any prospective stabilizing and aftermarket activities, including syndicate covering transactions and the imposition of a penalty bid, and their potential effects on the market price.[131] The objective of these proposals is to provide meaningful information to prospective investors regarding stabilizing and related activities.[132]

In addition to the foregoing disclosure requirements, when a person subject to Rule 104 conducts transactions in securities and the price of those securities may be or has been stabilized, that person is required by paragraph (h)(3) of Rule 104 to send to a purchaser, at or before the completion of the transaction, a document containing a statement similar to that required by Item 502(d)(1)(i) of Regulations S–B and S–K. This disclosure may be made by a document, including a prospectus, confirmation, or other writing that contains language indicating that the underwriter may effect stabilizing transactions in connection with an offering of securities.[133] The Commission proposed, but is not

[124] Release 34–28732. The proposals contained in Release 34–28732 are withdrawn, except to the extent they are adopted in Rule 104.

[125] The Commission by rule, regulation, or order will identify foreign statutes or regulations that are comparable to Rule 104.

[126] Chapter III, Part 10 of the Rules of the United Kingdom Securities and Investments Board.

[127] *See NASD Manual*, Marketplace Rules, IM–4614.

[128] Rule 100 defines syndicate covering transaction as the placing of any bid or the effecting of any purchase on behalf of the sole distributor or the underwriting syndicate or group to reduce a syndicate short position.

[129] Rule 100 defines penalty bid to mean an arrangement that permits the managing underwriter to reclaim a selling concession otherwise accruing to a syndicate member (or to a selected dealer or selling group member) in connection with an offering when the securities originally sold by the syndicate member are purchased in syndicate covering transactions.

[130] *See* 17 CFR 228.502(d) and 229.502(d).

[131] *See* 17 CFR 228.508 and 229.508.

[132] Once a ''plain English'' prospectus is implemented, a stabilizing legend would no longer be required on the inside front cover of the prospectus, although the disclosure required by Item 508 of Regulations S–K and S–B would be retained. *See Task Force Report* 17–18.

[133] This disclosure requirement is not intended to extend the prospectus delivery period required by Rule 174 under the Securities Act. The required disclosure may be made by means other than the prospectus. 17 CFR 230.174.

adopting at this time, that similar disclosure be given to purchasers of securities subject to aftermarket activities. The Commission intends to reconsider the need for this disclosure as it continues to review developments in the aftermarket area.

Amendments to Rule 17a–2 under the Exchange Act require managing underwriters to keep records of syndicate covering transactions and penalty bids, in addition to stabilizing information. Records must reflect the name and class of securities, the price, date, and time for each syndicate covering transaction and whether any penalties were assessed, the names and addresses of the syndicate group members, and their respective commitments. The records also must reflect the dates when any penalty bid was in effect. The information is required to be maintained in a separate file, or in a separately retrievable format, for a period of three years, the first two years in an easily accessible place, consistent with the requirement of Exchange Act Rule 17a–4(f). The required information must be kept for any offering registered under the Securities Act, conducted pursuant to Regulation A [134] thereunder, or where the aggregate proceeds exceed $5 million.

While several commenters opposed the disclosure, notification, and recordkeeping requirements proposed in Rule 104, particularly with respect to aftermarket activities, the Commission continues to believe that these provisions are an appropriate and effective means to monitor developments in aftermarket activities. Nevertheless, the Commission appreciates commenters' concerns that these provisions may require the implementation of new internal systems and procedures for underwriters and syndicate members. To accommodate possible revisions to broker-dealers' systems and procedures, the Commission has determined to delay the effectiveness of the recordkeeping requirements pertaining to syndicate covering transactions and penalty bids contained in Rule 17a–2 until April 1, 1997. The disclosure and notification requirements, which are contained in Rule 104 and pertain to stabilizing transactions, syndicate cover transactions, and penalty bids, will become effective on the same date as the other provisions of Regulation M.

[134] 17 CFR 230.251 *et seq.*

F. Rule 105—Short Sales in Connection With an Offering

The Commission is adopting Rule 105 to replace Rule 10b–21. Rule 105, like Rule 10b–21, prohibits certain short sales from being covered with securities obtained from an underwriter, broker, or dealer who is participating in an offering. Rule 105 is intended to prevent manipulative short selling prior to a public offering by short sellers who cover their short positions by purchasing securities in the offering, thus largely avoiding exposure to market risk. Such short sales could result in a lower offering price and reduce an issuer's proceeds. Rule 105 differs from Rule 10b–21 because it covers only those short sales effected in the period commencing five business days prior to the offering's pricing and ending with such pricing, rather than the potentially much longer period of Rule 10b–21, which commenced with the filing of a registration statement or Form 1–A.[135]

In its comment letter, the NASD expressed strong support for Rule 10b–21 and recommended that the current restricted period be retained because the date of the filing of a registration statement or Form 1–A can be identified with certainty in advance by potential short sellers. The NASD also urged that Rule 105 be amended to prohibit expressly a short seller from ''directly or indirectly'' covering short sales with securities purchased in a public offering. Another commenter suggested that the rule would be more effective if it covered transactions in related options. A third commenter urged that the exception in Rule 105 for shelf-registered offerings be eliminated.

The Commission believes that the application of Rule 105 should be limited to the period corresponding to the longest restricted period of Regulation M, which is five business days, and that short sellers contemplating a covering transaction will be in a position to know if any of their short sales were made within that five business day period. If short sales were made during this period, the short seller cannot cover those short sales with securities purchased in the offering.

As adopted, Rule 105 does not apply to short sales of derivative securities, because an extension of the rule's prohibitions to derivative securities would be inconsistent with the approach of Regulation M, which is to focus on those securities having the greatest manipulative potential.[136] Additionally, the rule does not expressly prohibit short sellers from ''directly or indirectly'' covering short sales out of the offering. The Commission decided not to add the term ''indirectly'' to Rule 10b–21 at the time that rule was adopted, and no different arguments have been presented that would alter its decision.[137]

Finally, Rule 105 retains the exclusion for shelf-registered offerings. However, it may be necessary for the Commission to reevaluate this exclusion if the availability of shelf registration is further expanded or offerings of shelf-registered equity become more commonplace.

[135] 17 CFR 239.90.

III. Status of Interpretations, Exemptions, No-Action Positions, Injunctions, and Orders to Cease and Desist

A. Interpretations, Exemptions, and No-action Positions

In the Proposing Release, the Commission sought comment on the implications for interpretations, exemptions, and no-action positions under the former trading practices rules in light of the adoption of Regulation M. Although a few commenters highlighted interpretive issues, and some specifically requested that certain exemption or no-action letters remain in effect,[138] there was little comment on the status of interpretations, exemptions, and no-action positions generally.

Many terms and concepts in Regulation M have the same meaning as under the former trading practices rules, and interpretations under those rules regarding such terms or concepts remain relevant to the new rules. Nevertheless, because the trading practices rules are rescinded as of the effective date of Regulation M, written exemptions that were granted and no-action positions taken under those rules no longer will be in effect as of Regulation M's

[136] Any manipulative short sales involving derivatives transactions continue to be addressed by the general anti-manipulation provisions, including Section 9(a)(2) of and Rule 10b–5 under the Exchange Act.

[137] *See* Securities Exchange Act Release No. 26028 (August 25, 1988), 53 FR 33455, 33457.

[138] *See, e.g.,* Letter from Peter Derendinger, General Counsel, CS Holding (June 24, 1996), to Jonathan G. Katz, Secretary, SEC, concerning *Letter regarding CS Holding,* [1995] Fed. Sec. L. Rep. (CCH) ¶ 77,018 (March 31, 1995); Letter from Dan Sheridan, Head of Market Regulation Department, London Stock Exchange (July 23, 1996), to Jonathan G. Katz, Secretary, SEC, concerning *Letter regarding London Stock Exchange,* (July 12, 1993) (permitting passive market making on the London Stock Exchange during a distribution of securities) (''LSE Letter'').

effectiveness.[139] Many of the exemptions and no-action positions issued under the trading practices rules have been codified, expanded, or otherwise made redundant by Regulation M. The Commission expects, therefore, that the need to continue the relief issued under the trading practices rules after the effective date of Regulation M will be very limited. [140] Accordingly, if a recipient or beneficiary of an exemption or no-action letter issued under the former trading practices rules believes that the relief granted by such letter continues to be necessary or appropriate under Regulation M, that person may wish to contact the Office of Risk Management and Control of the Commission's Division of Market Regulation, at (202) 942–0772.

B. Injunctions and Orders to Cease and Desist

The Proposing Release did not address the status of outstanding injunctions or orders to cease and desist from violating the trading practices rules. The Commission is of the view that all such injunctions and orders continue in force and effect, and should be considered injunctions or orders to cease and desist from violating the corresponding successor rule or rules under Regulation M. For purposes of determining the status of an outstanding injunction or order, Rules 101 and 102 are each deemed a successor rule to Rule 10b–6; Rule 103 is deemed a successor rule to Rule 10b–6A; Rule 104 is deemed a successor rule to Rule 10b–7; and Rule 105 is deemed a successor rule to Rule 10b–21. Additionally, with respect to Commission cases alleging a violation of one or more of the trading practices rules, if a court or administrative law judge determines after the adoption of Regulation M that a violation of one or more of the trading practices rules occurred while such rules remained in effect, and an injunction or order to cease and desist would have been an appropriate remedy at the time such rules remained in effect, the Commission believes such court or administrative law judge should issue an injunction or order to cease and desist from violating the appropriate successor rule or rules under Regulation M.

IV. Costs and Benefits of the Amendments and Their Effects on Competition, Efficiency, and Capital Formation

Section 23(a)(2) of the Exchange Act [141] requires the Commission to consider the anti-competitive effects of any rules it adopts thereunder, and to balance them against the benefits that further the purposes of the Act. Furthermore, Section 2 of the Securities Act [142] and Section 3 of the Exchange Act,[143] as amended by the recently enacted National Securities Markets Improvement Act of 1996 (''Markets Improvement Act''),[144] provide that whenever the Commission is engaged in rulemaking and is required to consider or determine whether an action is necessary or appropriate in the public interest, the Commission also shall consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation.

In the Proposing Release, the Commission stated its view that the rules would not likely impose any significant burden on competition not necessary or appropriate in furtherance of the Exchange Act.[145] In fact, the Commission stated that Regulation M would reduce significantly trading restrictions on issuers, underwriters, and others participating in a distribution and, therefore, should reduce the costs of raising capital. The Commission also indicated its belief that Regulation M would enhance the posture of U.S. underwriters in relation to foreign broker-dealers in competing for underwriting business in cross-border transactions.

The NYSE and the Amex argued that use of a trading volume test to determine which securities qualify for the actively-traded securities exception and the one or five day restricted period of Regulation M would have an anti-competitive effect. The NYSE and the Amex believed that the Commission's use of ADTV is discriminatory and anti-competitive because the rules make no distinction between dealer markets, where dealer ''interpositioning'' is alleged to approximately double the reported volume of shares changing hands between investors, as compared with auction markets, where buyers and sellers meet directly and reported volume reflects that direct interaction as a single reported trade. These commenters asserted that the alleged ''double counting'' would have an anti-competitive effect on the ability of auction markets to attract new corporate listings, because it makes it more likely that distribution participants will be subject to fewer restrictions in dealer markets. The NYSE recommended that if the Commission determined that ADTV for a dealer market should be considered as the volume reported by that market, the Commission should consider the ADTV for auction markets as being twice the volume reported by those markets. Similarly, the Amex suggested that Nasdaq reported volume be adjusted downward if a measure based on ADTV is used.

As stated above, the Commission is of the view that the ADTV test provides the best measurement of a security's relative susceptibility to manipulation. Moreover, the public float test described above provides an additional control to prevent securities from being categorized based on aberrational levels of trading volume. The public float test also serves to equalize the treatment of securities traded under different market structures.

Although the NYSE and the Amex letters contend that the use of a trading volume standard in Regulation M will have an anti-competitive effect on their ability to attract corporate listings, they offer no data or other information demonstrating that the use of a trading volume concept in other rules, such as Exchange Act Rule 10b–18 or Securities Act Rule 144,[146] has resulted in an issuer deciding not to list on the NYSE or the Amex.

The NYSE and the Amex proposals also do not take into account the complex and evolving nature of both dealer and auction markets, and do not recommend a workable methodology for making such trading ''comparable.'' The Commission notes that the Nasdaq market has a substantial and developing auction component,[147] and the exchanges have substantial dealer activity either through block positioning

[139] Regulation M is considered a major rule for purposes of the Small Business Regulatory Enforcement Fairness Act of 1996, Pub. L. No. 104–121, Title II, 110 Stat. 857 (1996). Thus, it is subject to a Congressional disapproval process and will not become effective until March 4, 1997. The provisions of Rules 10b–6, 10b–6A, 10b–7, 10b–8, and 10b–21 remain in effect until the effective date of their rescission, which is March 4, 1997. Persons participating in offerings are subject to the terms of the trading practices rules until they are rescinded.

[140] In response to a request from the London Stock Exchange, the LSE Letter shortly will be modified and reissued under Regulation M. To the extent that other letters have not been codified by Regulation M, appropriate requests for relief under Regulation M will be considered by the Division of Market Regulation.

[141] 15 U.S.C. 78w(a)(2).

[142] 15 U.S.C. 77b.

[143] 15 U.S.C. 78c.

[144] Pub. L. No. 104–290, § 106, 110 Stat. 3416 (1996).

[145] *See* Proposing Release, 61 FR at 17127.

[146] 17 CFR 230.144.

[147] For example, Instinet accounts for a significant proportion of the reported volume in Nasdaq securities. In addition, the Commission's recently adopted order handling rules are likely to lower the level of dealer involvement in Nasdaq order flow. *See* Release 34–37619A, 61 FR 48289.

or specialist dealer activity.[148] The NYSE and Amex do not suggest, however, that there is any need for a reduction in exchange volume based upon dealer activity.

The complexity is magnified when the focus is on individual securities rather than aggregate volume levels for a market. For example, a portion of trading in exchange-listed securities is effected in the over-the-counter (''OTC'') market (by dealers) but is reported in composite exchange volume.[149] Moreover, the level of exchange dealer activity undoubtedly varies from security to security, and the level of dealer activity for thinly-traded exchange stocks is probably high. If the approach suggested by the NYSE and the Amex were implemented, comparability would require an analysis of the dealer component in OTC and exchange trading and application of appropriate discounts. These discount calculations for each security also would need to be constantly updated. The Commission believes that this would be a cumbersome exercise of little value.

After considering carefully the views of the NYSE and the Amex, the Commission continues to believe that Regulation M will not likely impose any significant burden on competition not necessary or appropriate in furtherance of the Exchange Act. As stated above, the Commission believes that Regulation M is necessary and appropriate in the public interest because of the changes in securities markets and the fact that the trading practices rules had become needlessly complex and imposed substantial compliance costs. Furthermore, by reducing trading restrictions, Regulation M will promote efficiency and the competitive position of U.S. underwriters, and enhance the U.S. capital formation process.

[148] Specialists, which are the hallmark of auction markets, have important dealer obligations. They must trade for their own accounts (*i.e.*, as dealers) in order to maintain fair and orderly markets. *See* Exchange Act Rule 11b–1, 17 CFR 240.11b–1; NYSE Rule 104.

In 1995, trading by NYSE members accounted for 19.7% of NYSE reported share volume (purchases and sales) with specialist activity accounting for approximately half of this volume. *NYSE Fact Book* 20; *see generally* John F. Gould & Allan W. Kleidon, Market Maker Activity on Nasdaq: Implications for Trading Volume, 1 *Stanford Journal of Law, Business and Finance* 11 (1994).

[149] *See* The Nasdaq Stock Market, Inc., *The Nasdaq Stock Market 1996 Fact Book & Company Directory* 8 (1996) (4.3% of volume in exchange-listed securities was effected by Nasdaq market makers in 1995).

V. Final Regulatory Flexibility Analysis

This following discussion summarizes the Commission's Regulatory Flexibility Act analysis of Regulation M and the related amendments to other rules adopted today. A complete copy of the Final Regulatory Flexibility Act (''FRFA'') is available in Public File No. S7–11–96.

The rules adopted today are intended to streamline and simplify the Commission's current anti-manipulation regulation of securities offerings by reducing the regulatory burdens on issuers, underwriters, and others with a significant interest in a securities offering, while retaining core investor protections. The new rules replace Rules 10b–6, 10b–6A, 10b–7, 10b–8, and 10b–21.

Regulation M restricts offerings, activities, and persons where there is a readily identifiable incentive to manipulate the price of an offered security. The Commission believes that Regulation M reflects the improved surveillance technology of U.S. self-regulatory organizations, enhanced market transparency of securities transactions, increased globalization of securities markets, and changed offering and syndicate processes that have developed in recent years. The Commission continues to believe that prophylactic rules provide the most appropriate framework to achieve the objectives described above.

As stated in the FRFA, the Commission believes that Regulation M will enhance the ability of small issuers to raise capital. Regulation M is less restrictive than the structure under the former trading practices rules. Moreover, the Commission believes that Regulation M balances the objective of simplified, streamlined, and more flexible regulation with its statutory mandate of investor protection in a manner more appropriate than other alternatives.

The Commission requested comment with respect to the Initial Regulatory Flexibility Analysis (''IRFA'') prepared in conjunction with the Proposing Release. The Commission did not receive any comments with respect to the IRFA.

A. Rules 101 and 102

The prohibitions in Rule 10b–6 are contained in two separate rules, Rules 101 and 102. Each of these rules employ restricted periods based on the dollar value of the published ADTV of the offered security and the public float value of its issuer. The restricted periods commence one or five business days prior to the pricing of the offering and continue until the distribution is over. The restricted periods cover the times when manipulative activity is most likely. The most actively-traded securities (*i.e.*, those securities having a minimum ADTV value of $1 million and whose issuer meets a $150 million public float test) are not subject to Rule 101. With respect to the vast majority of securities distributions, the trading restrictions that existed under Rule 10b–6 are substantially reduced or eliminated.

Rule 101 does not apply to distributions of Rule 144A securities made to QIBs in transactions that are exempt under the Securities Act.[150] Transactions in nonconvertible investment grade debt and preferred securities, and investment-grade asset-backed securities are not covered by the rule. Derivative securities also are excluded. Further, Rule 101 permits the routine dissemination of research reports, the exercise of options and other securities, and transactions in baskets of securities containing the offered security. Rule 101 excepts inadvertent violations during the restricted period by excusing *de minimis* violations, provided that a distribution participant has in place written policies and procedures reasonably designed to achieve compliance with Regulation M's provisions. The scope of persons subject to Rule 101 is narrowed by recognizing information barriers between a distribution participant and its affiliates.

Rule 101 applies equally to all distribution participants, regardless of size. The Commission does not believe that it is practicable to exempt small entities from Rule 101 because to do so would be inconsistent with the Commission's statutory mandate to protect investors.

Rule 102 governs the activities of issuers, selling security holders, and their affiliated purchasers. This rule does not contain an exception for actively-traded securities, or many of the other exceptions in Rule 101, because issuers and selling shareholders generally are not engaged in the securities business and do not need to trade securities on their own behalf or for others. Nevertheless, issuer participants, like underwriting participants, are able to engage in market activities prior to the beginning of the applicable restricted period. During the restricted period, Rule 102 permits: odd-lot transactions; transactions in connection with issuer plans; exercises of options, warrants, rights, and similar securities;

[150] 17 CFR 230.144A.

transactions during Rule 144A distributions; and transactions in certain nonconvertible securities and asset-backed securities that are rated investment grade.

Rule 101 permits distribution participants to engage in a greater range of market activities during a distribution in recognition of their role as market intermediaries, independent of their function as underwriters. Because issuer participants do not have such a broad range of market obligations and have a more direct interest in the offering's outcome, Rule 102 places more restrictions on their activities during a distribution.

For many issuers, Regulation M reduces the period of trading restrictions from nine or two business days to one business day. For some securities, however, the restricted periods under Rules 101 and 102 may be longer than the cooling-off periods under Rule 10b–6 (*i.e.*, five business days as opposed to two business days) because the new rules' thresholds depend on dollar value of ADTV and of public float, rather than on the offered security's price and the number of shares held by nonaffiliates. Some of these issuers may be small entities. The Commission has determined to base the new rules' thresholds on the dollar value of the security's ADTV and the issuer's public float value because the higher the value of trading and public float, the more costly and more difficult it becomes to affect the security's price.

B. Rule 103

Rule 103 governs Nasdaq passive market making and replaces Rule 10b–6A. By eliminating the eligibility criteria contained in Rule 10b–6A, Rule 103 applies to all Nasdaq securities and nearly all distributions, and provides additional flexibility by permitting more distribution participants to engage in passive market making. The Commission no longer considers it necessary or appropriate to restrict passive market making to the narrow class of offerings where the potential liquidity loss may be substantial (*i.e.*, where syndicate members account for at least 30% of market making capacity). Rule 103 also allows less active passive market makers who might otherwise not be able to engage in a passive market making a minimum net purchase allowance of 200 shares. Some of these passive market makers may be small broker-dealers.

Rule 103 benefits small issuers and small broker-dealers because it removes the eligibility criteria of Rule 10b–6A. The eligibility criteria were designed to limit the availability of passive market making to those firm commitment, fixed price offerings qualifying for the two business day cooling-off period of Rule 10b–6 and to those circumstances where the restrictions otherwise would have reduced market maker capacity significantly (*i.e.*, where syndicate members accounted for at least 30% of market maker capacity). By removing the eligibility criteria, more offerings and more market makers qualify for passive market making.

C. Rule 104

Rule 104 regulates stabilizing and other activities related to a distribution and replaces Rule 10b–7. The rule permits underwriters to follow the independent bid for a security in the principal market, wherever located. Certain disclosure and recordkeeping requirements are extended to the aftermarket transactions by distribution participants. Underwriters frequently engage in aftermarket activities, including covering syndicate short positions and establishing and enforcing penalty bids, that are analogous to traditional stabilizing under Rule 10b–7.

The Commission believes that Rule 104 generally concerns syndicate managers because of their role as stabilizing managers. For the most part, these syndicate managers are larger broker-dealers. To the extent small broker-dealers engage in stabilizing activities, Rule 104 applies to them with the same force as large broker-dealers.

In conjunction with Rule 104, the Commission is adopting amendments to Items 502(d) and 508 of Regulations S–K and S–B, and Rule 17a–2. These rules require revised disclosure and recordkeeping requirements on certain post-distribution activities of underwriters. Rule 104 and Item 502(d) of Regulations S–K and S–B require disclosure of stabilizing activities through a new, shorter stabilizing legend in place of the legend that had been required. In addition, Rule 104 and Item 508 of Regulations S–K and S–B expand the discussion in the plan of distribution section of the prospectus to include a ''plain English'' discussion of any expected stabilizing activities and other aftermarket activities and their potential effects on the marketplace with respect to the particular securities offering. Rule 17a–2 is amended to require the manager of an underwriting syndicate to maintain records related to syndicate covering transactions and penalty bids.

The Commission believes that the preponderance of the broker-dealers acting as distribution participants are not small broker-dealers, and that there is only a relatively small number of small broker-dealers that act as distribution participants. The Commission believes, however, that any effect on small entities will be minimal because the additional disclosure in the offering materials and notification to regulatory authorities is the responsibility of the managing underwriter who is unlikely to fall within the small entity classification because of capital requirements for underwriting. The same is true of the additional recordkeeping requirements of Rule 17a–2.

D. Rule 105

Rule 105 recodifies Rule 10b–21 governing short selling in connection with a public offering. To harmonize Rule 105 with the provisions of Rules 101 and 102, the period of Rule 105's coverage is shortened to the five business day period before pricing, rather than the time extending from the filing of offering materials to the time when sales may be made. Rule 105 is less restrictive than Rule 10b–21, and applies equally to all market participants.

VI. Paperwork Reduction Act

As set forth in the Proposing Release,[151] Rules 101, 102, 103, and 104 under Regulation M and the amendments to Rule 17a–2 and to Items 502(d) and 508 of Regulations S–B and S–K contain collections of information within the meaning of the Paperwork Reduction Act of 1995 (''PRA'').[152] Accordingly, the collection of information requirements contained in the rules and related amendments were submitted to the Office of Management and Budget (''OMB'') for review and were approved by OMB which assigned the following control numbers: Rule 101, control number 3235–0464; Rule 102, control number 3235–0467; Rule 103, control number 3235–0466; Rule 104, control number 3235–0465; Amendments to Rule 17a–2, control number 3235–0201; Amendments to Items 502(d) and 508 of Regulation S–B, control number 3235–0418; and Amendments to Item 502(d) and 508 of Regulation S–K, control number 3235–0071. The collection of information requirements are in accordance with Section 3507 of the PRA.[153] An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the agency displays a valid OMB control number.

[151] 61 FR at 17127.

[152] 44 U.S.C. 3501 *et seq.*

[153] 44 U.S.C. 3507.

The collections of information under Regulation M and the related amendments are necessary for covered persons to obtain certain benefits or to comply with certain requirements. As described in more detail in the Proposing Release, the collections of information are necessary to provide the Commission with information regarding syndicate covering transactions and penalty bids.[154] The Commission may review this information during periodic examinations or with respect to investigations. Except for the information required to be kept under Rule 104(i) and Rule 17a–2(c), none of the information required to be collected or disclosed for PRA purposes will be kept confidential. If the records required to be kept pursuant to these rules are requested by and submitted to the Commission, they will be kept confidential to the extent permitted by statutory and regulatory provisions.

Several commenters provided comments regarding the Commission's estimate of the burdens associated with the recordkeeping requirement under Rule 104 and the related amendment to Rule 17a–2. Rule 104(i) and Rule 17a–2(c) require underwriters to keep records of syndicate covering transactions and penalty bids, in addition to the stabilizing information required prior to these amendments. The NASD suggested that the Commission review its estimated time for recordkeeping for syndicate covering transactions and penalty bids.[155] While they did not challenge specific burden estimates, two other commenters noted generally that the change in recordkeeping requirements will be more burdensome than represented by the Commission.[156] The Securities Industry Association asserted that the amendments would require system changes and retraining for underwriters. None of these commenters, however, provided specific alternatives to the Commission's estimates.

After carefully considering these comments, and based upon further review of the disclosure, notification, and recordkeeping changes required by Rule 104(h) and the amendment to Rule 17a–2(c), the Commission is retaining its burden estimates for the recordkeeping obligation under Rule 104 and the amendment to Rule 17a–2. Thus, the descriptions and estimated burdens of the collection of information requirements under Regulation M have not changed, and are set forth in the Proposing Release.[157]

VII. Statutory Basis and Text of Rules and Amendments

Rules 10b–6, 10b–6A, 10b–7, 10b–8, and 10b–21 are removed pursuant to, and the amendments to Rule 17a–2 are adopted under, the Exchange Act, 15 U.S.C. 78a *et seq.*, and particularly Sections 2, 3, 9(a)(6), 10(a), 10(b), 13(e), 15(c), 17(a), and 23(a), 15 U.S.C. 78b, 78c, 78i(a)(6), 78j(a), 78j(b), 78m(e), 78o(c), 78q(a), and 78w(a). The amendments to Items 502(d) and 508 of Regulations S–B and S–K are adopted under the Securities Act, 15 U.S.C. 77a *et seq.*, particularly Sections 6, 7, 8, 10, and 19(a), 15 U.S.C. 77f, 77g, 77h, 77j, and 77s(a); the Exchange Act, 15 U.S.C. 78a *et seq.*, particularly Sections 3, 4, 10, 12, 13, 14, 15, 16, and 23, 15 U.S.C. 78c, 78d, 78j, 78*l*, 78m, 78n, 78o, 78p, and 78w; and the Investment Company Act, 15 U.S.C. 80a–1 *et seq.*, particularly Sections 8 and 38(a), 15 U.S.C. 80a–8 and 80a–37(a). Regulation M is adopted under the Securities Act, 15 U.S.C. 77a *et seq.*, particularly Sections 7, 17(a), 19(a), 15 U.S.C. 77g, 77q(a), and 77s(a); the Exchange Act, 15 U.S.C. 78a *et seq.*, particularly Sections 2, 3, 9(a), 10, 11A(c), 12, 13, 14, 15(c), 15(g), 17(a), 23(a), and 30, 15 U.S.C. 78b, 78c, 78i(a), 78j, 78k–1(c), 78*l*, 78m, 78n, 78o(c), 78o(g), 78q(a), 78w(a), and 78dd–1; and the Investment Company Act, 15 U.S.C. 80a–1 *et seq.*, particularly Sections 23, 30, and 38, 15 U.S.C. 80a–23, 80a–29, and 80a–37. The necessary nomenclature amendments to Sections 200.30–3, 230.418, 230.461, 240.11a–1, 240.13e–4, 240.13e–102, and 240.14d–102 of this chapter, reflecting the removal of Rules 10b–6, 10b–6A, 10b–7, and 10b–8 under the Exchange Act and the adoption of Regulation M, are adopted pursuant to the authority cited above with respect to those amendments.

List of Subjects

17 CFR Part 200

Administrative practice and procedure, Authority delegations (Government agencies), Sunshine Act.

17 CFR Part 228

Reporting and recordkeeping requirements, Securities, Small businesses.

17 CFR Part 229

Reporting and recordkeeping requirements, Securities.

17 CFR Part 230

Reporting and recordkeeping requirements, Securities.

17 CFR Part 240

Broker-dealers, Fraud, Issuers, Reporting and recordkeeping requirements, Securities.

17 CFR Part 242

Broker-dealers, Fraud, Issuers, Reporting and recordkeeping requirements, Securities.

For the reasons set out in the preamble, Title 17, Chapter II of the Code of Federal Regulations is amended as follows:

PART 200—ORGANIZATION; CONDUCT AND ETHICS; AND INFORMATION AND REQUESTS

1. The authority citation for part 200 continues to read, in part, as follows:

Authority: 15 U.S.C. 77s, 78d–1, 78d–2, 78w, 78*ll*(d), 79t, 77sss, 80a–37, 80b–11, unless otherwise noted.

* * * * *

2. Section 200.30–3 is amended by revising paragraph (a)(6) to read as follows:

§ 200.30–3 Delegation of authority to Director of Division of Market Regulation.

* * * * *

(a) * * *

(6) Pursuant to Rules 10b–13(d), 14e–4(c), and 15c2–11(h) (§§ 240.10b–13(d), 240.14e–4(c), and 240.15c2–11(h) of this chapter), and Rules 101(d), 102(e), 104(j), and 105(c) of Regulation M (§§ 242.101(d), 242.102(e), 242.104(j), and 242.105(c) of this chapter), to grant requests for exemptions from Rules 10b–13, 14e–4, and 15c2–11) (§§ 240.10b–13, 240.14e–4, and 240.15c2–11 of this chapter), and Rules 101, 102, 104, and 105 of Regulation M (§§ 242.101, 242.102, 242.104, and 242.105 of this chapter).

* * * * *

PART 228—INTEGRATED DISCLOSURE SYSTEM FOR SMALL BUSINESS ISSUERS

3. The authority citation for part 228 continues to read as follows:

Authority: 15 U.S.C. 77e, 77f, 77g, 77h, 77j, 77k, 77s, 77aa(25), 77aa(26), 77ddd, 77eee, 77ggg, 77hhh, 77jjj, 77nnn, 77sss, 78*l*, 78m, 78n, 78o, 78w, 78*ll*, 80a–8, 80a–29, 80a–30, 80a–37, 80b–11, unless otherwise noted.

4. Section 228.502 is amended by revising the introductory text of paragraph (d)(1) and paragraph (d)(1)(i) to read as set forth below and by removing the phrase "RULE 10b–6A UNDER THE SECURITIES EXCHANGE

[154] *See* Proposing Release, 61 FR at 17127–30.

[155] NASD Comment Letter, *supra* note 31, at p. 9.

[156] Comment letter from the Securities Industry Association (July 16, 1996), at p. 13; Comment letter from J.P. Morgan Securities Inc., at p. 4.

[157] *See* Proposing Release, 61 FR at 17127–30.

ACT OF 1934'' from paragraph (d)(2) and adding, in its place, the phrase ''RULE 103 OF REGULATION M''.

§ 228.502 (Item 502) Inside front and outside back cover pages of prospectus.

* * * * *

(d)(1) *Stabilizing and other transactions.* (i) Include the following statement, if true, subject to appropriate modification where circumstances require.

Certain persons participating in this offering may engage in transactions that stabilize, maintain, or otherwise affect the price of (identify securities), including (list types of transactions). For a description of these activities, see ''Plan of Distribution.''

* * * * *

5. Section 228.508 is amended by removing the phrase ''§ 240.10b–6A of this chapter'' from paragraph (i) and adding, in its place, the phrase ''Rule 103 of Regulation M (§ 242.103 of this chapter)'' and by adding paragraph (j) to read as follows:

§ 228.508 (Item 508) Plan of distribution.

* * * * *

(j) *Stabilizing and other transactions.* If the underwriter or any selling group member intends to engage in stabilizing, syndicate short covering transactions, penalty bids, or any other transaction during the offering that may stabilize, maintain, or otherwise affect the offered security's price, indicate such intention and briefly describe such transaction(s).

PART 229—STANDARD INSTRUCTIONS FOR FILING FORMS UNDER SECURITIES ACT OF 1933, SECURITIES EXCHANGE ACT OF 1934 AND ENERGY POLICY AND CONSERVATION ACT OF 1975—REGULATION S–K

6. The authority citation for part 229 continues to read, in part, as follows:

Authority: 15 U.S.C. 77e, 77f, 77g, 77h, 77j, 77k, 77s, 77aa(25), 77aa(26), 77ddd, 77eee, 77ggg, 77hhh, 77iii, 77jjj, 77nnn, 77sss, 78c, 78i, 78j, 78*l*, 78m, 78n, 78o, 78w, 78*ll*(d), 79e, 79n, 79t, 80a–8, 80a–29, 80a–30, 80a–37, 80b–11, unless otherwise noted.

* * * * *

7. Section 229.502 is amended by revising the introductory text of paragraph (d)(1) and paragraph (d)(1)(i) to read as set forth below and by removing the phrases ''§ 240.10b–6A of this chapter'' and ''RULE 10b–6A UNDER THE SECURITIES EXCHANGE ACT OF 1934'' from paragraph (d)(2) and adding, in their places, the phrases ''§ 242.103 of this chapter'' and ''RULE 103 OF REGULATION M'', respectively.

§ 229.502 (Item 502) Inside front and outside back cover pages of prospectus.

* * * * *

(d)(1) *Stabilizing and other transactions.* (i) Include the following statement, if true, subject to appropriate modification where circumstances require.

Certain persons participating in this offering may engage in transactions that stabilize, maintain, or otherwise affect the price of (identify securities), including (list types of transactions). For a description of these activities, see ''Plan of Distribution.''

* * * * *

8. Section 229.508 is amended by removing the phrase ''§ 240.10b–6A of this chapter'' from paragraph (k) and adding, in its place, the phrase ''Rule 103 of Regulation M (§ 242.103 of this chapter)'' and by adding paragraph (l) to read as follows:

§ 229.508 (Item 508) Plan of distribution.

* * * * *

(l) *Stabilizing and other transactions.* If the underwriter or any selling group member intends to engage in stabilizing, syndicate short covering transactions, penalty bids, or any other transaction during the offering that may stabilize, maintain, or otherwise affect the security's price, indicate such intention and briefly describe such transaction(s).

PART 230—GENERAL RULES AND REGULATIONS, SECURITIES ACT OF 1933

9. The authority citation for part 230 continues to read, in part, as follows:

Authority: 15 U.S.C. 77b, 77f, 77g, 77h, 77j, 77s, 77sss, 78c, 78d, 78*l*, 78m, 78n, 78o, 78w, 78*ll*(d), 79t, 80a–8, 80a–29, 80a–30, and 80a–37, unless otherwise noted.

* * * * *

§ 230.418 [Amended]

10. Section 230.418 is amended by removing the phrase ''*offering at the market*, as defined in Rule 10b–7 under the Securities Exchange Act of 1934 (17 CFR 240.10b–7)'' from paragraph (a)(4) and adding, in its place, the phrase ''*at-the-market offering*, as defined in § 242.100 of this chapter''.

§ 230.461 [Amended]

11. Section 230.461 is amended by removing the phrase ''Rules 10b–2, 10b–6, and 10b–7 under the Securities Exchange Act of 1934 (§§ 240.10b–6 and 10b–7 of this chapter)'' from paragraph (b)(7) and adding, in its place, the phrase ''Regulation M (§§ 242.100 through 242.105 of this chapter)''.

PART 240—GENERAL RULES AND REGULATIONS, SECURITIES EXCHANGE ACT OF 1934

12. The authority citation for part 240 is amended by removing the subauthorities for ''Section 240.10b–6'' and ''Section 240.10b–21'' and the general authority continues to read as follows:

Authority: 15 U.S.C. 77c, 77d, 77g, 77j, 77s, 77eee, 77ggg, 77nnn, 77sss, 77ttt, 78c, 78d, 78f, 78i, 78j, 78k, 78k–1, 78l, 78m, 78n, 78o, 78p, 78q, 78s, 78w, 78x, 78ll(d), 79q, 79t, 80a–20, 80a–23, 80a–29, 80a–37, 80b–3, 80b–4 and 80b–11, unless otherwise noted.

* * * * *

§ 240.10a–1 [Amended]

13. Section 240.10a–1 is amended by removing the cite ''§ 240.10b–7'' from the introductory text of paragraph (e)(5) and paragraphs (e)(6) and (e)(11), and adding, in its place, the phrase ''§ 242.104 of this chapter'' and by removing the phrase ''pursuant to § 240.10–8'' from paragraph (e)(10).

§ 240.10b–6 [Removed and Reserved]

14. Section 240.10b–6 is removed and reserved.

§ 240.10b–6A [Removed]

15. Section 240.10b–6A is removed.

§§ 240.10b–7and 240.10b–8 [Removed and Reserved]

16. Sections 240.10b–7 and 240.10b–8 are removed and reserved.

17. Section 240.10b–18 is amended by redesignating paragraphs (a)(3)(i) through (a)(3)(vi) as paragraphs (a)(3)(ii) through (a)(3)(vii), and by adding paragraph (a)(3)(i) and revising paragraphs (a)(5) and (a)(6) to read as follows:

§ 240.10b–18 Purchases of certain equity securities by the issuer and others.

(a) * * *

(3) * * *

(i) Effected during the restricted period specified in § 242.102 of this chapter during a distribution (as defined in § 242.100 of this chapter) of such common stock, or during a distribution for which such common stock is a reference security, by the issuer or any of its affiliated purchasers;

* * * * *

(5) The term *plan* has the meaning contained in § 242.100 of this chapter;

(6) The term *agent independent of the issuer* has the meaning contained in § 242.100 of this chapter;

* * * * *

§ 240.10b–21 [Removed and Reserved]

17. Section 240.10b–21 is removed and reserved.

§ 240.11a–1 [Amended]

18. Section 240.11a–1 is amended by removing the phrase ''§ 240.10b–7 (Rule 10b–7)'' from paragraph (b)(3) and adding, in its place, the phrase ''§ 242.104 of this chapter''.

§ 240.13e–4 [Amended]

19. Section 240.13e–4 is amended by removing the phrase ''an issuer's plan as that term is defined in Rule 10b–6(c)(4) under the Act [§ 240.10b–6(c)(4)]'' from paragraph (h)(5)(i) and adding, in its place, the phrase ''a plan as that term is defined in § 242.100 of this chapter''.

20. Section 240.13e–102 is amended by revising General Instruction III.C. to Schedule 13E–4F to read as follows:

§ 240.13e–102 Schedule 13E–4F. Tender offer statement pursuant to section 13(e)(1) of the Securities Exchange Act of 1934 and § 240.13e–4 thereunder.

* * * * *

General Instructions

* * * * *

III. Compliance With the Exchange Act

* * * * *

C. The issuer's attention is directed to Regulation M (§§ 242.100 through 242.105 of this chapter), in the case of an issuer exchange offer, and to Rule 10b–13 under the Exchange Act (§ 240.10b–13), in the case of an issuer cash tender offer or issuer exchange offer. [*See* Exchange Act Release No. 29355 (June 21, 1991) containing an exemption from Rule 10b–13.]

* * * * *

21. Section 240.14d–102 is amended by revising General Instruction III.C. to Schedule 14D–1F to read as follows:

§ 240.14d–102 Schedule 14D–1F. Tender offer statement pursuant to Rule 14d–1(b) under the Securities Exchange Act of 1934.

* * * * *

General Instructions

* * * * *

III. Compliance With the Exchange Act

* * * * *

C. The bidder's attention is directed to Regulation M (§§ 242.100 through 242.105 of this chapter) in the case of an exchange offer, and to Rule 10b–13 under the Exchange Act (§ 240.10b–13) for any exchange or cash tender offer. [*See* Exchange Act Release No. 29355 (June 21, 1991) containing an exemption from Rule 10b–13.]

* * * * *

22. Section 240.17a–2 is amended by revising paragraph (a), the introductory text of paragraph (b), paragraph (b)(1), the introductory text of paragraph (c), and paragraphs (c)(1) and (d) to read as follows:

§ 240.17a–2 Recordkeeping requirements relating to stabilizing activities.

(a) *Scope of section.* This section shall apply to any person who effects any purchase of a security subject to § 242.104 of this chapter for the purpose of, or who participates in a syndicate or group that engages in, ''stabilizing,'' as defined in § 242.100 of this chapter, the price of any security; or effects a purchase that is a ''syndicate covering transaction,'' as defined in § 242.100 of this chapter; or imposes a ''penalty bid,'' as defined in § 242.100 of this chapter:

(1) With respect to which a registration statement has been, or is to be, filed pursuant to the Securities Act of 1933 (15 U.S.C. 77a *et seq.*); or

(2) Which is being, or is to be, offered pursuant to an exemption from registration under Regulation A (§§ 230.251 through 230.263 of this chapter) adopted under the Securities Act of 1933 (15 U.S.C. 77a *et seq.*); or

(3) Which is being, or is to be, otherwise offered, if the aggregate offering price of the securities being offered exceeds $5,000,000.

(b) *Definitions.* For purposes of this section, the following definitions shall apply:

(1) The term *manager* shall mean the person stabilizing or effecting syndicate covering transactions or imposing a penalty bid for its sole account or for the account of a syndicate or group in which it is a participant, and who, by contract or otherwise, deals with the issuer, organizes the selling effort, receives some benefit from the underwriting that is not shared by other underwriters, or represents any other underwriters in such matters as maintaining the records of the distribution and arranging for allotments of the securities offered.

* * * * *

(c) *Records relating to stabilizing, syndicate covering transactions, and penalty bids required to be maintained by manager.* Any person subject to this section who acts as a manager and stabilizes or effects syndicate covering transactions or imposes a penalty bid shall:

(1) Promptly record and maintain the following separately retrievable information, for a period of not less than three years, the first two years in an easily accessible place; *Provided, however,* That if the information is in a record required to be made pursuant to § 240.17a–3 or § 240.17a–4, or otherwise preserved, such information need not be maintained in a separate file if the person can sort promptly and retrieve the information as if it had been kept in a separate file as a record made pursuant to, and preserves the information in accordance with the time periods specified in, this paragraph (c)(1):

(i) The name and class of any security stabilized or any security in which syndicate covering transactions have been effected or a penalty bid has been imposed;

(ii) The price, date, and time at which each stabilizing purchase or syndicate covering transaction was effected by the manager or by any participant in the syndicate or group, and whether any penalties were assessed;

(iii) The names and the addresses of the members of the syndicate or group;

(iv) Their respective commitments, or, in the case of a standby or contingent underwriting, the percentage participation of each member of the syndicate or group therein; and

(v) The dates when any penalty bid was in effect.

* * * * *

(d) *Notification to manager.* Any person who has a participation in a syndicate account but who is not a manager of such account, and who effects one or more stabilizing purchases or syndicate covering transactions for its sole account or for the account of a syndicate or group, shall within three business days following such purchase notify the manager of the price, date, and time at which such stabilizing purchase or syndicate covering transaction was effected, and shall in addition notify the manager of the date and time when such stabilizing purchase or syndicate covering transaction was terminated. The manager shall maintain such notifications in a separate file, together with the information required by paragraph (c)(1) of this section, for a period of not less than three years, the first two years in an easily accessible place.

23. Part 242 is added to read as follows:

PART 242—REGULATION M

Sec.

242.100 Preliminary note; definitions.
242.101 Activities by distribution participants.
242.102 Activities by issuers and selling security holders during a distribution.
242.103 Nasdaq passive market making.
242.104 Stabilizing and other activities in connection with an offering.
242.105 Short selling in connection with a public offering.

Authority: 15 U.S.C. 77g, 77q(a), 77s(a), 78b, 78c, 78i(a), 78j, 78k–1(c), 78*l*, 78m, 78n, 78o(c), 78o(g), 78q(a), 78q(h), 78w(a), 78dd–1, 80a–23, 80a–29, and 80a–37.

§ 242.100 Preliminary note; definitions.

(a) *Preliminary note:* Any transaction or series of transactions, whether or not effected pursuant to the provisions of Regulation M (§§ 242.100–242.105 of this chapter), remain subject to the antifraud and antimanipulation provisions of the securities laws, including, without limitation, Section 17(a) of the Securities Act of 1933 [15 U.S.C. 77q(a)] and Sections 9, 10(b), and 15(c) of the Securities Exchange Act of 1934 [15 U.S.C. 78i, 78j(b), and 78o(c)].

(b) For purposes of regulation M (§§ 242.100 through 242.105 of this chapter) the following definitions shall apply:

ADTV means the worldwide average daily trading volume during the two full calendar months immediately preceding, or any 60 consecutive calendar days ending within the 10 calendar days preceding, the filing of the registration statement; or, if there is no registration statement or if the distribution involves the sale of securities on a delayed basis pursuant to § 230.415 of this chapter, two full calendar months immediately preceding, or any consecutive 60 calendar days ending within the 10 calendar days preceding, the determination of the offering price.

Affiliated purchaser means:

(1) A person acting, directly or indirectly, in concert with a distribution participant, issuer, or selling security holder in connection with the acquisition or distribution of any covered security; or

(2) An affiliate, which may be a separately identifiable department or division of a distribution participant, issuer, or selling security holder, that, directly or indirectly, controls the purchases of any covered security by a distribution participant, issuer, or selling security holder, whose purchases are controlled by any such person, or whose purchases are under common control with any such person; or

(3) An affiliate, which may be a separately identifiable department or division of a distribution participant, issuer, or selling security holder, that regularly purchases securities for its own account or for the account of others, or that recommends or exercises investment discretion with respect to the purchase or sale of securities; *Provided, however,* That this paragraph (3) shall not apply to such affiliate if the following conditions are satisfied:

(i) The distribution participant, issuer, or selling security holder:

(A) Maintains and enforces written policies and procedures reasonably designed to prevent the flow of information to or from the affiliate that might result in a violation of §§ 242.101, 242.102, and 242.104; and

(B) Obtains an annual, independent assessment of the operation of such policies and procedures; and

(ii) The affiliate has no officers (or persons performing similar functions) or employees (other than clerical, ministerial, or support personnel) in common with the distribution participant, issuer, or selling security holder that direct, effect, or recommend transactions in securities; and

(iii) The affiliate does not, during the applicable restricted period, act as a market maker (other than as a specialist in compliance with the rules of a national securities exchange), or engage, as a broker or a dealer, in solicited transactions or proprietary trading, in covered securities.

Agent independent of the issuer means a trustee or other person who is independent of the issuer. The agent shall be deemed to be independent of the issuer only if:

(1) The agent is not an affiliate of the issuer; and

(2) Neither the issuer nor any affiliate of the issuer exercises any direct or indirect control or influence over the prices or amounts of the securities to be purchased, the timing of, or the manner in which, the securities are to be purchased, or the selection of a broker or dealer (other than the independent agent itself) through which purchases may be executed; *Provided, however,* That the issuer or its affiliate will not be deemed to have such control or influence solely because it revises not more than once in any three-month period the basis for determining the amount of its contributions to a plan or the basis for determining the frequency of its allocations to a plan, or any formula specified in a plan that determines the amount or timing of securities to be purchased by the agent.

Asset-backed security has the meaning contained in General Instruction I.B.5. to Form S–3 (§ 239.13 of this chapter).

At-the-market offering means an offering of securities at other than a fixed price.

Business day means a 24 hour period beginning at midnight that includes an entire trading session for the security in the principal market for the security to be distributed.

Completion of participation in a distribution. Securities acquired in the distribution for investment by any person participating in a distribution, or any affiliated purchaser of such person, shall be deemed to be distributed. A person shall be deemed to have completed its participation in a distribution as follows:

(1) An issuer or selling security holder, when the distribution is completed;

(2) An underwriter, when such person's participation has been distributed, including all other securities of the same class that are acquired in connection with the distribution, and any stabilization arrangements and trading restrictions in connection with the distribution have been terminated; *Provided, however,* That an underwriter's participation will not be deemed to have been completed if a syndicate overallotment option is exercised in an amount that exceeds the net syndicate short position at the time of such exercise; and

(3) Any other person participating in the distribution, when such person's participation has been distributed.

Covered security means any security that is the subject of a distribution, or any reference security.

Current exchange rate means the current rate of exchange between two currencies, which is obtained from at least one independent entity that provides or disseminates foreign exchange quotations in the ordinary course of its business.

Distribution means an offering of securities, whether or not subject to registration under the Securities Act, that is distinguished from ordinary trading transactions by the magnitude of the offering and the presence of special selling efforts and selling methods.

Distribution participant means an underwriter, prospective underwriter, broker, dealer, or other person who has agreed to participate or is participating in a distribution.

Electronic communications network has the meaning contained in § 240.11Ac1–1(a)(8) of this chapter.

Employee has the meaning contained in Form S–8 (§ 239.16b of this chapter) relating to employee benefit plans.

Exchange Act means the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*).

Independent bid means a bid by a person who is not a distribution participant, issuer, selling security holder, or affiliated purchaser.

NASD means the National Association of Securities Dealers, Inc. or any of its subsidiaries.

Nasdaq means the Nasdaq system as defined in § 240.11Ac1–2(a)(3) of this chapter.

Nasdaq security means a security that is authorized for quotation on Nasdaq, and such authorization is not suspended, terminated, or prohibited.

Net purchases means the amount by which a passive market maker's purchases exceed its sales.

Offering price means the price at which the security is to be or is being distributed.

Passive market maker means a market maker that effects bids or purchases in accordance with the provisions of § 242.103.

Penalty bid means an arrangement that permits the managing underwriter to reclaim a selling concession from a syndicate member in connection with an offering when the securities originally sold by the syndicate member are purchased in syndicate covering transactions.

Plan means any bonus, profit-sharing, pension, retirement, thrift, savings, incentive, stock purchase, stock option, stock ownership, stock appreciation, dividend reinvestment, or similar plan; or any dividend or interest reinvestment plan or employee benefit plan as defined in § 230.405 of this chapter.

Principal market means the single securities market with the largest aggregate reported trading volume for the class of securities during the 12 full calendar months immediately preceding the filing of the registration statement; or, if there is no registration statement or if the distribution involves the sale of securities on a delayed basis pursuant to § 230.415 of this chapter, during the 12 full calendar months immediately preceding the determination of the offering price. For the purpose of determining the aggregate trading volume in a security, the trading volume of depositary shares representing such security shall be included, and shall be multiplied by the multiple or fraction of the security represented by the depositary share. For purposes of this paragraph, depositary share means a security, evidenced by a depositary receipt, that represents another security, or a multiple or fraction thereof, deposited with a depositary.

Prospective underwriter means a person:

(1) Who has submitted a bid to the issuer or selling security holder, and who knows or is reasonably certain that such bid will be accepted, whether or not the terms and conditions of the underwriting have been agreed upon; or

(2) Who has reached, or is reasonably certain to reach, an understanding with the issuer or selling security holder, or managing underwriter that such person will become an underwriter, whether or not the terms and conditions of the underwriting have been agreed upon.

Public float value shall be determined in the manner set forth on the front page of Form 10–K (§ 249.310 of this chapter), even if the issuer of such securities is not required to file Form 10–K, relating to the aggregate market value of common equity securities held by non-affiliates of the issuer.

Reference period means the two full calendar months immediately preceding the filing of the registration statement or, if there is no registration statement or if the distribution involves the sale of securities on a delayed basis pursuant to § 230.415 of this chapter, the two full calendar months immediately preceding the determination of the offering price.

Reference security means a security into which a security that is the subject of a distribution (''subject security'') may be converted, exchanged, or exercised or which, under the terms of the subject security, may in whole or in significant part determine the value of the subject security.

Restricted period means:

(1) For any security with an ADTV value of $100,000 or more of an issuer whose common equity securities have a public float value of $25 million or more, the period beginning on the later of one business day prior to the determination of the offering price or such time that a person becomes a distribution participant, and ending upon such person's completion of participation in the distribution; and

(2) For all other securities, the period beginning on the later of five business days prior to the determination of the offering price or such time that a person becomes a distribution participant, and ending upon such person's completion of participation in the distribution.

(3) In the case of a distribution involving a merger, acquisition, or exchange offer, the period beginning on the day proxy solicitation or offering materials are first disseminated to security holders, and ending upon the completion of the distribution.

Securities Act means the Securities Act of 1933 (15 U.S.C. 77a *et seq.*).

Selling security holder means any person on whose behalf a distribution is made, other than an issuer.

Stabilize or stabilizing means the placing of any bid, or the effecting of any purchase, for the purpose of pegging, fixing, or maintaining the price of a security.

Syndicate covering transaction means the placing of any bid or the effecting of any purchase on behalf of the sole distributor or the underwriting syndicate or group to reduce a short position created in connection with the offering.

30% ADTV limitation means 30 percent of the market maker's ADTV in a covered security during the reference period, as obtained from the NASD.

Underwriter means a person who has agreed with an issuer or selling security holder:

(1) To purchase securities for distribution; or

(2) To distribute securities for or on behalf of such issuer or selling security holder; or

(3) To manage or supervise a distribution of securities for or on behalf of such issuer or selling security holder.

§ 242.101 Activities by distribution participants.

(a) *Unlawful Activity.* In connection with a distribution of securities, it shall be unlawful for a distribution participant or an affiliated purchaser of such person, directly or indirectly, to bid for, purchase, or attempt to induce any person to bid for or purchase, a covered security during the applicable restricted period; *Provided, however,* That if a distribution participant or affiliated purchaser is the issuer or selling security holder of the securities subject to the distribution, such person shall be subject to the provisions of § 242.102, rather than this section.

(b) Excepted Activity. The following activities shall not be prohibited by paragraph (a) of this section:

(1) *Research.* The publication or dissemination of any information, opinion, or recommendation, if the conditions of §§ 230.138 or 230.139 of this chapter are met; or

(2) *Transactions complying with certain other sections.* Transactions complying with §§ 242.103 or 242.104; or

(3) *Odd-lot transactions.* Transactions in odd-lots; or transactions to offset odd-lots in connection with an odd-lot tender offer conducted pursuant to § 240.13e–4(h)(5) of this chapter; or

(4) *Exercises of securities.* The exercise of any option, warrant, right, or any conversion privilege set forth in the instrument governing a security; or

(5) *Unsolicited transactions.* Unsolicited brokerage transactions; or unsolicited purchases that are not effected from or through a broker or dealer, on a securities exchange, or through an inter-dealer quotation system or electronic communications network; or

(6) *Basket transactions.* (i) Bids or purchases, in the ordinary course of business, in connection with a basket of 20 or more securities in which a covered security does not comprise more than 5% of the value of the basket purchased; or

(ii) Adjustments to such a basket in the ordinary course of business as a result of a change in the composition of a standardized index; or

(7) *De minimis transactions.* Purchases during the restricted period, other than by a passive market maker, that total less than 2% of the ADTV of the security being purchased, or unaccepted bids; *Provided, however,* That the person making such bid or purchase has maintained and enforces written policies and procedures reasonably designed to achieve compliance with the other provisions of this section; or

(8) *Transactions in connection with a distribution.* Transactions among distribution participants in connection with a distribution, and purchases of securities from an issuer or selling security holder in connection with a distribution, that are not effected on a securities exchange, or through an inter-dealer quotation system or electronic communications network; or

(9) *Offers to sell or the solicitation of offers to buy.* Offers to sell or the solicitation of offers to buy the securities being distributed (including securities acquired in stabilizing), or securities offered as principal by the person making such offer or solicitation; or

(10) *Transactions in Rule 144A securities.* Transactions in securities eligible for resale under § 230.144A(d)(3) of this chapter, or any reference security, if the Rule 144A securities are offered or sold in the United States solely to:

(i) Qualified institutional buyers, as defined in § 230.144A(a)(1) of this chapter, or to offerees or purchasers that the seller and any person acting on behalf of the seller reasonably believes are qualified institutional buyers, in transactions exempt from registration under section 4(2) of the Securities Act (15 U.S.C. 77d(2)) or §§ 230.144A or 230.501 through 230.508 of this chapter; or

(ii) Persons not deemed to be ''U.S. persons'' for purposes of §§ 230.902(o)(2) or 230.902(o)(7) of this chapter, during a distribution qualifying under paragraph (b)(10)(i) of this section.

(c) *Excepted Securities.* The provisions of this section shall not apply to any of the following securities:

(1) *Actively-traded securities.* Securities that have an ADTV value of at least $1 million and are issued by an issuer whose common equity securities have a public float value of at least $150 million; *Provided, however,* That such securities are not issued by the distribution participant or an affiliate of the distribution participant; or

(2) *Investment grade nonconvertible and asset-backed securities.* Nonconvertible debt securities, nonconvertible preferred securities, and asset-backed securities, that are rated by at least one nationally recognized statistical rating organization, as that term is used in § 240.15c3–1 of this chapter, in one of its generic rating categories that signifies investment grade; or

(3) *Exempted securities.* ''Exempted securities'' as defined in section 3(a)(12) of the Exchange Act (15 U.S.C. 78c(a)(12)); or

(4) *Face-amount certificates or securities issued by an open-end management investment company or unit investment trust.* Face-amount certificates issued by a face-amount certificate company, or redeemable securities issued by an open-end management investment company or a unit investment trust. Any terms used in this paragraph (c)(4) that are defined in the Investment Company Act of 1940 (15 U.S.C. 80a–1 *et seq.*) shall have the meanings specified in such Act.

(d) *Exemptive Authority.* Upon written application or upon its own motion, the Commission may grant an exemption from the provisions of this section, either unconditionally or on specified terms and conditions, to any transaction or class of transactions, or to any security or class of securities.

§ 242.102 Activities by issuers and selling security holders during a distribution.

(a) *Unlawful Activity.* In connection with a distribution of securities effected by or on behalf of an issuer or selling security holder, it shall be unlawful for such person, or any affiliated purchaser of such person, directly or indirectly, to bid for, purchase, or attempt to induce any person to bid for or purchase, a covered security during the applicable restricted period; *Except That* if an affiliated purchaser is a distribution participant, such affiliated purchaser may comply with § 242.101, rather than this section.

(b) *Excepted Activity.* The following activities shall not be prohibited by paragraph (a) of this section:

(1) *Odd-lot transactions.* Transactions in odd-lots, or transactions to offset odd-lots in connection with an odd-lot tender offer conducted pursuant to § 240.13e–4(h)(5) of this chapter; or

(2) *Transactions by closed-end investment companies.* (i) Transactions complying with § 270.23c–3 of this chapter; or

(ii) Periodic tender offers of securities, at net asset value, conducted pursuant to § 240.13e–4 of this chapter by a closed-end investment company that engages in a continuous offering of its securities pursuant to § 230.415 of this chapter; *Provided, however,* That such securities are not traded on a securities exchange or through an inter-dealer quotation system or electronic communications network; or

(3) *Redemptions by commodity pools or limited partnerships.* Redemptions by commodity pools or limited partnerships, at a price based on net asset value, which are effected in accordance with the terms and conditions of the instruments governing the securities; *Provided, however,* That such securities are not traded on a securities exchange, or through an inter-dealer quotation system or electronic communications network; or

(4) *Exercises of securities.* The exercise of any option, warrant, right, or any conversion privilege set forth in the instrument governing a security; or

(5) *Offers to sell or the solicitation of offers to buy.* Offers to sell or the solicitation of offers to buy the securities being distributed; or

(6) *Unsolicited purchases.* Unsolicited purchases that are not effected from or through a broker or dealer, on a securities exchange, or through an inter-dealer quotation system or electronic communications network; or

(7) *Transactions in Rule 144A securities.* Transactions in securities eligible for resale under § 230.144A(d)(3) of this chapter, or any reference security, if the Rule 144A securities are offered or sold in the United States solely to:

(i) Qualified institutional buyers, as defined in § 230.144A(a)(1) of this chapter, or to offerees or purchasers that the seller and any person acting on behalf of the seller reasonably believes are qualified institutional buyers, in transactions exempt from registration under section 4(2) of the Securities Act (15 U.S.C. 77d(2)) or §§ 230.144A or 230.501 through 230.508 of this chapter; or

(ii) Persons not deemed to be ''U.S. persons'' for purposes of §§ 230.902(o)(2) or 230.902(o)(7) of this chapter, during a distribution qualifying under paragraph (b)(6)(i) of this section.

(c) *Plans.*—(1) Paragraph (a) of this section shall not apply to distributions of securities pursuant to a plan, which are made:

(i) Solely to employees or security holders of an issuer or its subsidiaries, or to a trustee or other person acquiring such securities for the accounts of such persons; or

(ii) To persons other than employees or security holders, if bids for or purchases of securities pursuant to the plan are effected solely by an agent independent of the issuer and the securities are from a source other than

the issuer or an affiliated purchaser of the issuer.

(2) Bids for or purchases of any security made or effected by or for a plan shall be deemed to be a purchase by the issuer unless the bid is made, or the purchase is effected, by an agent independent of the issuer.

(d) *Excepted Securities.* The provisions of this section shall not apply to any of the following securities:

(1) *Actively-traded reference securities.* Reference securities with an ADTV value of at least $1 million that are issued by an issuer whose common equity securities have a public float value of at least $150 million; *Provided, however,* That such securities are not issued by the issuer, or any affiliate of the issuer, of the security in distribution.

(2) *Investment grade nonconvertible and asset-backed securities.* Nonconvertible debt securities, nonconvertible preferred securities, and asset-backed securities, that are rated by at least one nationally recognized statistical rating organization, as that term is used in § 240.15c3–1 of this chapter, in one of its generic rating categories that signifies investment grade; or

(3) *Exempted securities.* ''Exempted securities'' as defined in section 3(a)(12) of the Exchange Act (15 U.S.C. 78c(a)(12)); or

(4) *Face-amount certificates or securities issued by an open-end management investment company or unit investment trust.* Face-amount certificates issued by a face-amount certificate company, or redeemable securities issued by an open-end management investment company or a unit investment trust. Any terms used in this paragraph (d)(4) that are defined in the Investment Company Act of 1940 (15 U.S.C. 80a–1 *et seq.*) shall have the meanings specified in such Act.

(e) *Exemptive Authority.* Upon written application or upon its own motion, the Commission may grant an exemption from the provisions of this section, either unconditionally or on specified terms and conditions, to any transaction or class of transactions, or to any security or class of securities.

§ 242.103 Nasdaq passive market making.

(a) *Scope of Section.* This section permits broker-dealers to engage in market making transactions in covered securities that are Nasdaq securities without violating the provisions of § 242.101; *Except That* this section shall not apply to any security for which a stabilizing bid subject to § 242.104 is in effect, or during any at-the-market offering or best efforts offering.

(b) *Conditions to be Met.*

(1) *General limitations.* A passive market maker must effect all transactions in the capacity of a registered market maker on Nasdaq. A passive market maker shall not bid for or purchase a covered security at a price that exceeds the highest independent bid for the covered security at the time of the transaction, except as permitted by paragraph (b)(3) of this section or required by a rule promulgated by the Commission or the NASD governing the handling of customer orders.

(2) *Purchase limitation.* On each day of the restricted period, a passive market maker's net purchases shall not exceed the greater of its 30% ADTV limitation or 200 shares (together, ''purchase limitation''); *Provided, however,* That a passive market maker may purchase all of the securities that are part of a single order that, when executed, results in its purchase limitation being equalled or exceeded. If a passive market maker's net purchases equal or exceed its purchase limitation, it shall withdraw promptly its quotations from Nasdaq. If a passive market maker withdraws its quotations pursuant to this paragraph, it may not effect any bid or purchase in the covered security for the remainder of that day, irrespective of any later sales during that day, unless otherwise permitted by § 242.101.

(3) *Requirement to lower the bid.* If all independent bids for a covered security are reduced to a price below the passive market maker's bid, the passive market maker must lower its bid promptly to a level not higher than the then highest independent bid; *Provided, however,* That a passive market maker may continue to bid and effect purchases at its bid at a price exceeding the then highest independent bid until the passive market maker purchases an aggregate amount of the covered security that equals or, through the purchase of all securities that are part of a single order, exceeds the lesser of two times the minimum quotation size for the security, as determined by NASD rules, or the passive market maker's remaining purchasing capacity under paragraph (b)(2) of this section.

(4) *Limitation on displayed size.* At all times, the passive market maker's displayed bid size may not exceed the lesser of the minimum quotation size for the covered security, or the passive market maker's remaining purchasing capacity under paragraph (b)(2) of this section; *Provided, however,* That a passive market maker whose purchasing capacity at any time is between one and 99 shares may display a bid size of 100 shares.

(5) *Identification of a passive market making bid.* The bid displayed by a passive market maker shall be designated as such.

(6) *Notification and reporting to the NASD.* A passive market maker shall notify the NASD in advance of its intention to engage in passive market making, and shall submit to the NASD information regarding passive market making purchases, in such form as the NASD shall prescribe.

(7) *Prospectus disclosure.* The prospectus for any registered offering in which any passive market maker intends to effect transactions in any covered security shall contain the information required in §§ 228.502, 228.508, 229.502, and 229.508 of this chapter.

(c) *Transactions at Prices Resulting from Unlawful Activity.* No transaction shall be made at a price that the passive market maker knows or has reason to know is the result of activity that is fraudulent, manipulative, or deceptive under the securities laws, or any rule or regulation thereunder.

§ 242.104 Stabilizing and other activities in connection with an offering.

(a) *Unlawful Activity.* It shall be unlawful for any person, directly or indirectly, to stabilize, to effect any syndicate covering transaction, or to impose a penalty bid, in connection with an offering of any security, in contravention of the provisions of this section. No stabilizing shall be effected at a price that the person stabilizing knows or has reason to know is in contravention of this section, or is the result of activity that is fraudulent, manipulative, or deceptive under the securities laws, or any rule or regulation thereunder.

(b) *Purpose.* Stabilizing is prohibited except for the purpose of preventing or retarding a decline in the market price of a security.

(c) *Priority.* To the extent permitted or required by the market where stabilizing occurs, any person stabilizing shall grant priority to any independent bid at the same price irrespective of the size of such independent bid at the time that it is entered.

(d) *Control of Stabilizing.* No sole distributor or syndicate or group stabilizing the price of a security or any member or members of such syndicate or group shall maintain more than one stabilizing bid in any one market at the same price at the same time.

(e) *At-the-Market Offerings.* Stabilizing is prohibited in an at-the-market offering.

(f) *Stabilizing Levels.—(1) Maximum stabilizing bid.* Notwithstanding the

other provisions of this paragraph (f), no stabilizing shall be made at a price higher than the lower of the offering price or the stabilizing bid for the security in the principal market (or, if the principal market is closed, the stabilizing bid in the principal market at its previous close).

(2) *Initiating stabilizing.*—

(i) *Initiating stabilizing when the principal market is open.* After the opening of quotations for the security in the principal market, stabilizing may be initiated in any market at a price no higher than the last independent transaction price for the security in the principal market if the security has traded in the principal market on the day stabilizing is initiated or on the preceding business day and the current asked price in the principal market is equal to or greater than the last independent transaction price. If both conditions of the preceding sentence are not satisfied, stabilizing may be initiated in any market after the opening of quotations in the principal market at a price no higher than the highest current independent bid for the security in the principal market.

(ii) *Initiating stabilizing when the principal market is closed.*

(A) When the principal market for the security is closed, but immediately before the opening of quotations for the security in the market where stabilizing will be initiated, stabilizing may be initiated at a price no higher than the lower of:

(*1*) The price at which stabilizing could have been initiated in the principal market for the security at its previous close; or

(*2*) The most recent price at which an independent transaction in the security has been effected in any market since the close of the principal market, if the person stabilizing knows or has reason to know of such transaction.

(B) When the principal market for the security is closed, but after the opening of quotations in the market where stabilizing will be initiated, stabilizing may be initiated at a price no higher than the lower of:

(*1*) The price at which stabilization could have been initiated in the principal market for the security at its previous close; or

(*2*) The last independent transaction price for the security in that market if the security has traded in that market on the day stabilizing is initiated or on the last preceding business day and the current asked price in that market is equal to or greater than the last independent transaction price. If both conditions of the preceding sentence are not satisfied, under this paragraph (f)(2)(ii)(B)(*2*), stabilizing may be initiated at a price no higher than the highest current independent bid for the security in that market.

(iii) *Initiating stabilizing when there is no market for the security or before the offering price is determined.* If no *bona fide* market for the security being distributed exists at the time stabilizing is initiated, no stabilizing shall be initiated at a price in excess of the offering price. If stabilizing is initiated before the offering price is determined, then stabilizing may be continued after determination of the offering price at the price at which stabilizing then could be initiated.

(3) *Maintaining or carrying over a stabilizing bid.* A stabilizing bid initiated pursuant to paragraph (f)(2) of this section, which has not been discontinued, may be maintained, or carried over into another market, irrespective of changes in the independent bids or transaction prices for the security.

(4) *Increasing or reducing a stabilizing bid.* A stabilizing bid may be increased to a price no higher than the highest current independent bid for the security in the principal market if the principal market is open, or, if the principal market is closed, to a price no higher than the highest independent bid in the principal market at the previous close thereof. A stabilizing bid may be reduced, or carried over into another market at a reduced price, irrespective of changes in the independent bids or transaction prices for the security. If stabilizing is discontinued, it shall not be resumed at a price higher than the price at which stabilizing then could be initiated.

(5) *Initiating, maintaining, or adjusting a stabilizing bid to reflect the current exchange rate.* If a stabilizing bid is expressed in a currency other than the currency of the principal market for the security, such bid may be initiated, maintained, or adjusted to reflect the current exchange rate, consistent with the provisions of this section. If, in initiating, maintaining, or adjusting a stabilizing bid pursuant to this paragraph (f)(5), the bid would be at or below the midpoint between two trading differentials, such stabilizing bid shall be adjusted downward to the lower differential.

(6) *Adjustments to stabilizing bid.* If a security goes ex-dividend, ex-rights, or ex-distribution, the stabilizing bid shall be reduced by an amount equal to the value of the dividend, right, or distribution. If, in reducing a stabilizing bid pursuant to this paragraph (f)(6), the bid would be at or below the midpoint between two trading differentials, such stabilizing bid shall be adjusted downward to the lower differential.

(7) *Stabilizing of components.* When two or more securities are being offered as a unit, the component securities shall not be stabilized at prices the sum of which exceeds the then permissible stabilizing price for the unit.

(8) *Special prices.* Any stabilizing price that otherwise meets the requirements of this section need not be adjusted to reflect special prices available to any group or class of persons (including employees or holders of warrants or rights).

(g) Offerings with no U.S. Stabilizing Activities—

(1) Stabilizing to facilitate an offering of a security in the United States shall not be deemed to be in violation of this section if all of the following conditions are satisfied:

(i) No stabilizing is made in the United States;

(ii) Stabilizing outside the United States is made in a jurisdiction with statutory or regulatory provisions governing stabilizing that are comparable to the provisions of this section; and

(iii) No stabilizing is made at a price above the offering price in the United States, except as permitted by paragraph (f)(5) of this section.

(2) For purposes of this paragraph (g), the Commission by rule, regulation, or order may determine whether a foreign statute or regulation is comparable to this section considering, among other things, whether such foreign statute or regulation: specifies appropriate purposes for which stabilizing is permitted; provides for disclosure and control of stabilizing activities; places limitations on stabilizing levels; requires appropriate recordkeeping; provides other protections comparable to the provisions of this section; and whether procedures exist to enable the Commission to obtain information concerning any foreign stabilizing transactions.

(h) Disclosure and Notification—(1) Any person displaying or transmitting a bid that such person knows is for the purpose of stabilizing shall provide prior notice to the market on which such stabilizing will be effected, and shall disclose its purpose to the person with whom the bid is entered.

(2) Any person effecting a syndicate covering transaction or imposing a penalty bid shall provide prior notice to the self-regulatory organization with direct authority over the principal market in the United States for the security for which the syndicate covering transaction is effected or the penalty bid is imposed.

(3) Any person subject to this section who sells to, or purchases for the account of, any person any security where the price of such security may be or has been stabilized, shall send to the purchaser at or before the completion of the transaction, a prospectus, offering circular, confirmation, or other document containing a statement similar to that comprising the statement provided for in Item 502(d) of Regulation S–B (§ 228.502(d) of this chapter) or Item 502(d) of Regulation S–K (§ 229.502(d) of this chapter).

(i) *Recordkeeping Requirements.* A person subject to this section shall keep the information and make the notification required by § 240.17a–2 of this chapter.

(j) *Excepted Securities.* The provisions of this section shall not apply to:

(1) *Exempted Securities.* ''Exempted securities,'' as defined in section 3(a)(12) of the Exchange Act (15 U.S.C. 78c(a)(12)); or

(2) *Transactions of Rule 144A securities.* Transactions in securities eligible for resale under § 230.144A(d)(3) of this chapter, if such securities are offered or sold in the United States solely to:

(i) Qualified institutional buyers, as defined in § 230.144A(a)(1) of this chapter, or to offerees or purchasers that the seller and any person acting on behalf of the seller reasonably believes are qualified institutional buyers, in a transaction exempt from registration under section 4(2) of the Securities Act (15 U.S.C. 77d(2)) or §§ 230.144A or 230.501 through 230.508 of this chapter; or

(ii) Persons not deemed to be ''U.S. persons'' for purposes of §§ 230.902(o)(2) or 230.902(o)(7) of this chapter, during a distribution qualifying under paragraph (j)(1) of this section.

(k) *Exemptive Authority.* Upon written application or upon its own motion, the Commission may grant an exemption from the provisions of this section, either unconditionally or on specified terms and conditions, to any transaction or class of transactions, or to any security or class of securities.

§ 242.105 Short selling in connection with a public offering.

(a) *Unlawful Activity.* In connection with an offering of securities for cash pursuant to a registration statement or a notification on Form 1–A (§ 239.90 of this chapter) filed under the Securities Act, it shall be unlawful for any person to cover a short sale with offered securities purchased from an underwriter or broker or dealer participating in the offering, if such short sale occurred during the shorter of:

(1) The period beginning five business days before the pricing of the offered securities and ending with such pricing; or

(2) The period beginning with the initial filing of such registration statement or notification on Form 1–A and ending with the pricing.

(b) *Excepted Offerings.* This section shall not apply to offerings filed under § 230.415 of this chapter or to offerings that are not conducted on a firm commitment basis.

(c) *Exemptive Authority.* Upon written application or upon its own motion, the Commission may grant an exemption from the provisions of this section, either unconditionally or on specified terms and conditions, to any transaction or class of transactions, or to any security or class of securities. By the Commission.

Jonathan G. Katz,

Secretary.

Dated: December 20, 1996

By: Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 97–1 Filed 1–2–97; 8:45 am]

BILLING CODE 8010–01–P

federal register

Friday
January 3, 1997

Part IV

Department of Health and Human Services

Food and Drug Administration

21 CFR Part 589

Substances Prohibited From Use in Animal Food or Feed; Animal Proteins Prohibited in Ruminant Feed; Proposed Rule

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 589

[Docket No. 96N–0135]

RIN 0910–AA91

Substances Prohibited From Use in Animal Food or Feed; Animal Proteins Prohibited in Ruminant Feed

AGENCY: Food and Drug Administration, HHS.

ACTION: Proposed rule.

SUMMARY: The Food and Drug Administration (FDA) is proposing to amend the regulations to provide that animal protein derived from ruminant and mink tissues is not generally recognized as safe (GRAS) for use in ruminant feed, and is a food additive subject to certain provisions of the Federal Food, Drug, and Cosmetic Act (the act). The proposed regulations would establish a flexible system of controls, designed to ensure that ruminant feed does not contain animal protein derived from ruminant and mink tissues in a manner that encourages innovation. FDA is also considering alternatives to this proposed ruminant-to-ruminant prohibition, and is requesting comment on the relative merits and disadvantages of the alternatives. FDA is proposing this action because the feeding to ruminants of protein derived from potentially transmissible spongiform encephalopathy (TSE)-infective tissues may cause TSE in animals. TSE's are progressively degenerative central nervous system (CNS) diseases of man and animal that are fatal. Epidemiologic evidence gathered in the United Kingdom (U.K.) suggests an association between an outbreak of a ruminant TSE, specifically bovine spongiform encephalopathy (BSE) and the feeding to cattle of protein derived from sheep infected with scrapie, another TSE. Also, scientists have postulated that there is an epidemiologic association between BSE and a form of human TSE, new variant Creutzfeldt-Jakob disease (nv-CJD) reported recently in England. BSE has not been diagnosed in the United States. However, this proposed rule is intended to prevent the establishment and amplification of BSE in cattle in the United States, and thereby minimize any risk which might be faced by animals and humans.

DATES: Written comments by February 18, 1997. FDA proposes that any final rule that may issue based on this proposal become effective 60 days after the date of its publication in the Federal Register.

Submit written comments on the collection of information requirements by February 18, 1997.

ADDRESSES: Submit written comments to the Dockets Management Branch (HFA–305), Food and Drug Administration, 12420 Parklawn Dr., rm. 1–23, Rockville, MD 20857. Submit written comments on the information collection requirements to the Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), New Executive Office Bldg., 725 17th St. NW., rm. 10235, Washington, DC 20503, ATTN: Desk Officer for FDA.

FOR FURTHER INFORMATION CONTACT:

Regarding Scientific and Industry Issues:

George A. (Bert) Mitchell, Center for Veterinary Medicine (HFV–1), Food and Drug Administration, 7500 Standish Pl., Rockville, MD 20855, 301–594–1761.

Regarding Procedural and Regulatory Issues:

Richard E. Geyer, Center for Veterinary Medicine (HFV–201), Food and Drug Administration, 7500 Standish Pl., Rockville, MD 20855, 301–594–1761.

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I. Summary

A. Introduction

In the Federal Register of May 14, 1996 (61 FR 24253), FDA published an advance notice of proposed rulemaking (ANPRM) that solicited information and public comment on the issue of using protein derived from ruminants (cattle, sheep, goats, deer, and elk) in ruminant feed. The agency requested information and comment on a number of issues because it was assessing whether to prohibit the use of ruminant protein in ruminant feed. BSE has not been identified in the United States. The agency issued an ANPRM because of its concern about the possible adverse effect on animal and human health if TSE's were to be spread through animal feed. After reviewing the ANPRM comments and other sources of information, the agency is proposing to prohibit the use of ruminant and mink animal tissue in the feed of ruminants. Because TSE has been found in U.S. mink, the agency is also including mink tissue in the proposed prohibition. The agency is also considering alternatives to the proposed ruminant-to-ruminant prohibition, including the alternative of taking no action.

B. GRAS Status of Ruminant and Mink Tissues

The agency is proposing to declare that protein derived from tissue from ruminant animals and mink is not GRAS, by qualified experts, for use in ruminant feed and is therefore a ''food additive'' under the law. As a result, because neither a food additive regulation nor an exemption is in effect for ruminant and mink tissues intended for feeding to ruminants, such tissues would be deemed adulterated. Milk and gelatin proteins derived from ruminants, and blood from cattle are exempt from the proposed prohibition. The proposed rule does not apply to any nonprotein animal tissues such as tallow or other fats.

Expert opinion that the tissues are GRAS would need to be supported by scientific literature, and other sources of data and information, establishing that there is a reasonable certainty that the material is not harmful under the intended conditions of use. Expert opinion would need to address topics such as whether it is reasonably certain that BSE does not, or will not, occur in the United States; whether it is reasonably certain that the BSE agent will not be transmitted through animal feed, i.e., that the processed tissues are not infected by the agent, are deactivated by the rendering process or are not transmitted orally; and whether it is reasonably certain that the agent will not be transmitted to humans through consumption of ruminant products. ''General recognition'' cannot be based on an absence of studies that demonstrate that a substance is unsafe; there must be studies to establish that the substance is safe. Also, the burden of establishing that substance is GRAS is on the proponent of the substance. *See U.S.* v. *An Article of Food * * * Co Co Rico,* 752 F.2d 11 (1st Cir. 1985).

Although the ANPRM did not specifically ask for opinion on the GRAS issue, a number of comments from scientific organizations and individual scientists strongly suggest that the comments would support the view that ruminant and mink tissue is not GRAS when fed to ruminants. Some of these comments submitted data and information that would support such opinions. Only a few comments included statements by scientists, or scientific organizations, to the contrary. Similarly, the opinions stated by scientists who spoke during a 1996 symposium on TSE's would, in general, support the ''nonGRAS'' position. The symposium, ''Tissue Distribution, Inactivation and Transmission of Transmissible Spongiform Encephalopathies,'' was cosponsored by FDA and USDA, and was held in Riverdale, MD, on May 13 and 14, 1996.

FDA has searched for but has not found sufficient literature or other sources of data and information that would, on balance, support expert opinion that ruminant and mink protein is GRAS as a ruminant feed additive. Previous comments on the agency's proposal to prohibit the feeding of specified sheep and goat offal (59 FR 44584, August 29, 1994) did not include either written GRAS opinions from qualified experts, or data and information that would support such opinions. The relevant data and information, and lack thereof, are discussed more fully in this section, and in section II. of this document. See Section III.A., of this document, for a further explanation of ''GRAS'' and ''food additive.''

C. The ''No Action'' Alternative

Even when, as in this case, FDA has taken steps leading to a tentative determination that a substance added to food is not GRAS, the agency is not required to issue a proposal declaring that the substance is not GRAS and is a food additive subject to section 409 of the act. Section 570.38 provides that the agency may take such an action. The agency considered the possibility of not issuing a proposal with regard to the feeding of ruminant and mink tissues to ruminants.

The fact that the data and information do not document an immediate threat to the U.S. public health supports this ''no action'' alternative. Moreover, certain of the available data and information can be used to support the view that the threat, if any, is minimal.

The evidence suggesting that there is no immediate threat is summarized as follows. First, BSE has not been detected in cattle in the United States despite an extensive surveillance effort that has been in place for several years. Restrictions on the importation of cattle, cattle products and feed ingredients from BSE-affected countries are in place to minimize the possibility of BSE entering into the United States. Surveillance, training of veterinary practitioners and diagnosticians, and other efforts are in place to detect any occurrence of BSE quickly, and to minimize its spread among the cattle population. No empirical scientific evidence is available to establish that BSE will occur from any of the possible sources, such as transmission from another U.S. species in which TSE's have been diagnosed; spontaneous occurrence in cattle; or importation of live animals or animal feed products carrying the BSE agent. For example, transmission between any two species is difficult to predict, based on available data, because of variability in species barriers (Ref. 1).

Second, even if BSE did develop in the United States there is no conclusive scientific evidence that the disease would be spread through animal feed, the product that provides FDA's jurisdictional nexis. Although there is strong epidemiological evidence that the feeding of processed tissue from sheep containing scrapie to cattle caused the widespread BSE infections in the United Kingdom, many experts believe that the chances that the United States will have a BSE outbreak, similar to the epidemic that took place in the United Kingdom, are low. For example, most of the industry practices and other conditions believed to have been associated with the BSE epidemic in the United Kingdom do not exist in the United States. Further, the U.K. epidemiological evidence of transfer from sheep to cattle has not been confirmed by direct scientific data. This has caused some to question the assumption that the BSE originated from scrapie (Ref. 1). Further, some

experimental information suggests that the TSE's in general are not readily transferred by the oral route. Experimentally, the oral route has been suggested to be the least efficient means of transmission for TSE's (Ref. 1).

Third, the postulated connection between BSE and CJD has not been definitively established. Scientists have theorized an association between BSE and the recent appearance of nv–CJD in the United Kingdom. While the epidemiological association, both in time and geography, of these two diseases in the United Kingdom provides suggestive evidence of an association between the two, the available evidence does not establish causation. Although the BSE agent has been transmitted to laboratory animals, the species barrier between cattle and humans may be higher than between cattle and mice (Ref. 1). Epidemiological evidence linking BSE with classical CJD is even less supportive. Although CJD occurs in the United States, nv–CJD has not been reported in this country.

The FDA's conclusion that there is no immediate threat to the public health in the United States is supported by a statement from the World Health Organization (WHO) that the ''risk, if any, of exposure to the BSE agent in countries other than the U.K. is considered lower than in the U.K.'' (Ref. 2). A number of comments to the ANPRM made a similar assertion, urging that FDA's regulatory decision be made on the basis of scientific information and contending that the available information did not support the contemplated action.

D. The Basis for the Agency's Proposed Action

1. General Discussion

Even though there is no immediate threat to the U.S. public health and some information that indicates that a threat, if any, is minimal, after careful consideration the agency has tentatively concluded that regulatory action is necessary to protect animal and human health. The agency has reached that tentative conclusion because there is a growing body of data and information that affirmatively raises public health concerns.

The data and information raise concern that BSE could occur in cattle in the United States; and that if BSE does appear in this country, the causative agent could be transmitted and amplified through the feeding of processed ruminant protein to cattle, and could result in an epidemic. The agency believes that the high cost, in animal and human lives and economics, that could result if this scenario should occur, justifies the preventive measure reflected by the proposed regulation. Although the agency expects some continued voluntary reduction in the feeding of ruminant and mink tissues to ruminants, the reduction is not expected to be extensive enough to obviate the need for mandatory preventive measures.

Statements from several prominent public and animal health organizations support this proposal to regulate the feeding of ruminant tissues to ruminant animals. For example, the Centers for Disease Control and Prevention (CDC) has urged the agency to adopt a ruminant-to-ruminant feed prohibition (Ref. 3), and USDA has recommended the same action. Although WHO considers the risk in countries such as the United States to be minimal, that organization has nevertheless called on all countries to prohibit the use of ruminant tissues in ruminant feed (Ref. 2).

A number of comments to the ANPRM, including comments by several consumer groups, supported regulatory action by FDA. The Pharmaceutical Research and Manufacturers of America urged FDA to take all necessary steps to prevent an outbreak of BSE, and to prevent the potential spread of BSE should a case occur in the United States. One pharmaceutical firm emphasized the importance of acknowledging public perception, stating that a ruminant-to-ruminant prohibition would ''significantly decrease the concern regarding this perceived risk.'' Another pharmaceutical firm characterized the risk as ''small but real.'' A group of livestock producers, veterinary associations and scientific organizations cited the WHO recommendations to support their call for a voluntary ruminant-to-ruminant prohibition. The group stated that such a prohibition would ''eliminate any risk, no matter how remote [and would] totally prevent BSE from ever occurring in the United States.''

The agency is concerned about the public health issues raised but not resolved by the available scientific information. The fact that the causative agent or agents for TSE's have not been clearly identified, and their transmissibility has not been fully characterized, adds to the concern. However, certain information that is well documented supports the agency's decision as well. TSE's are 100-percent fatal diseases that have been diagnosed in humans and a number of animal species. The diseases are progressively degenerative CNS diseases that are characterized by a relatively short clinical course of neurological signs. TSE's have a prolonged incubation period, i.e., 2 to 8 years in animals, and scientific evidence supports the view that TSE's can be transmitted in the preclinical stage. There is no practical method to detect the presence of TSE's during the preclinical stage.

2. Analysis of Risk Factors

This section describes the evidence that supports the agency's tentative conclusion. The evidence relates to the risks that BSE could occur in cattle in the United States; that the BSE agent or other TSE agents could be amplified in the cattle population by the feeding of ruminant and mink tissues to cattle; and that the agent could potentially be transmitted to humans.

a. *The risk of BSE occurring in the United States.* BSE has not been diagnosed in the United States. FDA does not have evidence to support the theory that BSE already exists, undiagnosed, in this country. However, the agency does find plausible the arguments of the theory that BSE could develop in the United States from three possible sources: Transmission of TSE's from other susceptible species, spontaneous occurrence, and importation in live animals or animal products.

The evidence concerning transmission from other species is summarized as follows. TSE's other than BSE have been diagnosed in animals in the United States. These include scrapie in sheep and goats, transmissible mink encephalopathy (TME), and chronic wasting disease (CWD) in deer and elk. Feline spongiform encephalopathy (FSE) has been diagnosed in cats in other countries. In general, the TSE's have been shown to be naturally transmissible within species and are believed by some scientists to be naturally transmissible (as distinguished from experimentally transmissible), at least to a limited extent, between species. Consumption of meat and bone meal (the predominant animal tissue-containing product fed to animals) which was produced under conditions similar to the meat and bone meal which was implicated in the U.K. BSE epidemic, as well as the feeding of raw bovine tissue, also appeared to cause TSE in exotic cats and various zoo animals. This implies that the species barrier for BSE may be uncharacteristically low. (See e.g., Refs. 3 and 4). In addition to the epidemiological evidence relating to TSE transmission from sheep to cattle in the United Kingdom, there is limited experimental evidence of transmission

of the BSE agent from cattle to sheep. Many laboratory animal species have also been experimentally infected following the administration of tissues from animals with TSE disease.

There is some evidence to support the theory that BSE can occur spontaneously in cattle. The leading theory as to the causative agent, e.g., infectious protein or prion, inherently suggests that the BSE could occur spontaneously. Additional support arises from the fact that 85 percent of CJD cases are sporadic, and have no familial or identifiable link as to their cause. Recent surveillance information from Northern Ireland and Switzerland also supports the spontaneous theory. In these countries, BSE has occurred in cases in which no exposure to rendered protein can be found, and there is no evidence of BSE in the parental stock or herd mates of affected animals (Ref. 5).

As described more fully in section II.F.1.b. of this document, USDA–APHIS has implemented import restrictions on live animals and animal products from BSE-affected countries. As a result of the restrictions, the potential risk of BSE occurring in this country as a result of exposure from imported cattle and imported animal protein products appears to be small (Ref. 6). However, the risk from foreign sources of BSE introduction into the United States cannot be dismissed entirely because the USDA import restrictions are unlikely to be 100 percent effective even though no cases of BSE have been diagnosed to date in the United States. The USDA regulations are intended to reduce or control risk, not completely eliminate it. See e.g., 56 FR 63866, December 6, 1991.

b. *The risk of amplification in the cattle population.* Research has shown that various animal tissues can transmit BSE infectivity. There is also evidence supporting the view that the agent could be transmitted orally (e.g., through animal feed). Although some experimental evidence suggests that the TSE's in general are more readily transmitted by means other that the oral route, research also suggests that the BSE agent is more susceptible to oral transmission. In most cases (e.g., the U.K. epidemic) the natural route of exposure to TSE's including BSE is suspected to be oral. This belief is supported by the dramatic decline in BSE cases in the United Kingdom following implementation of the ruminant-to-ruminant feeding prohibition. In the United Kingdom, where more than 160,000 cases of BSE have been diagnosed, a 1988 ban on the feeding of ruminant-derived protein supplements to other ruminants was associated with a steady decrease in the disease incidence starting in 1993. The 5-year period between the initiation of the ruminant-to-ruminant ban and the decline in the incidence of BSE is consistent with the known incubation period in cattle of 2 to 8 years. Further, preliminary experimental data show that the BSE agent can be transmitted orally to cattle through feeding of material from an infected cow (Ref. 3). Thus, there is a chance that BSE could be spread in animal feed if it developed in the U.S. cattle population, whether spontaneously, from another species or by some other means.

The greatest risk factor for cattle may not be the single occurrence of a BSE case. Instead, the greatest risk may arise from the potential, given the prolonged incubation period, for unrecognized amplification of BSE in the cattle population, resulting in a potential for greater animal exposure. The possibility of risk from recycling ruminant tissues is enhanced by the fact that current rendering methods have not been shown, and are not expected, to completely deactivate the BSE agent, and that practical tests are not available for detecting either the BSE agent in rendered material or the presence of ruminant material in feed.

The preliminary experimental cow-to-cow TSE transmission data previously described occurred with as little as a single dose (one-time exposure) of 1 gram of brain material from the infected cow, indicating a low transmitting dose. This means, among other things, that FDA cannot determine the level of feed ingredients from animals tissues, if any, that is considered safe in ruminants.

c. *The risk of transmission of humans.* Finally, there exists the theoretical possibility of the transmission of a TSE in animals, such as BSE, to humans. CDC agrees that the link between BSE, and TSE's in humans, has not been fully demonstrated. Some of the ANPRM comments agreed. For example, one pharmaceutical firm stated that the evidence is not entirely conclusive. Nevertheless, a body of epidemiological and experimental evidence is developing to support the postulated association between BSE and nv–CJD. This and other scientific evidence developed more fully in section II leads the agency to propose for comment the prudent risk reduction regulatory action that is incorporated in the proposed rule.

E. Enforcement Provisions

The agency is issuing this proposed rule within the context of comprehensive government-wide efforts to minimize the risks previously described, and within the statutory authority provided to the agency. The proposed rule has two major components. First, the agency proposes to prohibit feeding animal materials derived from ruminant and mink tissues to ruminants, in the absence of a food additive regulation or investigational exemption. Thus, the prohibition would ensure that tissues which could contribute to a TSE epidemic by spreading the causative agent rapidly would not be allowed in ruminant feed.

The second component of the rule provides for a system of controls to ensure that the proposed rule would achieve its intended purpose. These provisions are necessary because limited controls are in place, or available, to prevent the spread of BSE through animal feed in the United States, should BSE occur. The proposed regulation places two general requirements on persons that manufacture, blend, process and distribute animal protein products, and feeds made from such products. The first requirement is to place cautionary labeling on the protein and feed products. The second is to provide FDA with access to sales and purchase invoices, for compliance purposes.

Firms that handle animal protein products from both ruminant and nonruminant sources, and that intend to keep the two kinds of products separate, would have certain additional requirements. These requirements would relate to the need for separate facilities or cleanout procedures; the need for standard operating procedures (SOP's); and in the case of renderers, their source of nonruminant material. Similar requirements would be placed on firms that handle animal feed containing animal protein products from both ruminant and nonruminant sources, and intend to keep the two kinds of feed separate. Requirements would be greater for the firms that intend to separate the animal protein products and feeds, because of the greater risk these operations would present for the possibility that ruminant protein might be fed, inadvertently, to ruminants.

However, the regulatory system would be flexible, allowing the regulated firms to innovate and choose the most cost-effective means of compliance. For example, some or all of the regulatory requirements previously described would not apply if any of the following innovations were developed and validated by FDA: Processing methods that deactivate the agent that causes BSE; test methods to detect the presence of the agent; or methods of marking or otherwise identifying the

material that contains ruminant protein. Further, the agency will consider modifying or revoking any final rule that is published prohibiting the use of ruminant and mink tissues in ruminant feed, if scientific and technical advances permit even greater flexibility than that offered in the proposed regulation. Conversely, the diagnosis of one or more cases of BSE in the United States, or new scientific findings, could lead to stricter regulatory requirements.

F. Alternatives

The agency is soliciting comments on several alternative means of minimizing the risk of transmitting TSE's in ruminant feed, in addition to the proposed ruminant-to-ruminant prohibition. These alternatives include:

(1) A partial ruminant-to-ruminant prohibition which would exclude all ruminant and mink tissues from ruminant feed except those bovine tissues that have not been found to present a risk of transmitting spongiform encephalopathy. Possible exclusions include slaughter byproducts from cattle that have been inspected and passed in inspected slaughter facilities, except tissues that have been shown through experimental trials and bioassays to transmit spongiform encephalopathy. Examples of the latter might include the brain, eyes, spinal cord and distal ileum. The agency solicits comments on the scope of this alternative;

(2) A prohibition on the feeding of all mammalian tissues to ruminants;

(3) A prohibition on the feeding of rendered material from those animal species in which TSE's have been diagnosed in the United States (sheep, goats, mink, elk, and deer);

(4) A prohibition on the feeding of specified offal from adult sheep and goats as proposed in 1994;

(5) Other alternative approaches that meet the agency's regulatory objectives and that might be suggested in comments to the proposed rule. The agency may in any final rule issued adopt such alternative approaches. Such alternatives may be more or less stringent than this proposal or may be a combination of provisions from this proposal and other alternatives. For example, one such option might be a proposal to exclude from the scope of any regulation certain facilities that apply specified risk-reduction measures in addition to, or in place of, those included in the regulation FDA is proposing in this publication. Therefore, the agency specifically requests comments on other approaches that would achieve the agency's regulatory objectives. Any proposed alternative approaches should be explained in detail, and their justification should be well documented. To the extent possible, please include information on costs and benefits of the proposals; and

(6) The ''no action'' alternative as it relates to this proposed rule. Again, detailed explanation and well-documented justification should be presented.

The agency's views on the advantages and disadvantages of these options appears in section V of this document. The agency invites comments on the relative merits and disadvantages of all these alternative concepts.

FDA has estimated that the annualized costs of the proposal, comprised of both the direct compliance costs and various indirect gains and losses, would range from $21.4 to $48.2 million. The agency also estimated that the annualized costs could range from $45.0 to $56.5 million for the mammalian-to-ruminant option; from $28.5 to $37.3 million for the partial ruminant-to-ruminant option; and would total less than $10 million for each of the remaining options. On the other hand, if the agency chooses the ''no action'' option and a BSE epidemic occurs, the above costs could be expanded by a great magnitude.

Because the body of scientific research related to TSE's is growing rapidly, the agency will place in the Docket copies of relevant scientific literature published after the agency completes work on this proposal, and before the agency completes work on any final regulation. The agency will add to the Docket, as appropriate, a brief statement of its assessment of the significance of the literature, and will invite comments. However, substantive changes from the proposed rule would be made in accordance with the discussions in the preceding paragraphs and the Administrative Procedure Act.

II. Background

A. TSE's

1. Scrapie

Scrapie is a slowly progressive, transmissible disease of the CNS in sheep and goats. Scrapie is characterized by a prolonged incubation period averaging 2 years, followed by a clinical course of 2 to 6 months when the animal exhibits sensory and motor malfunction, hyperexcitability, and death. The agent presumably moves from infected to susceptible animals by direct or indirect contact and enters through the gastrointestinal tract. Consequently, its spread appears to be both vertical (mother to offspring in utero) (Ref. 7) and horizontal (direct contact) between sheep (Ref. 8). Early signs of scrapie include subtle changes in behavior or temperament which may be followed by scratching and rubbing against fixed objects. Other signs include loss of coordination, weight loss despite a good appetite, biting of feet and limbs, tremor around head and neck, and unusual walking habits (Ref. 9).

The scrapie agent is found in lymphatic tissue (spleen, thymus, tonsil, and lymph nodes) in sheep with preclinical infections; however, in clinically affected sheep, the agent is identified in the intestines, nervous tissues (brain and spinal cord), and lymphatic tissues as determined by experimental infectivity studies in a susceptible animal model (Ref. 8). The brain has been demonstrated to have the highest level of infectivity of all tissues (Ref. 10).

Scrapie is known to have existed in Britain, Ireland, France, and Germany for over 200 years. It has been observed in the United States and Canada for about 50 years. The first case of scrapie in the United States was diagnosed in Michigan in 1947. From 1947 through January 1993, approximately 653 flocks have been diagnosed with scrapie (Ref. 11). At the present time, there are 67 known scrapie-infected flocks (flocks with sheep diagnosed with scrapie), and there are 8 known scrapie-source flocks (flocks to which scrapie-infected sheep were traced) (Ref. 12). In the absence of an antemortem diagnostic test, it is not possible to establish with absolute certainty that a flock is free of scrapie. Moreover, lack of reporting, the long incubation period, and open range husbandry practices in the western United States make it difficult to detect classical clinical signs and completely monitor scrapie in the United States.

2. BSE

BSE is a transmissible, slowly progressive, degenerative disease of the CNS of adult cattle. This disease has a prolonged incubation period in cattle following oral exposure (2 to 8 years) and is always fatal. BSE is characterized by abnormalities of behavior, sensation, posture, and gait. These signs are similar to those seen in sheep that are infected with scrapie. BSE is associated with spongiform lesions in the gray matter neuropil of the brainstem and neuronal vacuolization (Ref. 13). The clinical signs usually begin with changes in animal behavior, and may include separation from the rest of the herd while at pasture, disorientation, or excessive licking of the nose or flanks (Ref. 14). The most common history given by the herdsman was nervousness

or altered behavior or temperament, weakness associated with pelvic limb ataxia, paresis, and loss of body weight (Ref. 15). In some animals there are few gross pathological changes at necropsy associated with BSE other than the loss of body weight. However, postmortem histopathology of BSE distinguish it from other neurological disorders (Refs. 16 and 17). Neither vertical nor horizontal transmission has been documented for BSE.

BSE was first recognized as a new cattle disease by researchers at the Central Veterinary Laboratory of the British Ministry of Agriculture, Fisheries, and Foods at Weybridge, England in November 1986. As of November 15, 1996, BSE had been diagnosed in Great Britain in more than 165,000 head of cattle from more than 31,000 herds. Cases have been confirmed in 59.2 percent of the dairy herds and 15.3 percent of the beef herds (Ref. 18). The BSE epidemic curve for Great Britain peaked in January 1993 and is decreasing steadily, concomitantly with changes in rendering and feeding practices. BSE has also been reported in native cattle of Northern Ireland, Guernsey, Jersey, Isle of Man, the Republic of Ireland, Switzerland, France, and Portugal. BSE has been confirmed in cattle exported from Great Britain to Oman, the Falkland Islands, Germany, Denmark, Canada, and Italy.

There have been no cases of BSE in cattle in the United States. There has been one case of BSE in a cow imported into Canada from Great Britain. That cow was destroyed, along with its herdmates and other nearby cattle considered by animal health authorities in Canada to have possibly been exposed to the cow with BSE (Ref. 19).

3. Other Animal TSE's

Other animals have TSE's with typical characteristics of long incubation, neurological degeneration, and a 100-percent death rate. These animals include: Mink, elk and deer, zoo ruminants, and exotic and domestic cats.

TME is a mink disease with clinical signs and brain lesions similar to those of sheep infected with scrapie. TME is a rare disease in the United States. Since the disease was first recognized in 1947, in Wisconsin, four additional outbreaks have occurred in the United States. The last outbreak occurred in 1985 and was limited to a single mink ranch in Wisconsin (Ref. 20).

CWD of deer and elk is characterized by emaciation, changes in behavior and excessive salivation, polydipsia, and polyuria. The clinical course is from several weeks to 8 months, and the disease is invariably fatal (Ref. 20). From 1967 to 1979, CWD was observed in 53 captive mule deer in Colorado and Wyoming. Clinical signs were seen in adult deer and included behavioral alterations, progressive weight loss and death in 2 weeks to 8 months. Consistent histopathologic change was limited to the CNS and characterized by widespread spongiform transformation of the neuropil. The disease is a specific, spontaneously occurring form of spongiform encephalopathy (Ref. 21). Topographic distribution and lesion severity were most similar to those of scrapie and BSE. The duration of the clinical disease did not significantly influence lesion distribution or severity in either species (Ref. 22).

Scrapie-like encephalopathies have been described in certain zoo ruminants, i.e., a nyala, an Arabian oryx, and a greater kudu. Clinical signs included ataxia and loss of coordination with a short, progressive clinical course. Histopathological examination of the brains revealed spongiform encephalopathy characteristic of that observed in scrapie and BSE (Refs. 23, 24, and 25). Strain typing of the agent suggests that all of the cases are directly related to BSE.

Seventy domestic cats in the United Kingdom have developed FSE, a spongiform encephalopathy that was never previously reported. The cats all had progressive, neurological disease involving locomotor disturbances, abnormal behavior and, in most cases, altered sensory responses. Histopathological examination of the central nervous system revealed changes pathognomonic of spongiform encephalopathy; this included widespread vacuolization of the gray matter neuropil and neuronal perikarya (Refs. 26 and 27). Infective tissue from several of these cases, when injected into mice, resulted in brain lesions with a distribution and morphology that is undistinguishable from the lesions produced by BSE infective tissue injected into mice.

4. TSE's of Humans

The TSE's of humans are divided into specific clinical types, which may appear similar histopathologically but are either transmitted differently or demonstrate different patterns of distribution and prevalence.

a. *CJD*. CJD was first described in 1920 and 1921 when it was known as ''spastic pseudosclerosis'' or ''subacute spongiform encephalopathy'' (Ref. 28). The illness exists throughout the world and is claimed to have a similar prevalence in each of the countries tested with an annual incidence of approximately one case per million of the population. Autopsies are sometimes not performed on persons who may have died of CJD and many older people dying of a dementing illness do not have autopsies performed. There is an increased incidence among Libyan Jews (26 cases per million) and spatial or temporal clusters in areas of Slovakia, Hungary, England, the United States, and Chile. The average age of a typical CJD victim is 56 years of age, and only a few cases involving persons between 4 and 29 years have been reported prior to 1993. Between 4 and 15 percent of cases have a familial connection with other cases. There is a slightly higher incidence of CJD in women compared to men. Clinical prodromal symptoms start with changes in sleeping and eating patterns, and often include confusion, inappropriate behavior, vague visual complaints and/or ataxia. Those symptoms progress over a few weeks to a clearly neurological syndrome. A rapid onset of neurological symptoms appears in 20 percent of cases, most commonly myoclonic jerks and dementia with loss of higher brain function and behavioral abnormalities. The disease progresses with continued deterioration in cerebral and cerebellar function, and the onset of seizures. Ninety percent of the cases end in death within 1 year of onset. Diagnosis is by clinical assessment of patients and by examination of electroencephalogram patterns. Post mortem diagnosis is currently carried out by histological examination of cerebral tissue under the light microscope, although this is not always reliable. Research techniques that have been used to demonstrate CJD (and other TSE's) include electron microscopic examination of brain tissue extracts for scrapie-associated fibrils (SAF), immuno-staining of the tissue for prion-protein (PrP) antigens, western blotting of extracted PrP antigens and the intracerebral injection of tissue suspensions into test animals.

In some patients, the source of CJD has been claimed to be an infection transferred from other patients with the condition. For example, in one case, cerebral electrodes that had been sterilized with alcohol and formalin vapor after use in a patient with CJD, were used in the brains of two young epileptic patients, both of whom contracted CJD after a short incubation. The transfer of CJD by corneal transplant in 1 patient, by cadaveric dura mater grafts in several patients and by pituitary-derived human growth hormone injections in over 80 patients has also been reported.

Only the medical procedures described previously have been conclusively linked to transmission. The transmission of the disease from animal sources has been suggested; see further discussion in section II.C. of this document.

b. *nv–CJD.* A previously undetected new variant of CJD (nv–CJD) was reported by British scientists at a meeting of international experts convened by WHO on April 2 and 3, 1996 (Ref. 29), and published 3 days later (Ref. 30).

The major evidence for the existence of nv–CJD is the recognition of a new neuropathologic profile and the unusually young ages of 10 U.K. patients. Although all the cases had evidence of the pathognomonic spongiform changes characteristic of classic CJD, and therefore were appropriately classified as a form of CJD, the clinical course of the disease was atypical of classic CJD. The most striking and consistent neuropathologic feature of nv–CJD was the formation of amyloid plaques surrounded by halos of spongiform change. Plaques were extensively distributed throughout the cerebrum and cerebellum. Many of these plaques resembled those in kuru and were visible when examined by routine staining methods.

The temporal cluster of cases of nv–CJD in young patients (three were teenagers, five were in their twenties, and two were in their thirties at onset of disease) is highly unusual. Five of the eight deceased patients died before 30 years of age. (The expected annual mortality rate for CJD in persons under 30 years of age is less than five per billion.) The characteristic clinical features of the nv–CJD cases were: (1) A psychiatric presentation, (2) onset of a progressive cerebellum syndrome with ataxia within weeks or months of the initial presentation, (3) memory impairment with dementia in the late stages, (4) myoclonus, and (5) the absence of electroencephalographic changes typical of classic CJD.

Review of the patients' medical histories and consideration of various risk factors for CJD yielded no adequate clues as to the cause of this disease. The PrP genotype was determined for eight cases. The researchers noted that all genotypes were methionine homozygotes at codon 129 of the PrP gene. The research did not identify any of the known mutations associated with the inherited forms of CJD (Ref. 30).

Although scientists have stated that exposure to the BSE agent prior to the U.K. bans described in section II.F. of this document is the most plausible explanation for these findings, no clear epidemiologic link to BSE was identified. (See further discussion in section II.C. of this document.) Another potential explanation is exposure to TSE agents from animals other than cattle. Because the United Kingdom reinstituted epidemiological surveillance for CJD in 1990, increased surveillance is still another potential reason for the identification of this cluster of 10 cases of nv–CJD.

c. *Gertsmann-Strausller-Scheinker (GSS) syndrome.* GSS syndrome is an autosomal dominant condition in about 50 percent of siblings of reference cases (Ref. 28). The disease is similar to CJD except that it has a more extended onset and duration, a tendency towards cerebellar ataxia as the initial predominant neurological sign, and a large number of amyloid plaques present among the spongiform encephalopathic changes of the brain. The extensive distribution of amyloid plaques in the patient's brain is an observation shared by GSS syndrome and v–CJD. It has been transmitted to monkeys and rodents by intracerebral inoculation.

d. *Kuru.* Kuru is a condition of the Fore people of the Okapa district of the Eastern Highland in Papua New Guinea, in which a practice of ritual cannibalism of fellow tribesmen took place until approximately 1956 (Ref. 28). This TSE disease, which affected mainly adult women and children of both sexes, caused an annual disease specific mortality of approximately 3 percent. Most deaths of women in the tribe occurred through this disease. Some men who died from this disease were thought to have contracted it when they were young. Kuru may be transmitted by eating infected tissue or through open wounds. The brains of dead tribal members were eaten by women and children and the muscle tissue by men. The cohort of children born since 1957 have not suffered from kuru at all.

Clinically the disease causes a progressive cerebellar ataxia, uncoordinated movements, neurological weakness, palsies, and decay in brain stem function. Most patients dying of kuru are not demented, a major clinical difference between kuru and CJD.

e. *Fatal familial insomnia (FFI).* FFI is another inherited TSE-linked disease (Ref. 31). FFI is characterized clinically by untreatable progressive insomnia, dysautonomia, and motor dysfunctions. The disease often starts between 35 and 60 years of age and leads to death within 7 to 32 months. FFI is characterized pathologically by atrophy, neuronal loss, and gliosis in the anterior and dorsomedial nuclei of the thalamus (Ref. 32). FFI has been successfully transmitted to mice (Ref. 33), but not to primates.

5. Etiology

The cause of TSE's is controversial. The TSE agent: (1) Is presumably smaller than most viral particles and is highly resistant to heat, ultraviolet light, ionizing radiation, and common disinfectants that normally inactivate viruses or bacteria; (2) causes little detectable immune or inflammatory response in the host; and (3) has not been observed microscopically.

Resistance of the TSE agent to physical and chemical methods that destroy nucleic acid have essentially ruled out conventional microbiological agents as the cause. Currently, the infectious protein or prion theory is favored. Other proposed causes are an unconventional virus, consisting of virus-coded protein and virus-specific nucleic acid with unconventional properties, and a ''virino'' consisting of a core of nontranslated nucleic acid associated with host cell proteins (Ref. 34). Proposed causes of TSE's with less supporting evidence are: (1) Retroviruses (Ref. 35), (2) a spiroplasma (Refs. 36 and 37), (3) organophosphates (Ref. 38), and (4) peptide hormones (Ref. 39).

The prion theory suggests that the causative agent is a normal host protein (PrP or PrP–C) that is posttranslationally transformed into the causative agent or PrP–Sc. Transformation of the PrP can occur from rare somatic mutation of the prion gene, spontaneously or from contact with extraneous PrP–Sc. The spread of BSE in the United Kingdom is postulated to have occurred through the feeding of ruminant protein that contained the PrP–Sc protein and thus follows the portion of the theory that involves contact with extraneous PrP–Sc. This explanation requires that one accept that abnormal prion protein from sheep crossed the species barrier and resulted in BSE in cattle. An alternate explanation is that a spontaneous mutation or transformation or other nonorally induced event, occurred and resulted in undetected disease in a bovine. These explanations are not mutually exclusive and it is possible that both occurred.

Recent surveillance information from Northern Ireland and Switzerland tend to support the spontaneous mutation as a method by which BSE can occur. Northern Ireland has had more than 10 cows produce offspring, after the feeding ban, that developed BSE. Thus, 10+ cases are theorized to be spontaneous because there is no evidence of feeding meat and bone meal to the offspring and the dams are alive

and show no signs of BSE (Ref. 5). Switzerland, which has one of the most aggressive BSE investigational surveillance of any European Union (EU) country, has reported 205 cases of BSE. Some of these cases are in animals that were fed only grass and hay (Ref. 5). Regardless of how the initial cases occurred, however, the resulting unrecognized disease was amplified by the feeding of ruminant protein to ruminants.

Additional support for the feasibility of the TSE spontaneous mutation explanation is the fact that 85 percent of all CJD cases are sporadic and have no familial or identifiable link as to their cause. It is these cases that give rise to the very stable, 1 in a million per year, world wide incidence of the disease. DeArmond and Prusiner (Ref. 40), and Lansbury and Caughey (Ref. 41) have postulated that a noninduced somatic cell mutation or the spontaneous conversion of PrP–C into PrP–Sc are plausible explanations for the sporadic cases of CJD. DeArmond and Prusiner theorized that the 1 in a million

* * * may represent the combined probabilities that a mutation occurs in the PRNP gene, the probability that the mutation leads to the synthesis of the PrP–cjd (the abnormal protein), and the probability that the resultant PrP–cjd targets other neurons for the synthesis of more PrP–cjd at a rate fast enough to cause clinical disease in the patient's lifetime.

The etiology of human and animal TSE's are similar. Therefore the spontaneous mutation explanation cannot be dismissed with regard to BSE.

6. Pathogenesis

Following oral exposure of goats or sheep to the scrapie agent, the agent first accumulates in gut-associated lymphoid organs (tonsils and Peyers patches of terminal ileum) and later in other lymphoid organs, such as spleen and thymus, and finally in the spinal cord and brain (Ref. 8).

Likewise, in mice inoculated intra-peritoneally with the CJD agent, the agent localizes first in Peyer's patches and spleen, followed by the central nervous system (Ref. 42). The agent may enter the body through macrophages in the tonsils and domes over Peyer's patches in the intestine (distal ileum). The proposed routes of spread from the point of entry to other tissues and central nervous system are blood stream or nerve trunks. In experimentally inoculated animals, spread from the inoculation site in the eye of monkeys and peritoneum of mice has been shown to be by optic and splanchnic nerves respectively (Ref. 43).

Other investigators have demonstrated transient infectivity in the blood of experimentally infected laboratory animals, and naturally occurring infections of humans and mink, causing speculation that the agent is carried in the blood (Refs. 45 to 49). With one exception in serum (Ref. 50), all attempts to isolate TSE agents from the blood or milk of sheep or cattle have failed (Refs. 51 to 54). When TSE agents are injected intravenously into mice, the rate of clearance from the blood is extremely rapid (Ref. 55). In natural cases of BSE, infectivity has been found only in the brain, spinal cord, and eye; in experimental cases the agent has also been identified in the ileum (Ref. 56).

The question of disease mechanism remains open. Candidate mechanisms are the storage or accumulation of a large amount of abnormal PrP in the brain (Refs. 57 to 60), or insufficient amounts of normal PrP.

7. Transmission

There is little information about the natural transmission of TSE's of animals. In most cases the natural route of exposure to the TSE agent is suspected to be oral, although genetic disposition is known to play a role in sheep scrapie (Ref. 61). Investigators have suspected transmission of scrapie in sheep and goats by ingestion of placenta and have been successful in experimentally transmitting scrapie by feeding placenta to sheep (Ref. 62); however, genotyping of the PrP gene was not conducted.

In 1993, a study by Foster, et al., (Ref. 63) using a line of sheep in which natural scrapie does not occur demonstrated that sheep can be experimentally infected with BSE by intracerebral or oral administration. The intracerebral challenge resulted in five of six sheep developing the disease. The oral challenge resulted in one of six sheep developing the disease. Brain and spleen were recovered from the orally infected sheep and from one of the intracerebrally injected sheep. Goldmann, et al. (Ref. 64), confirmed that both sheep had the same PrP genotype. In 1996, Foster, et al. (Ref. 65) reported the results of injecting homogenized tissue harvested from these infected animals into a panel of mice. Transmission from the brains and spleen of both sheep gave incubation periods and pathology in mice similar to those seen in direct BSE transmissions from cattle to mice. Foster's work supports the position that BSE can cross species barriers by the oral route and that, when judged by the mouse bioassay, the disease manifested in sheep retains the incubation time and pathology characteristic of BSE rather than scrapie. However, the manifestation of BSE in the sheep is histopathologically and clinically indistinguishable from natural scrapie.

Information regarding the interaction of the TSE agents and the environment is limited. In 1964, Gordon reported the transmission of scrapie among bands of unrelated sheep on pasture. The mode of transmission was unknown (Ref. 66). In an effort to eradicate scrapie from Iceland a large area was depopulated of sheep and restocked with new sheep following a period of 3 years. Despite this effort, a few flocks of the new sheep developed scrapie; the origin was believed to be from scrapie that survived in the environment and not from reintroduction of the agent with the new sheep or through contaminated hay remaining on farms. However, a 1996 report suggests that six species of hay mites may be potential vectors associated with transmission of TSE's in Iceland (Ref. 67).

8. Genetics

There is a genetic component associated with several of the human TSE diseases. A specific point mutation at codon 178 is associated with fatal familial insomnia (Ref. 68). Point mutations at codons 102, 105, 117, 145, 198, and 217 are associated with GSS syndrome (Ref. 69). Point mutations at codons 178, 180, 200, 210, and 232 are associated with CJD (Refs. 68 and 70). Various insertions into the octapeptide repeat region of the PrP gene have also been associated with human TSE's (Ref. 71). It appears that the methionine/valine polymorphism at codon 129 may modify the phenotype and the transmission rate from GSS syndrome patients to mice (Ref. 72). No abnormalities in the sequence of the PrP gene in kuru patients were found.

There is also a genetic component associated with sheep scrapie. Point mutations at codon 171 of the sheep PrP gene are linked to the disease in the Corriedale, Lacaune, Romanov, Suffolk, and Texel breeds (Refs. 73 to 76).

An analysis of 370 cattle from Scotland revealed no difference between healthy cattle and cattle with BSE in the number of octapeptide repeat sequences (either five or six) and in a silent HindII restriction site polymorphism on the PrP gene (Ref. 77). No data were found that compared the sequence of the PrP gene of healthy deer, elk, mink, and goats with those afflicted by TSE's.

9. Diagnostics

Because of the long incubation period, the ability to diagnose the presence of a BSE infection prior to the onset of the

clinical disease would enhance the efficacy of surveillance and prevention programs. Because there is no fully characterized immune response to BSE or scrapie, diagnosis in live animals has been thought to be possible only when clinical signs are evident and must be confirmed by histopathology at post mortem (Ref. 10), or brain biopsy of moribund patients. Recently published research suggests antemortem tests for the TSE agent may be possible.

The observation of histopathological changes in the brain, such as vacuolization of the brainstem in BSE are positive indicators of disease (Ref. 78). Other available diagnostic tests are immunohistochemical staining and immunoblotting of the abnormal protein (Ref. 10). Detection and titration of the TSE agent can also be accomplished by intracerebral inoculation in mice or hamsters with a brain homogenate from a suspected animal. After an appropriate incubation period, the brain of the laboratory animal is examined for histopathological changes characteristic of TSE (Ref. 8).

The potential antemortem tests that have been published are described as follows: (1) Tests specific for PrP: (a) A capillary electrophoresis test (Ref. 79), and (b) a western blot test with increased sensitivity (Ref. 80); and (2) tests which identify metabolites of infected animals or humans: (a) A cyclic voltametric method which describes metabolites in urine (Ref. 81), and (b) an immunoblot test describing metabolites in cerebral spinal fluid (Ref. 82). Antemortem tests have not yet been validated for practical use.

Recent research has shown some promise for antemortem testing. Research by Shreuder et al. (Ref. 83), detected scrapie-associated PrPsc protein in tonsils from scrapie susceptible sheep about a year before the expected onset of the clinical disease. The research holds promise for preclinical detection in sheep, but needs further development. With regard to cattle, the researchers concluded that the technique may not work but is worth investigating. Research by Hsich et al. (Ref. 84), describes an experimental assay in humans and animals. The research found that a positive immunoassay in human dementia patients supports a diagnosis of CJD. The authors concluded that the assay may be helpful in premortem diagnosis of TSE in humans and animals showing clinical signs associated with TSE's. The validity of the test as a preclinical screen has not been established.

10. Inactivation

The agency considered requiring procedures for the manufacture of animal-derived proteins that would inactivate TSE infectivity. There have been several studies on the inactivation of TSE agents. The only broad generalization that can be drawn is that agents that denature protein can diminish the infectivity of the TSE agents. TSE infectivity does not appear to be markedly diminished by radiation or UV-light.

Recent research (Ref. 85) showed that 11 of the 15 rendering procedures tested produced meat and bone meal with no detectable BSE infectivity in a mouse bioassay. Only limited conclusions can be drawn about safety from these 11 procedures because the infectivity titer of the spiked starting material (which consisted of 10 percent brain) was several logs lower than that typically found in brain that is not minced and not stored at −20 °C. Also, the question of the adequacy of the mouse bioassay as the regulatory test which acceptably assures the absence of TSE infectivity to animals or man remains to be answered through future research investigations.

The four procedures that failed included two protocols using continuous vacuum rendering of high fat material and two protocols using continuous atmospheric rendering of natural fat material. The continuous vacuum rendering processes that failed were 120 °C for 20 minutes at a vacuum of 0.38 bar and 121 °C for 57 minutes at a vacuum of 0.4 bar. The continuous atmospheric rendering processes of natural fat material that failed were end temperatures of 112 and 122 °C after 50 minutes; however, end temperatures of 123 and 139 °C after 125 minutes both inactivated the BSE agent. Unexpectedly, the BSE agent was inactivated by three wet rendering processes that only reached a maximum temperature of 119 °C with a cooking time of 240 minutes, a maximum temperature of 101 °C with a cooking time of 120 minutes, and a maximum temperature of 72 °C with a cooking time of 240 minutes under a vacuum of 0.85 bar.

Preliminary, unpublished results indicate that the only rendering process which completely inactivates the scrapie agent (which was spiked with higher infectivity than that in the BSE experiments described in this section) is batch rendering under pressure (Ref. 86). The agency encourages more research in this area.

B. The Association Between Scrapie and BSE

Epidemiological studies of the outbreak of BSE in the United Kingdom, including a computer simulation of the BSE epidemic, have characterized it as an extended common-source epidemic. Each case has been considered a primary case resulting from exposure to a single common source of infection. It is believed in the United Kingdom that rendered feed ingredients contaminated with scrapie infected sheep, or cattle with a previously unidentified TSE, served as the common source of infection. One study demonstrated that meat and bone meal could be incorporated into cattle feed in sufficient quantity to transmit BSE to some of the animals that consumed the feed (Ref. 87). Thus far, other research including research by USDA has not confirmed that the feeding of U.S.-origin scrapie-infected feed ingredients to cattle produces BSE. Therefore, the theory that BSE evolved naturally in cattle has not been ruled out (Ref. 88). See also the discussion in II.A.5. of this document.

Furthermore, the U.K. studies suggest that the spread of BSE appeared to have been exacerbated by the practice of feeding ingredients from rendered BSE-infected cattle to cattle, including young calves, a practice that was subsequently banned. Incomplete immediate compliance with the feeding ban may account for the fact that some cattle born after the ban continue to be infected with BSE and has complicated any theory of vertical transmission of the disease. The research findings of maternal transmission of BSE are inconclusive, but if it occurs, it does so at a rate insufficient to maintain the epidemic (Ref. 89).

C. The Association Between Animal TSE's and Human TSE's

All the animal and human TSE's have been shown to be transmissible experimentally to laboratory animals. The human and animal diseases are pathologically similar and share some etiological similarities. TSE's are not officially considered zoonotic diseases, i.e., known to be naturally transmissible from animals to humans. The distribution of CJD in the world does not coincide with that of scrapie in sheep or of BSE in cattle. Human exposure to sheep or cattle has a low correlation with CJD. However, the recent report from the United Kingdom of nv-CJD, and its possible relationship to BSE, is causing scientists around the world including those at CDC to

reevaluate whether BSE may be a zoonotic disease.

This concern is further supported by the recent report of experimental BSE transmission to macaques, with the development of nv-CJD-like plaques in these monkeys (see the following discussion in this section).

The possibility of transmission of TSE's from animals to humans has been suggested, most recently in connection with the identification of nv–CJD in the United Kingdom. Scientists in the United Kingdom concluded that the nv–CJD cases may be unique to the United Kingdom, raising the possibility that they are causally linked to BSE. The scientists stated that ''the common neuropathological picture may indicate infection by a common strain of the causative agent, as in sheep scrapie in which strains of the disease have been identified * * *'' (Ref. 30). The United Kingdom Spongiform Encephalopathy Advisory Committee (SEAC) stated that ''although there is no direct evidence of a link, on current data and in absence of any credible alternative the most likely explanation at present is that these cases are linked to exposure to BSE before introduction of the SBO [specified bovine offal] ban in 1989'' (Ref. 90). A WHO consultation in April 1996 concluded that ''a link has not yet been proven between v–CJD in the U.K. and the effect of exposure to the BSE agent. The most likely hypothesis for v–CJD is the exposure of the United Kingdom population to BSE'' (Ref. 2). However, a second WHO consultation, in May 1996 concluded that ''the clinical and neuropathological features of the newly recognized CJD variant do not provide information which could be used to prove the possible link between this disease and BSE in cattle'' (Ref. 91).

The recent finding of florid amyloid plaques in the brains of macaques inoculated with suspensions of BSE-infected cow brains increases suspicion that exposure to the BSE agent may be the source of nv–CJD. Amyloid plaques have never before been seen in monkeys with TSE's, and the florid plaques resembled those in nv–CJD patients (Ref. 92). In a recent paper by Collinge, et al. (Ref. 93), it is stated that ''strains of transmissible encephalopathies are distinguished by differing physicochemical properties of PrPsc, the disease-related isoform of prion protein, which can be maintained on transmission to transgenic mice. 'New variant' CJD has a strain characteristic distinct from other types of CJD and which resembles those of BSE transmitted to mice, domestic cat and macaque, and is consistent with BSE being the source of this new disease. Strain characteristics revealed here suggest that the prion protein may itself encode disease phenotypes.''

The possible association between BSE and nv–CJD may be further clarified by results from studies that are under way (e.g., experimental inoculation of brain tissue from the nv–CJD patients into mice).

D. Infectivity of Specific Tissues

The WHO in a recent publication has summarized the infectivity of various tissues from sheep, goat, and cattle (Ref. 94). Scientific studies are currently being conducted in which calves are fed homogenized brain tissue from United Kingdom cattle confirmed to have BSE, and then various tissues are collected from the calves at 4-month intervals (Refs. 56 and 95). The tissues from these calves are being analyzed for the presence of the BSE agent. The study has been in progress for 18 months and only brain, spinal cord, and retina have been shown to be highly infectious. Distal ileum has been shown to be infectious, but much less than the previously mentioned tissues. No other tissues, most notably, muscle meat, milk, or blood have been shown to be infectious. The results of these current experiments parallel the previous research as summarized by WHO. However, the agency notes that infectivity of other tissues that might be fed to ruminants has not been definitively determined. This is, in part, because of the lack of desired sensitivity in the available assay methods.

In summary, meat, milk, milk products, and blood have not been shown to transmit BSE infectivity. These products are considered safe for human consumption by health authorities including the WHO.

E. Potential Risk of TSE's to the United States

1. Overview

This proposed FDA action is designed to reduce the risk of a BSE epidemic in the United States and thereby protect the health of animals and possibly of people if there is, in fact, a zoonotic relationship between BSE and CJD. Risk is defined as the probability of an adverse effect to an individual or a population. The four steps that are typically involved in risk analysis are hazard identification, hazard exposure, dose response, and risk characterization.

While BSE has not been found in the United States, the agency believes it presents a potential risk to the health of animals and people. There are incubational and symptomatic similarities (as well as several differences) among the TSE's. The scientific characterization of these diseases is incomplete. However, interspecies cross-infections have been scientifically demonstrated by parenteral injection and oral routes of exposure.

The typically long incubation period and the potentially devastating effect that a BSE outbreak would have on animal health and U.S. agribusiness also supports a conservative regulatory approach aimed at prevention. While the current level of exposure to products derived from animals with a TSE is extremely low or absent, the potential consequences of such exposure and the apparent small intake of the agent needed to achieve infection in some animals further encourage a conservative regulatory policy.

Dose response assessments will be difficult because of the lack of good exposure data and the possibility of different susceptibilities, e.g., age or genetic factors, in different subpopulations. Although the TSE's are generally transmissible to laboratory animals following intraperitoneal (ip) or intracerebral (ic) routes of administration, the limited data that are available following the oral route of administration suggests that this route is much less efficient than ip or ic. Currently, it is quite difficult to make an accurate dose response assessment for a TSE agent following oral administration.

A number of actions, in addition to this proposed rule, have been taken to manage a reduction in risk that BSE will enter the United States cattle population. Restrictions have been placed on the importation of live cattle (July 1989) and ruminant products (e.g., meat and bone meal, bone meal, blood meal, offal, fat, and glands) from countries which have BSE. Live animals imported prior to the restrictions on imports have been regularly monitored by Animal and Plant Health Inspection Service (APHIS) veterinarians, and APHIS is currently in the process of purchasing the remaining live cattle for diagnostic research purposes. Histopathological examination of brain tissues has been carried out on more than 5,000 specimens from cattle that were disabled or that demonstrated neurological signs prior to slaughter or on the farm, e.g., nonambulatory or rabies-negative cattle. Histopathological and immunohistochemical examination of the nonambulatory or ''downer'' cows has been carried out since 1993. There has been no finding of BSE in tissues from these animals. These animals represent the highest BSE risk in the country, however, they also represent an extremely small percentage of the cattle

slaughtered in the United States. This active surveillance program is continuing and may be expanded. The expansion of this program was indirectly supported by a comment to the ANPRM that all ''downer'' cows should be examined for BSE.

Voluntary actions by industry have reduced the feeding of rendered sheep proteins to ruminants and the rendering of adult sheep. A voluntary Scrapie Flock Certification Program was implemented in 1992. The program, a cooperative effort among industry, State animal health officials and APHIS, seeks to reduce the prevalence of scrapie in U.S. sheep. A considerable educational effort continues to increase the awareness of veterinarians, veterinary laboratory diagnosticians, livestock and related industry businesses, and producers to the early clinical signs of BSE. Videos of United Kingdom BSE affected animals have been distributed to USDA veterinarians to enhance their ability to clinically diagnose BSE in suspect live animals. CDC has recently published an update (Ref. 96) of its previous review of national CJD mortality and the results of active CJD surveillance in five sites in the United States. These reviews did not detect evidence of the occurrence of the newly described variant form of CJD in the United States. As an important complement to these other public health efforts, this proposed rule would declare that animal protein derived from ruminant and mink tissues is an unapproved food additive for use in ruminant feeds, and would establish enforcement procedures. These actions, individually and collectively, contribute to a greatly reduced risk of a BSE epidemic ever occurring in the United States.

2. Comparison With the U.K. Conditions

Investigators have identified several major risk factors that apparently contributed to the emergence of the disease and the resultant epidemic in the United Kingdom. These are: (1) A large sheep population relative to the cattle population, (2) a large, uncontrolled, scrapie incidence rate, (3) the production of ''greaves,'' an incompletely processed intermediate product in the rendering process, (4) changes in rendering processes, such as the reduced use of solvent extraction, and (5) the feeding of significant amounts, up to 4 percent of the diet, of meat and bone meal to young dairy calves.

In addition to the risk factors described in section II.E.2. of this document, the practice of processing dead sheep and cattle in the United Kingdom likely contributed to the amplification of the TSE agent. In the United Kingdom, sheep which may have died of scrapie and cattle with BSE, were picked up by ''knackers'' for rendering into animal feed. This material was partially rendered into ''greaves,'' which might have contained large amounts of the scrapie/BSE agent, and was fed to dairy calves in large amounts. The spread of BSE appeared to be facilitated by the feeding of rendered BSE-infected cattle back to calves. The BSE agent is postulated to have recycled from cows to calves through ruminant-to-ruminant feeding until the practice ceased following the 1989 ban on the practice.

In the United States, the cattle population is much larger than the sheep population, the incidence of scrapie is much lower and a scrapie control program is in place; renderers in the United States do not manufacture greaves; and the rendering processes used in the United States are thought to reduce the titre (level) of TSE agents if any. The lack of a practice of feeding large amounts of meat and bone meal to calves in the United States, and the comparatively younger average age of U.S. dairy cattle are also differences that are believed to be important in protecting the United States against a U.K.-type BSE epidemic. Nevertheless, scrapie does exist in the United States, sheep are rendered and included in ruminant feed, the rendering process does not totally inactivate TSE agents, and calves are fed meat and bone meal. Therefore the risk of a BSE epidemic in the United States, while much less, cannot be completely discounted.

F. Historical Efforts to Control TSE's

1. U.S. Actions

a. *FDA*. FDA is the Federal agency responsible for the safety and effectiveness of a large number of products and commodities. Briefly, these include, drugs for use in people and animals, human biological products, medical devices, food, dietary supplements, cosmetics, and animal feeds. Each of these product groups provides the potential for the transmission of spongiform encephalopathies in man or animals. FDA formed a Working Group composed of the Deputy Commissioner for Operations and representatives from the Centers to consider TSE's in relation to FDA regulated products. As a result of the Working Group's deliberations, FDA has taken the following actions:

- In 1992, letters were sent to manufacturers of dietary supplements asking those manufacturers to reformulate their products to be certain they do not contain materials from BSE or scrapie infected animals;
- In 1993, letters were sent to manufacturers of drugs, biologics, and devices asking them not to use bovine-derived materials from countries with BSE; and
- In 1996, letters were sent to manufacturers of drugs, biologics, devices, and animal feeds noting a possible relationship between BSE and nv-CJD and asking that they not use materials from BSE countries.

In 1992, FDA conducted a survey of major sheep rendering plants to determine compliance with a 1989 voluntary industry ban on the use of adult sheep offal in ruminant feeds. The voluntary ban and results of the survey are described in section I.F.3. of this document. In the Federal Register of August 29, 1994 (59 FR 44584), FDA published a proposed rule proposing to declare that specified offal from adult sheep and goats is an unapproved feed additive in ruminant feed (hereinafter referred to as the August 1994 proposed rule). In the Federal Register of May 14, 1996, FDA published an ANPRM stating that FDA was considering whether to provide that the use of protein derived from ruminants in ruminant feed be prohibited.

An international symposium entitled ''Tissue Distribution, Inactivation, and Transmission of Transmissible Spongiform Encephalopathies'' and cohosted by APHIS and FDA's Center for Veterinary Medicine (CVM) was held on May 13 and 14, 1996, in Riverdale, MD. The symposium participants engaged in discussion of findings from unpublished, recently completed, and in-progress scientific investigations on TSE's, and optimal approaches to managing any risk of TSE's to animal health.

b. *USDA*. USDA policy has been both proactive and preventive. The Food Safety and Inspection Service (FSIS) and APHIS have been active in taking measures in surveillance, prevention, and education about TSE's. In 1990, APHIS created a BSE Issues Management Team to analyze risks of BSE to the United States, disseminate accurate information about the disease, and act as a reference source for responding to questions about BSE. APHIS has also collaborated in the education of veterinary practitioners, veterinary laboratory diagnosticians, industry and producers on the clinical signs and pathology of BSE.

APHIS has increased its surveillance efforts to verify that the United States is free of BSE and to detect the disease should it be introduced into the United

States. As part of an ongoing active surveillance program, more than 60 veterinary diagnostic laboratories across the United States, and the National Veterinary Service Laboratories (NVSL) of APHIS, continue to examine bovine brains from the following sources: (1) APHIS investigations in the United States where suspected encephalitic conditions in cattle are reported under the foreign animal disease investigation program; (2) CDC and State public health laboratories (specimens from bovine that were found negative for rabies); and (3) FSIS (specimens from ''downer'' cows or those exhibiting CNS abnormalities). More than 5,000 bovine brains have been examined, and none of these specimens contained lesions with the characteristics and distribution typical for BSE (Refs. 12 and 97). APHIS is currently in the process of purchasing the 69 living cattle (from a total of 496 cattle) imported from the United Kingdom between 1981 and 1989. In July 1989, the importation of live ruminants and ruminant products from all countries known to have BSE in native animals was banned.

USDA continues to analyze and report epidemiologic findings and potential risks to the United States. In 1991, USDA issued two reports analyzing risk factors associated with BSE in the United Kingdom based on the British hypothesis of the disease occurring as a result of feeding scrapie-contaminated meat and bone meal (Refs. 98 and 84). Because of some similarities in the animal industries between the two countries, the possibility of BSE occurring in the United States could not be eliminated. However, the probability of occurrence was determined to be very low as the amount of sheep offal was found to be 0.6 percent of all U.S. rendered product compared to the estimate of 14 percent of all U.K. rendered product. Furthermore, the incidence of scrapie in the United States is much lower than in Great Britain; a scrapie eradication or control program has been in effect in the United States and rendered products are not routinely incorporated into calf diets as was the practice in the United Kingdom.

Since 1991, USDA has closely followed scientific findings and has updated the BSE risk factor analysis, first in 1993 (Ref. 99) and as recently as February 1996 (Ref. 4). Changes within each of the risk factors have been evaluated, and because there has either been no change or a decrease in the magnitude of risk factors, the overall risk of BSE in the United States is believed to have decreased. The February, 1996 report estimated the maximum potential 1-year period prevalence of BSE to range from 2.3 to 12 cases per 1 million adult cattle. In other words, under the worst case scenario between approximately 115 and 600 adult cattle would become infected with BSE each year, in a U.S. population of nearly 50 million adult cattle.

APHIS has had a scrapie control program in effect since 1952. Flocks that have been enrolled in the voluntary certification program for sheep for 5 years, and have not had a diagnosed case of scrapie within 5 years or a case traced back to the flock during that period, may apply for APHIS certification and be officially identified as such. This new control effort provides a mechanism to recognize flocks as scrapie-free in the absence of a live animal diagnostic test.

There is no official USDA program on TME or CWD. Although the last TME case detected in the United States was in 1985, monitoring for this disease continues. APHIS cooperates with State wildlife and diagnostic officials in Colorado and Wyoming in the limited areas where CWD has been reported.

In December 1991, APHIS placed a ban on importation of certain products of ruminant origin from countries known to have BSE (56 FR 63865, December 6, 1991). These products include: Meat and bone meal, bone meal, blood meal, offal, fat, and glands. In addition to prohibiting the materials listed previously, the regulation requires that imported meat for human or animal consumption from bovines be deboned, with visible lymphatic and nervous tissue removed; that it be obtained from animals which have undergone a veterinary examination prior to slaughter; and that it be obtained from ruminants which have not been in any country in which BSE has been reported during a period of time when that country permitted the use of ruminant protein in ruminant feed. APHIS may allow the importation of the banned products under a special permit for scientific or research purposes, or under special conditions to be used in cosmetics. No bovine meat from the United Kingdom has been allowed to be imported into the United States by FSIS for human consumption since before the BSE epidemic occurred in the United Kingdom. The network of private veterinary practitioners that refers unusual cases to veterinary schools or State diagnostic laboratories around the United States provides an extensive surveillance system. FSIS performs both antemortem and post mortem inspections at all federally-inspected slaughter establishments, and inspectors condemn all animals with central nervous system disorders. State-inspected slaughter operations follow the same procedures.

USDA also maintains a database on these and other conditions. The Veterinary Diagnostic Laboratory Reporting System (VDLRS) is a database of selected disease conditions submitted by 29 State and university veterinary diagnostic laboratories throughout the United States, and includes the results of histologic examinations for BSE. The VDLRS is a cooperative effort of the American Association of Veterinary Laboratory Diagnosticians (AAVLD), the U.S. Animal Health Association (USAHA), APHIS' Veterinary Service Centers for Epidemiology and Animal Health, and the 29 laboratories mentioned previously.

c. *Public Health Service (PHS).* i. *CDC.* CDC conducts surveillance for CJD through examination of death certificate data compiled by the National Center for Health Statistics, CDC, for U.S. residents for whom CJD was listed as one of the multiple causes of death (Ref. 100). These data indicate that the annual CJD mortality rates in the United States between 1979 and 1993 have been relatively stable, ranging between only 0.8 case per million in both 1979 and 1990 and 1.1 cases per million in 1987. In addition, CJD deaths in persons younger than 30 years of age in the United States remain extremely rare (<5 cases per billion per year) (Ref. 101).

CDC is working with the Council of State and Territorial Epidemiologists to consider expansion of current CJD surveillance. CDC is also working with its four established Emerging Infections Programs (Minnesota, Oregon, Connecticut, and the San Francisco Bay area, California), the Georgia Department of Human Resources, and the Atlanta Metropolitan Active Surveillance Program to pilot enhanced surveillance efforts for CJD (Ref. 101). This effort includes an active search for v-CJD as described in the United Kingdom (Ref. 30). On August 9, 1996, the results of this enhanced CJD surveillance effort was published; no evidence of the occurrence of the newly described variant form of CJD was found in the United States. No evidence of v-CJD has been found in the United States.

ii. *National Institutes of Health (NIH).* A project of the Laboratory of Central Nervous System Studies of the National Institute of Neurological Diseases and Stroke is conducting investigations on slow, latent, and temperate viral infections associated with chronic degenerative neurological diseases. Important areas of study are the pathogenesis of slow infections and mechanisms of persistence in kuru and

CJD. Also intensive molecular, biological, genetic, and immunological studies are being conducted on amyloid formation in the brain in Alzheimer's disease, normal aging, Down's syndrome, and slow viral infections, and the elucidation of the de novo generation of infectious amyloid proteins from normal host precursor proteins in kuru, CJD, GSS syndrome, scrapie and BSE. Research on TSE's has also been conducted by the NIH Laboratory of Persistent Viral Disease. FDA maintains close contact with scientists in the laboratories and expects to use their expertise in the evaluation of inactivation methods and transmission studies.

iii. *Other actions.* On April 8, 1996, an interagency meeting at CDC including representatives from CDC, NIH, FDA, USDA, and the U.S. Department of Defense was held to disseminate conclusions from the WHO consultation regarding v-CJD and to coordinate preventive activities among these agencies to address the BSE and CJD issues.

2. International Actions

a. *United Kingdom.* Regulatory controls taken to manage the BSE epidemic in the United Kingdom and to address public health concerns include: (1) An action in June 1988 to make the disease reportable; (2) a ban in July 1988 on the feeding of ruminant-derived protein supplements to other ruminants; (3) an order in August 1988 for the compulsory slaughter and incineration of BSE suspect cattle; (4) a ban in November 1989 on the inclusion of specified bovine offal (brain, spinal cord, thymus, spleen, tonsils, and intestines) for human consumption; and (5) a ban in September 1990 on use of specified bovine offal in any animal feed.

A CJD Surveillance Unit was established to monitor CJD numbers in the United Kingdom. SEAC, consisting of experts in neurology, epidemiology, and microbiology from outside the British government, was established in 1990 to oversee all aspects of TSE's and human and animal health. USDA has a representative on this committee.

Major regulatory actions occurring after the SEAC report on nv-CJD (Ref. 90) include legislation to ban the feeding of mammalian meat and bone meal to any farmed animal, and legislation to ban the use of cattle head meat for human consumption.

b. *WHO.* WHO has held meetings on the spongiform encephalopathies in 1991, 1993, 1995, and 1996, and a meeting in collaboration with the Office International des Epizooties (OIE) in 1994. The general purposes of these meetings were to review the existing state of knowledge on spongiform encephalopathies including BSE, to evaluate possible means of transmission, and to identify risk factors for infection. A specific purpose was to review the possible human public health implications of animal spongiform encephalopathies, with special emphasis on BSE. The group of international experts convened in April 1996 by WHO recommended that all countries should ban the use of ruminant tissues in ruminant feed. The WHO group also declared that milk and milk products, including such products from the United Kingdom, are safe for human consumption and that gelatin in the food chain is considered safe because its preparation effectively destroys BSE. Finally, the group concluded that tallow could be safe if effective rendering procedures are in place (i.e., rendered as protein-free) (Ref. 2).

c. *OIE.* OIE has supported the U.K. ban on the use of specified offals and has recommended that the same action be taken in other countries with a high incidence of the disease (Ref. 102). OIE has held meetings in 1990, 1991, 1992, 1995, and 1996, and has developed guidelines concerning animals and animal products to prevent movement to unaffected countries.

d. *European Community (EC).* The EC has held a series of meetings related to BSE. Following issuance of the U.K. SEAC statement suggesting a possible link between nv-CJD and BSE, the EC imposed a ban on British cattle, beef and bovine derivatives (Ref. 103).

3. Voluntary Measures by the U.S. Animal Industries

a. *Voluntary ban on rendering adult sheep.* In 1989, the National Renderers Association (NRA) and the Animal Protein Producers Industry (APPI) recommended to their members that they stop rendering adult sheep or providing sheep offal for sale as meat and bone meal for inclusion in cattle feed (Ref. 104). Following the recommendation of the voluntary ban, FDA carried out a survey of current practices in the United States for rendering or otherwise disposing of adult sheep carcasses and parts, specifically head, brain, and spinal cord. Limited inspections of rendering plants were conducted in 1992 to: (1) Assess compliance by U.S. renderers with the voluntary ban; (2) identify rendering plant practices concerning adult sheep; and (3) determine if rendered adult sheep protein byproducts were being sold or labeled for use as feed or feed components for cattle. Of the 19 plants surveyed, 15 rendered carcasses or offal of adult sheep. These 15 plants processed more than 85 percent of the adult sheep rendered in the United States. Eleven of the 15 plants rendered carcasses of adult sheep with heads, 7 of the 15 rendered sheep carcasses separately from other species, 6 of the 15 maintained meat and bone meal from adult sheep separate from meat and bone meal from other species, and 4 of the 15 rendered sheep that had died of causes other than slaughter. Six of the 11 renderers processing adult sheep with heads had sold meat and bone meal to manufacturers of cattle feed. Thus, the rendering industry's voluntary ban on the rendering of adult sheep or providing sheep offal for use in cattle feed was not fully implemented at the time of the survey (Ref. 105).

b. *Voluntary ban on feeding ruminant proteins to ruminants.* On March 29, 1996, the National Cattlemen's Beef Association (NCBA), the National Milk Producers Federation, the American Sheep Association, the American Veterinary Medical Association, the American Association of Veterinary Medical Colleges, and the American Association of Bovine Practitioners announced the recommendation of a voluntary ban on the feeding of ruminant-derived proteins to ruminant animals (Ref. 106). USDA, PHS, the American Society of Animal Science, and other organizations announced support for the voluntary ban (Refs. 107 and 108). According to the NCBA (Ref. 109), a comprehensive communication strategy, seeking removal of ruminant-derived proteins from the rations of ruminants, was implemented in May 1996 by the feed industry, nutritionists, veterinarians, extension specialists, and dairy and beef producers. NCBA has not conducted a survey to assess the impact of its communication strategy; however, NCBA did point out that past requests for voluntary action by the cattle industry have been quite successful, approaching 90 percent compliance. In contrast, an anonymous comment to the ANPRM suggested a compliance level of less than 5 percent (Ref. 110). FDA has not conducted a survey to ascertain the level of compliance with the voluntary ban.

G. Processing Animal Tissues for Feed Ingredients

1. Current Rendering Practices

The following discussion on current rendering practices comes directly from comments supplied to FDA in response to the ANPRM from representatives of

APPI and NRA. Knowledge about the four basic types of rendering systems that are most commonly used in the United States today may be crucial in dealing with the TSE issue in this country. Data on the inactivation of the BSE and scrapie agents following simulation of the most commonly used basic types of rendering systems in the United States could be quite useful, especially because some of these systems do not appear to have been used in the only published rendering study on BSE inactivation (Ref. 85).

Rendering, the process of cooking raw material to remove the moisture and fat from the solid protein portion of animal tissues, has been practiced by humans for more than 2,000 years. The United States rendering industry has developed over the last 160 years. Modern rendering systems are high-technology recycling processes that efficiently convert animal byproducts (shop fat and bone, beef and pork slaughterhouse materials, poultry offal, fish, etc.) to stable protein and fat supplements for feed.

Current technology consists of four basic types of rendering systems—batch cooker, continuous cooker, continuous multi-stage evaporator, and continuous preheat/press/evaporator. All systems consist of three basic steps: Grinding the raw material, cooking it to remove moisture, and separating the melted fat from the protein solids.

Batch cookers are multiple units, each consisting of a horizontal, steam-jacketed cylindrical vessel with an agitator. Batch cookers are operated at atmospheric pressure. The cooked material is discharged to the percolator drain pan, which contains a perforated screen that allows the free-run fat to drain and be separated from the protein solids known as ''tankage.''

Because ''tankage'' contains considerable fat, it is processed through a screw press to complete the separation of fat from solids. The fat discharged from the screw press usually contains fine solid particles that are removed by either centrifuging or filtration. The protein solids discharged from the screw press are known as ''cracklings,'' which normally are screened and ground with a hammer mill to produce protein meal.

The continuous cooker rendering system normally consists of a single continuous cooker, operating at atmospheric pressure. The discharge from the continuous cooker usually passes across either a vibrating screen or stationary perforated screen to allow the free-run fat to drain. The subsequent steps in the continuous cooker rendering process are similar to those described before for the batch cooker.

In the continuous multi-stage evaporator rendering system, crushing is used as the first stage of size reduction of the raw material. A fat recycle stream is then used to deliver the material as a pumpable slurry through the secondary grinding step to reduce further the particle size. Particle size and fat ratios are important components of this system. The slurry discharge from the final stage of evaporation is pumped to a centrifuge which removes most of the fat and part of it is recycled back to the second stage of size reduction. The solids discharged from the centrifuge are conveyed to screw presses which complete the separation of fat from the protein solids.

The continuous preheat/press/evaporator rendering system is known by a variety of names including the Stord dewatering rendering system and the Atlas low temperature wet rendering system. In either case, raw material is ground in two stages and passes through the preheater to raise the temperature to 180 to 190 °EF before entry to the twin screw press. The press separates this material into two phases: A presscake of solids containing moisture and a low fat concentration, and a liquid containing mostly water (stickwater) with fine solids, soluble protein, insoluble protein and melted fat.

The press liquid is processed either by passing through a multistage evaporator system to remove the water before centrifuging to remove the fine solids from the fat, or by passing through a centrifuge to separate the fat before multistage evaporation of the remaining water/fine solids fraction. The liquid separation system consisting of two stages of centrifuges completes the separation of the melted fat from the solids and water. In this system, the screw press normally used to process the ''tankage'' is no longer needed. Longer drying times are needed with this system as compared to previous systems because of the early fat removal (less fat means less effective heat transfer).

The agency encourages further research into methods of deactivation of the BSE agent during the rendering process.

2. Assay Methodologies for Proteins

Enforcement of the proposed regulation would be facilitated if a test to detect and distinguish ruminant from nonruminant materials in feeds or feed ingredients was available. However, practical assays that could be used to enforce the proposed regulation are not available at this time. The test procedure would need to exhibit a high degree of sensitivity and selectivity; that is, the test must be able to detect the analyte of interest to the exclusion of other components. A test for acceptable rendered products in animal feed must therefore be able to discriminate and differentiate between permitted and prohibited animal derived proteins. Other factors of importance are the ruggedness of the test method, speed, and simplicity of design.

An enzyme-linked immunosorbant assay (ELISA) based analytic method that is both sensitive (detects low levels of analyte) and specific (detects primarily the analyte of interest) is one possibility. ELISA is a relatively straightforward methodology. There are numerous commercial sources for antisera capable of binding to bovine, ovine, porcine, and caprine proteins. Antisera have also been generated from muscle extracts and validated for use in USDA-approved ELISA methods to determine the identity of raw and cooked meats (Refs. 111 and 112). However, rendered products present a unique problem because rendering causes the destruction of most of the antibody binding epitopes needed for an ELISA test. Therefore, detection of rendered proteins by a given antibody cannot be automatically assumed.

Other potential methodologies include western blot analysis, capillary electrophoresis, and high pressure liquid chromatography. The applicability of these three methods to this issue has not been addressed. Furthermore, they require expensive, specialized equipment and a high degree of technical competence.

The agency encourages research to detect and distinguish ruminant from nonruminant materials in rendered products and animal feeds.

III. Statutory Provisions Regarding Food Additives

The term ''food'' as defined in the act includes animal feed. Section 201(f) of the act (21 U.S.C. 321(f)) defines food as ''articles used for food or drink for man or other animals'' and ''articles used for components of any such article.'' Furthermore, any substance whose intended use results or may reasonably be expected to result in its becoming a component of food is a food additive unless, among other things, it is GRAS or is the subject of a prior sanction. Section 402(a)(2)(C) of the act (21 U.S.C. 342(a)(2)(C)) deems food adulterated ''if it is, or it bears or contains, any food additive which is unsafe within the meaning of section 409 * * *.'' Under section 409(a) of the act (21 U.S.C 348(a)), a food additive is unsafe unless

a food additive regulation or an exemption is in effect with respect to its use or its intended use.

A food additive regulation is established by the submission and approval of a food additive petition, as provided in 21 CFR 571.1, or on FDA's initiative as provided in 21 CFR 570.15. FDA on its own initiative or at the request of an interested party, also may propose to determine that a substance intended for use in animal feed is not GRAS and is a food additive subject to section 409 of the act as provided in § 570.38 (21 CFR 570.38). Subsequent to the publication of such a proposal and after consideration of public comments, FDA may issue a final rule declaring the substance to be a food additive and require discontinuation of its use except when used in compliance with a food additive regulation.

A. GRAS Determination

A determination that a substance added directly or indirectly to a food is GRAS, is generally based on specific information regarding the composition of the substance, its use, method of preparation, methods for detecting its presence in food, and information about its functionality in food (21 CFR 570.35) as determined by experts qualified by scientific training and experience to evaluate the safety of such a substance. A substance added to food becomes GRAS as the result of a common understanding about the substance throughout the scientific community familiar with safety of such substances. The basis of expert views may be either scientific procedures, or, in the case of a substance used in food prior to January 1, 1958, experience based on common use in food (§ 570.30(a)) (21 CFR 570.30(a)). General recognition of safety through experience based on common use in food prior to January 1, 1958, may be determined without the quantity or quality of scientific studies required for the approval of a food additive regulation. However, substances that are GRAS based on such use must be currently recognized as safe based on their pre-1958 use. (See *United States* v. *Naremco,* 553 F.2d 1138 (8th Cir. 1977); compare *United States* v. *Western Serum,* 666 F.2d 335 (9th Cir. 1982).) A recognition of safety through common use is ordinarily to be based on generally available data and information (§ 570.30(c)). An ingredient that was not in common use in food prior to January 1, 1958, may achieve general recognition of safety only through scientific procedures.

General recognition of safety based upon scientific procedures requires the same quantity and quality of scientific evidence as is required to obtain approval of a food additive regulation for the ingredient (§ 570.30(b)). (See *United States* v. *Naremco,* 553 F.2d at 1143.) A substance is not GRAS if there is a genuine dispute among experts as to its recognition (*An Article of Drug * * * Furestrol Vaginal Suppositories,* 251 F. Supp. 1307 (N.D. Ga. 1968), *aff'd* 415 F.2d 390 (5th Cir. 1969).) Further, general recognition of safety through scientific procedures must be based upon published studies (*United States* v. *Articles of Food and Drug Colitrol 80 Medicated,* 372 F. Supp. 915 (N.D. Ga. 1974), *aff'd,* 518 F.2d 743, 747 (5th Cir. 1975)), so that the results are generally available to experts. It is not enough, in attempting to establish that a substance is GRAS, to establish that there is an absence of scientific studies that demonstrate the substance to be unsafe; there must be studies that show the substance to be safe (*United States* v. *An Article of Food * * * Co Co Rico, supra.*)

Conversely, a substance may be ineligible for GRAS status if studies show that the substance is, or may be, unsafe. This is true whether the studies are published or unpublished (50 FR 27294 at 27296, July 2, 1985). If there are studies that tend to support a finding that a particular substance is GRAS, but also studies that tend to support a contrary position, the conflict in the studies, just as a conflict in expert opinion, may prevent the general recognition of the safe use of the substance.

B. Prior Sanction

Under section 201(s) of the act, the term ''food additive'' does not apply to any substance used in accordance with a sanction or approval granted prior to enactment of section 201(s) of the act and granted under the act, the Poultry Products Inspection Act (21 U.S.C. 451 *et seq.*), or the Federal Meat Inspection Act (21 U.S.C. 601 *et seq.*). Section 570.38(d) provides that if the Commissioner of Food and Drugs is aware of any prior sanction for use of a substance, he will, concurrently with a notice determining that a substance is not GRAS and is a food additive subject to section 409 of the act, propose a separate regulation covering such use of the substance.

In the case of the materials subject to this proposed rule, FDA has determined that it is unaware of any applicable prior sanction. Any person who intends to assert or rely on such sanction is required to submit proof of the existence of the applicable prior sanction. The failure of any person to come forward with proof of such an applicable prior sanction in response to this notice will constitute a waiver of the right to assert or rely on such sanction at any later time.

C. Food Additive Status of Ruminant Tissues

The agency recognizes that processed ruminant byproducts have a long history of use in animal feeds without known adverse effects. However, the evidence as discussed in sections I and II.A. through II.D. of this document, for the development of a new pattern of disease transmission, now indicates that these ingredients can no longer be categorically regarded as safe. The agency tentatively concludes that, based on this evidence, use of such products in ruminant feed is not GRAS. The agency is proposing this regulation in light of the findings and conclusions described in sections I and II in this notice. Nor is the agency aware of a prior sanction for any feed products that contain these tissues. Therefore, FDA is proposing that the addition of protein derived from ruminant tissues to ruminant feed would constitute the use of an unapproved food additive because no regulation is in effect providing for such use. Any ruminant feed that contains protein derived from ruminant and mink tissues would be adulterated. Accordingly, FDA is proposing to list protein derived from ruminant tissues in part 589.

IV. Comments

FDA's May 1996 ANPRM requested public comment and information on all aspects of TSE's, including BSE, and the potential consequences of a prohibition on the feeding of ruminant protein to ruminants. The agency received nearly 600 comments, including many that were submitted long after the comment period ended. The agency has attempted to address the comments in this proposal. If there are any significant concerns that the agency has not addressed, these concerns should be brought to the agency's attention in timely comments on this proposal. Comments that were specific to the topics covered by the other sections of this preamble were considered in the preamble as written. Comments are discussed in the text of some of these sections. The following is a general discussion of the comments received.

Many comments, especially from renderers, meat packers, feed companies and farmers, opposed the prohibition of ruminant protein being fed to ruminants. The main reasons offered were the lack of evidence of BSE in the United States, lack of scientific data to support the proposal in the absence of

BSE, environmental concerns, lack of an assay or other practical means to support enforcement, and the economic hardship that would fall upon the animal producers, slaughter facilities, renderers, feed manufacturers, and packers. Support for such a prohibition from consumer groups, pharmaceutical firms, scientists and veterinarians, and some livestock organizations, emphasized a potential effect on human health, the experience and data from the United Kingdom, and significant economic detriment if a BSE epidemic were to occur in this country. Other comments described a need to ensure that exported U.S. bovine-derived products met international standards and guidelines, and to maintain consumer confidence in the beef and dairy industries even though those comments acknowledged that there is a minimal potential risk of infectivity to animals and humans.

The agency requested scientific information regarding the occurrence, transmission, etiology, pathogenesis, epidemiology, and inactivation of TSE agents. Many comments were received that contained useful scientific information that was considered in the preparation of this proposed rule, as described in this preamble and supporting documents.

Three comments suggested that the documented existence of nonBSE TSE's, and the presence of ''downer'' cows (cows unable to walk) in the United States is evidence that BSE is present in this country. Three comments stated that the BSE surveillance in the United States provides sufficient assurance that BSE does not exist in this country. A number of persons commented on whether specific tissues, such as milk, blood, and gelatin, should be excluded from any prohibition, with nearly all supporting such exclusion.

The agency requested information on the economic impact of the described action. Numerous comments provided data on volume of product impacted, potential economic benefits, and cost of compliance to affected persons. The data were used to develop the preliminary economic assessment supporting this proposed rule.

The agency requested information on the environmental impact and potential mitigating factors of the described action. Many comments stated that alternative disposal of the prohibited carcasses would be less environmentally safe than rendering. These and other comments were considered in the development of the environmental assessment.

Numerous comments were received regarding the need to prohibit only tissues that have been demonstrated to be infective. Generally, the comments stated that tissues that have been proven to be noninfective should be exempted. Although the agency is proposing a rule that would prohibit the use of all ruminant-derived protein in ruminant feeds, the agency will, as explained elsewhere in this document, consider a partial ruminant-to-ruminant prohibition as well as a mammalian-to-ruminant prohibition.

Many comments supported establishment of Hazard Analysis Critical Control Points (HACCP) for the rendering industry, often with concurrent support for current good manufacturing practices (CGMP's) for animal-derived proteins. For example, the American Feed Industry Association proposed a specific set of Good Manufacturing Practices for the producers of animal protein products, and the National Renderers Association proposed a specific HACCP regulation for rendering operations. The agency agrees that the need for HACCP, perhaps supported by CGMP's, for animal-derived proteins could be considered in future rulemaking. Several comments were received regarding labeling requirements for animal-derived proteins. The majority of the comments supported a statement of the origin of animal-derived protein. The agency has included a labeling requirement in the proposed rule.

V. Analysis of Alternatives

A. Overview

In addition to the proposed ruminant-to-ruminant rule, the agency is considering alternative approaches. The alternatives include: (1) excluding from ruminant feed all ruminant and mink materials except those that have not been found to present a risk of transmitting spongiform encephalopathy (partial ruminant-to-ruminant prohibition); (2) prohibiting the use in ruminant feed of all mammalian protein (mammalian-to-ruminant prohibition); (3) prohibiting the feeding of materials from species in which TSE's have been diagnosed in the United States (sheep, goats, mink, deer, and elk); (4) prohibiting the feeding of specified sheep and goat offal, as proposed by the agency in 1994; (5) other alternatives that might be proposed by the comments; and (6) no action.

Analysis of the advantages and disadvantages of the options follows. Analysis of costs and benefits, including detailed economic analysis, also appears in section IX. of this document. Environmental consequences are discussed in section VIII. of this document.

In determining the scope of the final rule, the agency will weigh carefully the comments received, along with material contained in the administrative record for this proposal and the comments submitted in response to the ANPRM. Comments regarding the scope of the rule, including those comments supporting other options other than the proposed option, should be addressed accordingly.

B. Ruminant-to-Ruminant Prohibition

Advantages of this option, compared with the ''no action'' option, are discussed in detail in section I. of this document. The advantages of this option that are discussed in that section would apply if BSE were to occur in this country. As discussed in separate sections that follow, there would also be environmental and economic advantages to the ruminant-to-ruminant option, if BSE were to occur in this country. Disadvantages of the ruminant-to-ruminant option, compared to the ''no action'' option, would be relevant primarily if BSE did not occur in the United States. These disadvantages would include the time and expense required to comply with the provisions of the regulation, and the limited, short term environmental effects described in section VIII. of this document.

Compared with the mammalian-to-ruminant option, the ruminant-to-ruminant option has the advantages of being tailored more precisely to the identified scientific concerns, and less burdensome on the affected industries. Economic and environmental costs would be less. The major disadvantage is that the ruminant-to-ruminant option results in more complexity for the regulated industries, and thereby provides less assurance of compliance. This is explained further in the discussion of the mammalian-to-ruminant option, in section V.D. of this document.

Compared to the other remaining options, which are less restrictive, the ruminant-to-ruminant option provides greater assurance of protection of the public health and, if BSE were to occur in the United States, lower economic and environmental costs. The disadvantages relate generally to the greater economic and environmental costs that would be incurred if BSE did not occur in the United States.

C. Partial Ruminant-to-Ruminant Prohibition

As an alternative to the proposed ruminant-to-ruminant prohibition, the agency is considering a partial

ruminant-to-ruminant prohibition which would exclude from ruminant feed all ruminant and mink materials except those that have not been found to present a risk of transmitting spongiform encephalopathy. The exclusions would be in addition to milk products, gelatin and bovine blood, which are excluded in the proposed rule. Possible exclusions include slaughter byproducts from bovine that have been inspected and passed in inspected slaughter facilities, except the brain, eyes, spinal cord, and distal ileum. The four named tissues would be prohibited because they have been shown through experimental trials and bioassays to transmit spongiform encephalopathy. The remaining tissues have not been demonstrated to transmit spongiform encephalopathy.

This option has the advantage of having its prohibitions based primarily on scientific information related to infectivity of specific tissues. A number of persons who commented on the ANPRM urged the agency to base its regulation entirely on such scientific information. In addition, this option would likely involve lower lost sales revenues to the affected industries, and could have fewer adverse economic effects, than would the other options.

However, the agency has three concerns with regard to the adequacy of this option in providing sufficient protection for the public health. First, FDA recognizes that it may be impractical in the slaughter and rendering processes to segregate and exclude the bovine tissues that have not been found to present a risk. For example, USDA has expressed reservations that separating the distal ileum from the other intestinal offal could jeopardize a slaughter plant's ability to meet pathogen reduction goals required under USDA's HACCP regulations. Furthermore, regulatory enforcement of a prohibition affecting only specified bovine tissues may be impractical in the absence of specific diagnostic methods for identifying protein derived from such tissues. If a partial prohibition were adopted, it would be based on a finding that practical methods can be implemented for segregating, processing, storing, and identifying feed materials derived from tissues that have not been found to present a risk.

Second, this option would be inconsistent with actions taken in a number of other nations. For example, CDC has commented that any prohibition of lesser scope than a ruminant-to-ruminant prohibition would place the United States out of step with the international public health community.

Third, limiting the prohibition of tissues to those that have been shown to be infective would not address the risk that may be presented by other tissues. Definitive assays using methods more sensitive than currently available methods might identify such additional tissues as infective. The possibility of undetected low dose exposure cannot be eliminated, particularly for tissues such as lymph nodes and spleens which would be expected to be infective (Ref. 1).

These issues raise a substantial question as to whether the tissues could be GRAS. To achieve the highest level of public health protection, the agency believes that it may be reasonable to assume that, in the absence of scientific data definitively establishing that each tissue does not transmit spongiform encephalopathy, all ruminant tissues present a risk of infectivity.

The agency nevertheless welcomes comments on this alternative to the proposed ruminant-to-ruminant prohibition and especially invites comments on possible practical means of separating the distal ileum in compliance with USDA and industry standards, as well as the practicality of the removal of brain, spinal cord, and eye and the segregation of these tissues from others in the slaughter plant.

D. Mammal-to-Ruminant Prohibition

The agency received comments in support of a rule that would prohibit the use in ruminant feed of all mammalian-derived protein. For instance, the American Feed Industry Association, NRA, and APPI expressed concerns that segregating certain mammalian derived proteins from others would not be feasible because of regular commingling of protein products at feed mills and rendering facilities. A mammalian-to-ruminant prohibition would provide greater assurance of industry compliance than either a partial or total ruminant-to-ruminant prohibition because practical analytical methods exist for distinguishing mammalian from nonmammalian proteins. Implementation of a mammal-to-ruminant prohibition by the regulated industries would be less complex, and would reduce the potential for contamination of cattle feeds with material intended for feeding monogastric animals. Contamination of cattle feeds with material intended for feeding nonruminants was the primary reason that the United Kingdom has prohibited mammalian proteins in the rations of cattle. A mammal-to-ruminant prohibition would enable the continued use of Association of American Feed Control Officials definitions for the purpose of identifying and labeling products covered by the prohibition, and would not require additional or new labeling. Finally, concerns were expressed that allowing certain products containing meat and bone meal to be used in ruminant feeds while prohibiting others would lead to instability in financially sensitive commodity markets for animal protein.

On the other hand, the agency is not aware of any scientific data that establish or suggest TSE infectivity in nonruminant mammals except in mink. Thus, excluding nonruminant tissues from ruminant feed would be based primarily on the view that the possibility of infection of nonruminant tissue through cross-contamination or commingling with ruminant tissue is sufficient to preclude GRAS status for the nonruminant tissue. However, FDA is aware that some portions of the affected industries would prefer to segregate ruminant from nonruminant tissues, and believe that such separation is practical. Accordingly, the agency invites comments on the relative merits and disadvantages of a mammal-to-ruminant prohibition compared with a total or partial ruminant-to-ruminant prohibition.

E. Prohibition of Materials From U.S. Species Diagnosed With TSE's (Sheep, Goats, Mink, Deer, and Elk)

This option would involve requiring that ruminants not be fed any proteins derived from any U.S. animal species in which a TSE has been diagnosed. This includes sheep, goats, mink, deer, and elk. This approach would eliminate the scrapie agent, along with TME and CWD, from ruminant feed, and thereby reduce the risk of BSE in cattle caused by TSE transmission from other species. However, it would not prevent the spread of BSE among cattle if BSE occurred for some other reasons, e.g., by a spontaneous mutation in cattle or importation of animals with BSE, and the animals were processed and subsequently included in ruminant feed. As explained in section IX. of this document, this option involves lower economic costs than the three options previously described, in the absence of a BSE outbreak.

F. Sheep-Specified Offal Prohibition

The option of prohibiting only protein from specified offal from sheep and goats for use in ruminant feed would eliminate the scrapie agent from bovine feed. However, it would not prevent the spread of BSE among cattle if BSE occurred for some other reason, e.g., by

a spontaneous mutation in cattle or importation of animals with BSE, and the animals were processed and subsequently included in ruminant feed. The agency notes that if it were to select this option, it would reconsider its statement in the 1994 proposed rule that sheep less than 12 months of age presented a minimal risk. Cases of scrapie in sheep as young as 7 months have been reported (Ref. 113). Although the risk presented by young animals may be minimal, excluding them may provide inadequate protection to the public health. As explained in section IX. of this document, this option involves lower economic costs than the options described previously, in the absence of a BSE outbreak.

G. No Action

The advantages and disadvantages of this option, in relation to the other options, are discussed in detail in section I. of this document and in the preceding subsections of this section, as well as the environmental and economic sections. In general, this option offers lower economic and environmental costs if BSE does not occur in the United States, and higher such costs (in addition to public health implications) if BSE does occur.

VI. Description of the Proposed Rule

A. Introduction

1. Regulatory Alternatives

Typically, FDA regulates products that are of public health concern through a combination of regulatory tools including: labeling for appropriate use; CGMP regulations and, recently, HACCP regulations; specifications for the product or its manufacture; and testing to determine the presence or level of the agent of concern. Use of two or more of these means provides for appropriate reinforcement to ensure that the public is protected.

The agency's choice of readily available approaches for regulating animal protein products derived from ruminant and mink tissues is limited. For example, there are no practical tests for the presence of the TSE agent or of ruminant protein in animal feed. No commercial method of deactivating the TSE agent in animal protein products has been scientifically validated as effective. None of the agency's CGMP or HACCP regulations apply to this situation. Labeling requirements can be used but, by themselves, do not meet the agency's regulatory objectives.

2. The Regulated Industry

Often, the industry that manufactures and distributes an FDA-regulated product is fairly easily characterized. This facilitates regulation. That is not the case for animal protein products, as the following brief overview makes clear.

Renderers collect animal tissues from a variety of sources, and process these tissues into both protein and nonprotein products. The renderers may be specialized (packer/renderer) or independent. The packer/renderer, which involves a renderer associated with a large slaughter operation, specializes in one species—primarily cattle, swine, or poultry. Thus, whether the packer/renderer handles ruminant materials is fairly easily determined. The independent renderer, on the other hand, obtains a variety of raw materials ranging from restaurant scraps to byproducts from multi-species slaughtering operations to dead animals obtained from farmers. Typically, the independent renderer does not have a practical method to separate incoming ruminant from nonruminant materials, and thus commingles both ruminant and nonruminant materials in the rendering process. The rendered product is typically designated ''meat and bone meal,'' but rendering operations produce a variety of other products. Renderers sell their products to animal protein blenders, animal feed manufacturers or pet food manufacturers. Virtually all rendered material at present is used ultimately for pet food or the feed of livestock or poultry.

Animal protein blenders mix animal and plant protein materials to meet a protein guarantee stated on the label, and to make a balanced nutritional product. Typically, the blender does not separate ruminant from nonruminant animal protein in its blending operation, although it may keep mammalian, poultry, fish and soybean meal protein separate at least in the initial stages. The blender sells its products to feed or pet food manufacturers. Some renderers also blend animal protein products.

Feed manufacturers use the protein material to make a complete feed (ready to be feed to animals), or a concentrated feed that needs to be further diluted (blended) before it can be fed to animals. The feed may be manufactured by an off-farm miller, or on the farm. Feed that is manufactured off-farm may be sold to one or more persons (for blending and/or further distribution) before reaching the farm.

Farmers that feed animals typically raise one species, but may have more than one (including both ruminants and nonruminants). Only about 10 percent of all animal protein products are fed to ruminants (mainly cattle) but approximately half of all animal protein products comes from ruminants.

3. Enforcement Considerations

The industry scenario described in the preceding section presents unique enforcement challenges. The agency is aware, from the comments to the ANPRM and other sources, of concerns that the regulatory impact be minimized. The agency is also aware of the need to provide incentive for innovation, e.g., in testing methodology and manufacturing technology, that would reduce the need for regulation. Finally, the agency is aware of the need, in designing a regulatory program, to acknowledge the different circumstances that exist in the industries previously described.

Therefore, the agency has designed a proposed regulatory scheme using the following principles. First, the agency has identified minimally necessary requirements to meet its regulatory objectives. The agency's goal is to apply risk management principles that minimize risk. Second, the proposed regulation applies greater restriction where the risk is greater—for example, where a firm handles both ruminant and nonruminant materials and intends to keep them separated. Third, the agency intends to rely on normal business records for much of the documentation it needs.

A fourth and most important principle concerns the related objectives of flexibility and providing incentives to reduce recordkeeping and labeling requirements. The proposed regulation provides for the reduction or elimination of recordkeeping and labeling requirements, upon the development of methods for detection, deactivation, or verification of product identity. These provisions are described further in the discussion that follows.

Industry-wide adoption of scientific advances including, or in addition to, those specified in the regulation, could ultimately lead to amendment or revocation of any final regulation. An example of an additional method would be the development of a practical method to detect the presence of ruminant protein in animal protein products or feed, which could be used for quality control by firms that separate ruminant from nonruminant protein, and by firms downstream from renderers.

Similarly, research leading to identification of the TSE causative agent and the etiology of BSE, and the characterization of the zoonotic nature of animal TSE's, could also lead to amendment or revocation of any final regulation.

The agency has tentatively decided not to place any record keeping, labeling or other specific requirement on firms that handle only protein materials from nonruminant sources. An example would be a rendering operation that is part of a swine slaughter operation. However, if these firms would use or intend to use animal protein products containing ruminant tissues in ruminant feed, or caused such use or intended use, the feed would be adulterated under the act.

The agency has also tentatively decided to require farmers (those responsible for feeding ruminant animals) only to make available copies of invoices and labeling for feed purchases. Farmers would not be required to maintain written procedures for handling animal protein products. These minimal requirements would apply even if the farmers were feeding both ruminant and nonruminant animals. Purchase records would be used primarily for traceback purposes. Because only minimal requirements would be placed on farmers, the proposed rules require that labeling for the animal protein and feed products caution against feeding the products to ruminants. Comments on these two tentative decisions are encouraged.

B. Outline of the Proposed Regulation

The proposed regulation places two general requirements on persons that manufacture, blend, process, and distribute animal protein products and feeds made from such products. The first requirement is to place cautionary labeling on the protein and feed products. The second is a requirement to provide FDA with access to sales and purchase invoices, for compliance purposes. For example, an invoice obtained from a feed manufacturer for a protein product not labeled with the cautionary statement could be used to trace back to the supplying renderer to ensure that it manufactures and distributes animal protein product from nonruminant sources.

Firms (renderers, blenders, and feed manufacturers and distributors) that handle animal protein products from both ruminant and nonruminant sources, and that intend to keep the products separate, would have certain additional requirements related to their source of nonruminant material; the need for separate facilities or cleanout procedures; and the need for SOP's. The same requirements would apply to firms that handle feeds containing animal protein products from both ruminant and nonruminant sources, and that intend to keep the feeds separate. Requirements would be greater for these operations because of the greater risk they would present for the possibility of ruminant protein being fed to ruminants.

The proposed rule provides that some or all of the regulatory requirements would not apply if innovations such as development of test methods and deactivation processes for TSE agents were scientifically validated and put into commercial use. Provisions for use of such methods do not imply that the agency believes that such agents are or will be in the animal protein products. The objective is to minimize the risk that the agent would occur in the products, regardless of the level of risk. Certain minimal but additional requirements would be imposed in such circumstances. For example, because the innovations likely would be applied by renderers, the renderers would need to certify to downstream customers that the methods were being utilized.

Section 589.2000(a) presents definitions of certain words used in the regulation. The definition of ''protein derived from ruminant and mink tissues'' excludes blood from bovines, milk proteins, and gelatins. Thus, those products are not subject to the regulatory provisions of the regulation. The proposed rule does not apply to any nonprotein animal tissues such as tallow or other fats. ''Renderer'' includes firms, not traditionally considered to be included within the definition of that term, but that collect animal tissues from various sources and subject them to minimal processing before offering the materials for use in animal feed. Also, ''feed manufacturers'' is defined to include both off-farm and on-farm feed manufacturing operations.

Section 589.2000(b) declares that protein derived from ruminant and mink tissues is not GRAS when intended for use in the feed of ruminant animals. The use or intended use of such material in ruminant animal feed causes the feed to be adulterated.

Section 589.2000(c) establishes regulatory requirements for renderers that manufacture products that contain or may contain protein derived from ruminant and mink tissues. (''May contain'' allows for the fact that the renderer may not be able to determine the species of some incoming material). These renderers typically process both ruminant and nonruminant materials, but do not attempt to separate ruminant from nonruminant materials. Section 589.2000(e) covers renderers that intend to separate such materials. As mentioned, renderers that process exclusively nonruminant materials are not covered by the specific requirements of the regulation. Section 589.2000(c) applies to animal protein products intended for use in animal feeds, as well as animal feeds containing such products.

Two requirements would be placed on renderers covered by § 589.2000(c). First, they would be required to label their products to indicate that they contain (or may contain) protein derived from ruminant and mink tissues, and that the materials should not be fed to ruminant animals or used to manufacture feed for ruminants. Second, the renderers would be required to maintain copies of sales invoices for all their animal protein products, and to make those copies readily available for inspection. As an example, FDA would use the invoices to follow up with customers to verify that the customers are not using the products to manufacture ruminant feed. Because sales invoices are normal business records, the agency believes that the additional burden imposed by this requirement would be minimal.

Section 589.2000(c) renderers would be exempted from the labeling and record requirements if they used a manufacturing method that deactivates the agent that causes TSE's, or a test method that detects the presence of the agent that causes TSE's. Both methods would have to be validated by FDA, and made available to the public. The regulation would require ''routine'' use. That is, renderers would be required to use the test method on all incoming material or in each batch it manufactures.

Section 589.2000(c) renderers would be exempted from the record requirements (but not the labeling requirement) if they used a safe method to mark the presence of the materials. The marking could be visible to the naked eye, e.g., through use of a dye, or by a nonvisual means. One ANPRM comment recommended use of a colored uniform fine iron product to identify specific feed ingredients. If the marking is not visible, the marking agent must be detectable by a method that has been validated by FDA, and made available to the public. The mark must be permanent, i.e., it must be visible in mixed feed as used on the farm.

Section 589.2000(d) establishes regulatory requirements for persons other than renderers and persons responsible for feeding ruminants that handle animal protein products or feeds containing such products. This includes protein blenders, and feed manufacturers and distributors. However, as in the case of renderers, those firms that would otherwise be included in § 589.2000(d) but that handle both ruminant and nonruminant

materials and intend to separate the materials would be covered by § 589.2000(e) instead. Protein blenders, and feed manufacturers and distributors, that handle only nonruminant materials are excluded from the regulatory requirements of the proposed rule.

Persons covered by § 589.2000(d) would be subject to the same requirements as renderers, i.e., labeling and records. The records would include invoices both to cover purchases and sales of animal protein products and feeds containing those products. For on-farm mixers, production records could be substituted for sales invoices.

Section 589.2000(d) firms would be exempt from the labeling and record requirements if they purchased materials from renderers that certified the use of deactivation or detection methods as described in § 589.2000(c). They would also be exempt from the labeling and record requirements if they purchased materials from persons other than renderers who certified that they purchased materials from renderers who certified the use of deactivation and detection methods as described in § 589.2000(c). Paragraph (d) firms would also be exempt if they used the deactivation or detection methods described in § 589.2000(c), where use of such method is appropriate for the particular firm.

Paragraph (d) firms would be exempt from the record requirements if they purchased visibly-marked materials, or purchased from renderers that certified the use of marking methods as described in § 589.2000(c). They would also be exempt from the record requirements if they used the marking methods as described in § 589.2000(c).

Section 589.2000(e) establishes regulatory requirements for renderers, protein blenders, feed manufacturers and distributors, and independent haulers that handle both ruminant and nonruminant materials, and intend to keep the products separate. Section 589.2000(e) establishes four kinds of requirements. First, the firms would have the same labeling and recordkeeping requirements as specified in paragraphs (c) and (d) of § 589.2000, except that the labeling requirement would apply only to the ruminant and mink materials. Second, a renderer's source of nonruminant protein materials would be limited to single-species facilities, i.e., facilities slaughtering only swine. A renderer could purchase nonruminant protein from more than one single-species facility. The agency believes that this restriction is necessary because of its understanding that it is not likely to be feasible for mixed species slaughterhouses to undertake the additional compliance costs, and possibly additional facility costs, that would be required to assure separation of ruminant and nonruminant materials. The restriction would therefore help assure that enforcement of § 589.2000(e) would be practicable. However, the agency specifically requests comments on this provision.

Third, the firms would be required to establish separate equipment and facilities for the two kinds of materials, or cleanout procedures to prevent cross contamination. Fourth, the firms would need to establish written SOP's specifying the cleanout procedures, if used, and specifying procedures for separating the materials from the time of receipt until the time of shipment. Although § 589.2000(e) applies to several different kinds of firms, the agency's preliminary expectation is that only feed manufacturers and distributors will find it feasible to separate ruminant and nonruminant materials. As an example, a feed manufacturer might obtain ruminant materials from an independent renderer and swine materials from a packer/renderer, and use these materials to manufacture feed both for ruminants and nonruminants. The feed manufacturer would be required to meet the criteria listed previously, including the use of separate equipment and facilities or cleanout procedures, and the establishment of SOP's. The requirements of § 589.2000(e) would be applicable in the transportation process, whether the material is hauled by the feed manufacturer or another party such as an independent hauler. The requirement for separate facilities, procedures or SOP's would not apply to a firm, e.g., a feed mill or hauler, that handles only nonruminant materials, or only ruminant materials. Nor would it apply to a firm that handles both ruminant and nonruminant materials but does not attempt to separate the two kinds of materials.

The paragraph (e) firms would be exempted from the labeling and/or record keeping requirements, and the requirements related to sourcing, facilities and SOP's, if they meet the appropriate criteria for exemption. That is, renderers covered by § 589.2000(e) would be exempt from the labeling and recordkeeping requirements if they used deactivation or detection methods, and from the recordkeeping requirements if they used marking methods. Blenders and feed manufacturers and distributors would be exempt in a similar manner.

Section 589.2000(f) establishes requirements for those who are responsible for feeding ruminant animals. The only requirement contained in this paragraph is that those persons make available to FDA copies of purchase invoices and labeling for all incoming feeds. However, § 589.2000(f) does not apply to the feed manufacturing portion of farms and feedlots that have on-farm feed manufacturing operations. Section 589.2000 (d) and (e) would apply in those instances. Furthermore, persons who feed or intend to feed ruminant protein to ruminant animals would be subject to regulatory action for using or intending to use an unapproved feed additive as established in § 589.2000 (b).

Section 589.2000(g) establishes that violations of § 589.2000 (c) through (f) would cause animal protein products or feed containing animal protein products to be adulterated under sections 402(a)(4) or 402(a)(2)(d) of the act, or misbranded under section 403(a)(1).

Section 589.2000(h) establishes inspection and records retention requirements for persons covered by section 589.2000 (c) through (f). Records that are required under those paragraphs would need to be kept for a minimum of 2 years. The agency believes that this time period is adequate for purposes of verifying compliance with the regulation's procedural requirements. The agency invites comments on the need for a longer retention period related to the BSE incubation period, especially the practicality of using such records for epidemiologic investigation.

Section 589.2000(h) also requires that written procedures required by the regulation be made available for inspection and copying by FDA. The written procedures referred to are those specified in § 589.2000(e)(3). Affected firms would be required to have a copy of the current procedures available at all times.

VII. Specific Protein Sources

A number of comments discussed the exemption of certain tissues, including fluids, from any prohibitory rule. Most commentors favored the exemption of one or more tissues, including milk products; blood products; skeletal muscle and gelatin; and a variety of other tissues including both protein and nonprotein materials. Most of the comments cited published studies as well as positions taken by the European Union, European Commission, WHO and the government of France. The agency's comments on the status of milk, gelatin and blood follow. In addition, we discuss a comment on the use of canine and feline derived protein.

A. Milk Proteins

Data available to the agency suggests that milk proteins do not transmit the TSE agent. Research with oral exposure, intracerebral, and intraperitoneal administration of milk or mammary glands from BSE-infected bovine to normal and BSE-sensitive mice has not demonstrated the development of TSE's (Refs. 42 and 52). An expert group under the auspices of WHO recommended that all countries prohibit the use of ruminant tissues in ruminant feed. The WHO expert group also declared that milk and milk products, including such products from the United Kingdom, are safe for human consumption. In addition, OIE has recommended, because of lack of infectivity, that restriction of import or transit of milk products from healthy animals from BSE countries need not be instituted. Therefore, the proposed rules provide that protein derived from ruminant tissues does not include milk proteins derived from bovine, ovine, caprine, and cervine.

B. Gelatin Proteins

Data available to the agency suggest that gelatin does not transmit the TSE agent. The WHO has concluded that gelatin in the food chain is considered to be safe, as the conventional manufacturing process for gelatin has been demonstrated to significantly inactivate any residual infective activity that may have been present in source tissues (Ref. 2). FDA concurs with this statement and the scientific information on which it is based. Thus, the proposed rule excludes gelatin from protein derived from ruminant tissues.

C. Blood Meal Proteins

Data available to the agency suggests that bovine blood components do not transmit the TSE agent (Refs. 56, 78, and 94). Therefore, the proposed rule does not include blood meal from bovine as a protein derived from ruminant tissues.

D. Canine and Feline Derived Proteins

One comment suggesting that canine- and feline-derived proteins should not be fed to ruminants because of the finding of FSE in domestic cats in the United Kingdom. The agency is also aware of an ethically-based objection by some to the rendering of the carcasses of pet animals. TSE has not been diagnosed in dogs or other canines. FSE has not been diagnosed in the United States. The agency has considered the information provided by the comments and the published scientific literature (Refs. 26 and 27), and has preliminarily determined that there is no measurable risk of the spread of TSE's from canine- or feline-derived proteins to ruminants in the United States. However, the agency is inviting further comment on this issue.

VIII. Environmental Impact

FDA has carefully considered the potential environmental effects of this proposed rule and of five possible alternative actions. In doing so, the agency reviewed ANPRM comments submitted by a number of organizations and individuals. The comments were mostly concerned with the volume of material (e.g., dead animals and slaughter byproducts) that would be affected, and the nonrendering or rendering alternative means by which these materials could be disposed of, or utilized, safely. Comments suggested a number of uses for the processed materials, other than ruminant feed, including use in nonruminant animal feed and fertilizers, and disposal methods such as on-farm burial, landfilling, and incineration.

In the environmental assessment that accompanies this proposed rule, FDA evaluated the environmental consequences of six different options. These included: No action; ruminant and mink-to-ruminant prohibition (the proposed action); partial ruminant and mink-to-ruminant prohibition; mammalian-to-ruminant prohibition; prohibition of feeding tissues from any animal species in which TSE has been detected in the United States; and sheep and goat specified offal prohibition.

The environmental assessment considered each of the alternatives in the context of two scenarios. The first assumes that BSE does not occur in the United States, regardless of the alternative selected. The second scenario assumes that BSE does occur in the United States, again regardless of the alternative selected. In the first scenario, the assessment considered environmental impacts related to on-farm disposal, landfill, incineration, and industry wastes produced. The second scenario considered environmental impacts related to production losses and impacts, wildlife exposure, on-farm disposal, landfill, and incineration.

In the first scenario (no BSE), the ''no action'' alternative does not have environmental consequences because it is the ''status quo'' or baseline alternative. Environmental impacts for the other alternatives ranged from slight to moderate increases in environmental effects. For the proposed option (ruminant-to-ruminant) there would be moderate increases in environmental effects from on-farm disposal and landfill use, and slight increases in the other effects. Increases in waste disposal (on-farm, landfill, etc.) are anticipated to be temporary, however, as the markets are expected to adjust quickly to the more restricted uses of the ruminant materials.

In the second scenario (occurrence of BSE), the greatest negative environmental effect would occur in the case of the ''no action'' alternative. This is because the likely spread of the BSE agent through animal feed before the first BSE case is diagnosed would result in disposal of large numbers of animals by means other than rendering. Similar large impacts would occur with the sheep and goat, and TSE animal, options. Minimum environmental consequences would occur with the proposed option (ruminant-to-ruminant), because the spread of the BSE agent would have been controlled. Minimum to small effects would result from the remaining two options, partial ruminant prohibition and mammalian-to-ruminant prohibition.

The agency has concluded that the proposed rule will not have a significant impact on the human environment, and that an environmental impact statement is not required. FDA's finding of no significant impact (FONSI) and the evidence supporting that finding, contained in an environmental assessment (EA) prepared under 21 CFR 25.31, may be seen in the Dockets Management Branch (address above) between 9 a.m. and 4 p.m., Monday through Friday. FDA invites comments and submission of data concerning the EA and FONSI.

IX. Analysis of Impacts

FDA has examined the impacts of the proposed rule under Executive Order 12866, under the Regulatory Flexibility Act (5 U.S.C. 601–612), and under the Unfunded Mandates Reform Act (Pub. L. 104–4). 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 and safety, and other advantages; and distributive impacts and equity). The Regulatory Flexibility Act requires agencies to analyze regulatory options that would minimize any significant impact of a rule on small entities. The Unfunded Mandates Reform Act requires that agencies prepare an assessment of anticipated costs and benefits before proposing any rule that may result in an annual expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100,000,000 (adjusted annually for inflation). FDA

concludes that this proposed rule is consistent with the principles set forth in the Executive Order and in these two statutes.

A study of the impacts on industry of the proposed rule (on file with the Docket Management Branch (Ref. 114)) conducted for FDA by the Eastern Research Group (ERG), a private consulting firm, and the discussion in the remainder of this section, demonstrate that the proposed rule constitutes an economically significant rule as described in the Executive Order. The agency has further determined that the proposed rule will have a significant impact on a substantial number of small entities. The proposal makes no mandates on government entities and is estimated to result in aggregate net annual costs ranging from $21.4 to $48.2 million to the private sector.

A. The Need for Regulation

Although BSE has not been diagnosed in the United States, the need for regulatory action is based on a need to protect U.S. livestock from the risk of contracting BSE. In its guidelines for the preparation of Economic Impact Analyses, the Office of Management and Budget (OMB) directs Federal regulatory agencies to determine whether a market failure exists, and if so, whether that market failure could be resolved by measures other than new Federal regulation. In this instance, private incentive systems for both suppliers and purchasers may fail in markets for cattle, rendering, and ruminant feed. The potential for market failure among the suppliers in these sectors results from the externality that could be created by individual suppliers imposing economic hardships on other suppliers within the industry. The potential for market failure among the purchasers results from the inadequate information that would be available to purchasers of potentially infective products.

Any renderer, feed manufacturer, or cattle producer that permits animal protein derived from ruminants and mink to be placed in ruminant feed increases the risk that other renderers, feed manufacturers, or cattle producers will suffer the severe economic consequences that would follow an outbreak of BSE in the United States. The industry is aware of this risk, as evidenced by the existence of voluntary programs aimed at reducing the transmission of the infectious agent. These include an adult sheep rendering ban recommended by the NRA, a recommended ban on the feeding of rendered ruminant protein to ruminants by the NCBA and others, and scrapie-free certification programs by individual sheep producers. Although the benefits of such programs—the reduction or elimination of the risk of an outbreak of BSE and the increased consumer confidence in the safety of the industries' products—accrue to all members of these industries, compliance with these measures is incomplete, because individual noncomplying members can avoid the costs of risk reduction measures while still enjoying the benefits of compliance by others in the industry.

If purchasers could easily identify the risks of infective agent contamination associated with products from specific suppliers, they could more easily take defensive actions to reduce these risks (e.g., refusing products from cattle known to have consumed specified ruminant proteins). Purchasers are unlikely to obtain the information they need, however, for several reasons. First, the long incubation period for BSE creates a lag between the actual onset and the recognition of the disease and could lead to a suboptimal level of risk prevention by the concerned parties during the incubation period. By the time the first signs of disease are observed, many animals may have been already exposed. Moreover, renderers sell their product to feed manufacturers who frequently combine proteins from many different plant sources and animal species to produce cattle feed. Ruminant producers, therefore, have no sure way of knowing whether a particular batch of feed is free from potentially infective proteins and cannot easily avoid purchasing risky feed. Finally, if renderers or feed manufacturers do not believe that BSE is an important threat they may choose not to take preventive action, regardless of the risk levels perceived by epidemiological experts or consumers.

B. Benefits

The proposed rule would reduce the risk of an outbreak and subsequent proliferation of BSE disease in the United States. It may also forestall the loss of consumer confidence in the U.S. beef market due to concerns about BSE and its implications. Thus, the benefits of this proposal would include the value of reduced risks to human and animal health and to the economic stability of the U.S. livestock and livestock dependent industries compared to the ''no action'' option. In technical terms, these benefits measure the expected value of the future disease-related costs that might be averted by the proposed rule. Specifically, they are calculated as a product of three factors: (1) The probability that, in the absence of this rule, BSE would be introduced and proliferate in the United States, (2) the costs, both direct and indirect, that would be associated with the spread of BSE in the United States, and (3) the extent to which the proposed rule would reduce the likelihood of BSE proliferation.

BSE has not been detected in the United States and the probability that it currently exists is remote. Nevertheless, it is possible that BSE could develop in the future. Once developed, BSE could remain undetected for several years because of its long incubation period and because, at present, it can be diagnosed reliably only by microscopic brain examination after death. During the period between introduction and diagnosis, the disease could spread as it apparently did in the U.K. via intake of infective feed. If regulation was delayed until after discovery, the costs would be substantial. By addressing the central risk factors associated with BSE, FDA believes that the proposed rule would eliminate the vast majority of the BSE-related risks and costs.

BSE was first detected in the U.K. in November 1986, and a ban on ruminant offal in ruminant feed was imposed in the U.K. in July 1988 (Ref. 115). An analysis of cattle born before and after the feed ban went into effect suggests that the feed ban significantly decreased disease transmission (Ref. 116). This analysis found that the incidence of confirmed BSE roughly doubled each year for animals born between July 1985 and July 1988, but declined precipitously in animals born in August 1988 compared to the previous year and continued to fall thereafter. Because BSE has a long incubation period, however, a decrease in the incidence was not evident until several years after the initial feed ban was implemented. The incidence of BSE peaked in 1992 at 36,681 detected cases, or approximately 0.3 percent of the UK's 11.5 million cattle. Despite a sharp decrease in the incidence rate since then, by the end of 1996, more than 165,000 cases of BSE will have been detected, with one-third of all U.K. cattle herds infected (Refs. 115 and 117).

The likelihood that BSE will someday be developed in the United States cannot be estimated with any confidence, although U.S. risk factors are believed to be significantly smaller than existed in the United Kingdom of the early 1980's. As described previously, the various remaining modes include transmission from scrapie-infected sheep or other animals with TSE, e.g., through meat and bone meal; introduction via imported

animals; and spontaneous introduction (which in some TSE's has been hypothesized to occur at a rate of about 1 case per million per year). USDA import controls and the voluntary bans on sheep offal and ruminant tissues in ruminant foods reduce the risk of disease introduction but cannot completely eliminate it.

Although FDA cannot quantitatively estimate the risk of a significant BSE outbreak in the United States, the agency has used the U.K. experience, modified to account for major differences in circumstances, to assess the consequences of the potential spread of the disease within the United States. If BSE were introduced in this country, the pattern of disease spread would presumably be similar to that in the United Kingdom, with most symptomatic disease appearing in older cattle (the average time for BSE symptoms is approximately 5 years after infection (Ref. 115)). The rate of spread of symptomatic disease would probably differ, however, because compared with the pre-BSE U.K. dairy industry, U.S. dairy cows are younger and are exposed to meat and bone meal in feed later in life than was true in the United Kingdom (Ref. 118). United Kingdom dairy animals were historically fed meat and bone meal as calves, whereas U.S. dairy cows ingest meat and bone meal primarily as adults.

1. Methodology

To develop an illustrative estimate of the number of cattle that might be lost to BSE infection if the disease were to occur in the United States in the absence of regulation, FDA extrapolated from the experience in the United Kingdom, but adjusted for the differences in cattle age and potential age of exposure to meat and bone meal. This extrapolation assumes that the detection of BSE in this country would quickly lead to a ruminant-to-ruminant feed prohibition but that, as in the United Kingdom, BSE incidence would nonetheless continue to increase for 6 years due to the disease's long incubation time (hence several years of disease spread before the diagnosis of the first case). To account for the difference in cattle age-related risk factors, FDA assumed that, if BSE occurred in the United States, the affected animals would be predominately dairy cows of age 4 or more, rather than age 3 and up as in the U.K. (due to the differences in age of exposure.) The difference of 1 year is based on the agency's estimate that U.S. cattle are first exposed to meat and bone meal 1 year later than U.K. cattle. Therefore, the onset of the clinical disease is estimated to start 1 year later. Accordingly, only 47 percent of U.S. dairy cows are age 4 and up (about 4.8 million cows), while 90 percent of United Kingdom cows are age 3 and up (about 2.6 million cows). Thus, a lower percentage of U.S. cattle were assumed to be at risk of symptomatic BSE, and the projected rate of death was proportionately lower. Based on the relative size of the U.S. and U.K. dairy cattle populations, these projections suggest that if BSE were introduced in the United States and spread in a similar manner, the disease would destroy 299,000 U.S. cattle over 11 years (4.8 x 2.6 x 162,000 U.K. BSE deaths). (These calculations assume that a feed prohibition would be implemented very soon after the first case is diagnosed, and that the prohibition would immediately begin to affect the underlying rate of new infection. If a feed prohibition were not implemented at that time, the number of cattle deaths would be much higher.)

Other adjustments could be made to this estimate, but their effect on the direction of the results would be uncertain. For example, compared with U.K. practices before 1988, U.S. dairy cattle consume a higher proportion of concentrated feed that contains meat and bone meal. On the other hand, most U.S. concentrate contains a lower percentage of meat and bone meal (and a higher percentage of vegetable-based proteins). If BSE infectivity in feed is highly dose-dependent, these factors could cause FDA's cost estimate to be either too high or too low, if one of the factors is dominant over the other.

The risks and costs associated with BSE when it occurs are primarily of three types. First, there is the possible risk and associated cost of ruminant-to-human transmission of TSE disease. The proposed rule would reduce this risk by eliminating the main routes by which ruminants might acquire transmissible TSE, greatly reducing any risk incurred by the human consumption of ruminant-derived products. Thus, the proposed rule would reduce the risk of future mortality, morbidity, and health care costs due to human TSE. Second, there is the risk of livestock losses. These losses include not only the deaths of BSE-infected animals, but also the loss and disposal costs of other animals that would be destroyed, either to contain the immediate spread of disease or to restore consumer confidence in the safety of beef and dairy products. Third, there are the costs associated with decreased domestic sales and exports of beef and other bovine-derived products until consumer and international confidence could be restored.

2. Reduced Risk to Public Health

As discussed earlier, scientists believe that the nv-CJD cases identified in the U.K. may have been associated with the BSE epidemic. If indeed there were such an association, and if BSE were to occur in this country, there would be a risk of spreading BSE-related human TSE in the United States The proposed rule therefore might avert human deaths in the United States, although the number of deaths cannot be estimated. The proposed rule would also save the health care and other costs associated with treating individuals with the disease.

3. Reduced Risk of Direct Livestock Losses

For estimating the present value of livestock losses if BSE occurred in the United States, FDA assumed that the first case of BSE would not be detected—even in the absence of the proposed rule—for 4 years. Based on an estimated value of $502 per animal (Ref. 119) and disposal costs of $4 per animal, direct losses from the death of 299,000 BSE-infected cattle would reach $151 million over 11 years (starting 4 years from now). At a discount rate of 7 percent, the total present value of these losses is $75 million.

In addition to the animal losses from direct infection, a significant outbreak would probably lead to the eradication of high-risk animals to restore consumer confidence. Switzerland, for example, has proposed slaughtering all cattle born before that country implemented a feed ban, or approximately one-eighth of its national herd (Ref. 120). The United Kingdom has begun a program to destroy and incinerate all animals over age 30 months as they reach the end of their useful life, or about 1 million animals in 1996 and a total of 4.7 million over 6 years. In addition, the United Kingdom has a program to slaughter some unmarketable male dairy calves (126,000 had been slaughtered as of August 1996) and up to 147,000 additional ''high-risk'' animals (Refs. 115 and 121). Even if the U.K. eradication of animals were limited to a one-time total of 1 million cattle (about 8.7 percent of their cattle stock), similar measures in the United States, if they occurred immediately upon detection of the disease, would result in the one-time destruction of $4.58 billion worth of cattle, with a present value of $3.49 billion.

4. Costs of Future Regulation

Moreover, the ability to control a BSE outbreak once it occurred would require putting in place restrictions on the use

of ruminant proteins in ruminant feeds that would be at least as restrictive as the measure under this proposed rule. Presumably, the total costs of implementing a ruminant-to-ruminant feed prohibition at that point would be at least as great as the low estimates for this proposed rule, or $21.4 million per year. The present value of these future regulatory costs would total approximately $240 million. Moreover, this estimate may vastly understate the economic impact because the market value of ruminant-derived proteins could disappear if there were an actual outbreak.

5. Reduced Risk of Losses in Domestic Sales and Exports

If BSE were to emerge in the United States, the news could greatly reduce both domestic sales and exports of bovine products. In the United Kingdom, domestic consumption fell by more than 20 percent between 1988 and 1990 and has not yet fully recovered (Ref. 122), presumably due to continuing concerns about possible links between BSE and CJD. If U.S. consumers acted similarly, U.S. producers of beef products could lose over $9 billion in annual sales (Ref. 123). Alternatively, U.S. consumers might demonstrate considerably less concern, as the U.K. experience may have improved the ability of U.S. risk managers to communicate both the extent of the risk of contracting CJD from the consumption of beef and the responsiveness of the government's safety policies. Nonetheless, it remains probable that the uncertainty surrounding a serious BSE outbreak would lead U.S. consumers to reduce their consumption and spending on beef by a significant amount. Also, at the same time that U.K. domestic sales of beef were declining due to the fear of BSE, the volume of U.K. exported beef fell by nearly 16 percent (Ref. 122). Based on U.S. beef exports in 1994 of approximately $2.2 billion (Ref. 109), a proportional decline of this magnitude would reduce U.S. exports by up to $0.3 billion per year.

While the values of such lost domestic and international sales would reduce the profits of the U.S. beef industry and the enjoyment of some U.S. consumers of beef, they do not provide an accurate measure of societal costs, because competitor industries, such as poultry, pork, and seafood, would gain new profits. Thus, the net costs that would result from such potential shifts in consumer spending cannot be precisely discerned without extensive economic modeling. While FDA examined a partial equilibrium model for projecting the approximate losses of consumer and producer surplus within the market for beef products, the agency could not adequately quantify the likely effects on the markets for substitutes of beef. Consequently, FDA could not estimate the net economic cost of these lost sales. Nevertheless, the magnitude of these potential costs could be substantial and the agency requests public comment on how the appropriate measurement methodologies could be developed and applied.

Finally, even in the absence of evidence of BSE in the United States, consumer concern about BSE could affect beef consumption and expenditures. Thus, one benefit of implementing the proposed rule now is that it might prevent a loss of consumer confidence in the beef market, irrespective of the actual risk of BSE. FDA did not attempt to quantify this potential loss, but believes that it also may be substantial, particularly in light of the recent increased U.S. publicity of BSE and its hypothesized links to CJD.

6. Total Losses Averted

In summary, the losses averted by the proposed rule include the expected value of the costs associated with BSE itself, and the potential value of forestalling a drop in domestic and international demand for U.S. beef due to BSE-related causes. The first component largely reflects the statistical probability that BSE could occur and spread within the United States and the potential $3.7 billion cost of destroying BSE-exposed livestock. The second primarily measures the expected loss to U.S. consumers and producers that would result from reduced sales. While FDA has not quantified these latter costs, plausible scenarios indicate that they could reach billions of dollars. Moreover, these figures have not included the possibility of lost lives and treatment costs associated with treating human TSE.

Finally, the expected benefits of the proposed rule are slightly lower than the sum of the expected value of all the costs associated with BSE, because the rule would not totally eliminate all of the related risk (e.g., due to the possibility of spontaneous introduction of disease and the possible incomplete compliance with the rule). FDA believes, however, that any remaining risk would be extremely small. In addition, because the rate of BSE infection and the associated costs would probably vary geographically (as scrapie does now) (Ref. 98) , the benefits would vary across regions of the country.

7. Comparison of Alternatives

As described elsewhere in this document, FDA is considering five alternatives to the proposed rule, in addition to other options that might be offered in the comments. The first three of these alternatives are: (1) No action (relying on voluntary industry activities), (2) prohibit only materials from U.S. species in which TSE has been diagnosed, and (3) a prohibition on proteins from specified sheep and goat offal in ruminant feed. Compared with the proposed action, prohibiting proteins from all U.S. TSE species provides similar reductions in the risk that BSE might be introduced, with a sheep/goat specified offal protein ban and no action providing progressively less risk reduction. The TSE species alternative, however, would be significantly less effective in limiting the spread of BSE (e.g., after spontaneous introduction) until BSE was diagnosed and cattle were added to the list of TSE species. Likewise, the two other alternatives would be significantly less effective in inhibiting the spread of ruminant-to-ruminant transmission of disease once BSE is introduced. Thus, the expected value of the benefits of each of the three rejected options is substantially lower than the proposed rule, although the amount of difference cannot be estimated precisely.

The agency is also considering two other alternatives: (1) A mammalian-protein-to-ruminant prohibition, and (2) a partial ruminant-to-ruminant prohibition which would exclude all ruminant and mink tissues except certain bovine tissues. Compared with the proposed rule, both alternatives offer similar benefits in substantially inhibiting the initial introduction of BSE. The extent of inhibition of the spread of disease (and associated costs), however, would be different.

The mammalian protein alternative would further reduce the spread of disease compared with the proposed rule, by reducing the risk of cross-contamination within rendering and processing plants. Thus, this alternative would bring the expected value of the BSE-related costs even closer to zero than would the proposed measure. However, the incremental benefit is small if cross- contamination under the proposed measure does not pose a substantial risk.

The partial ruminant-to-ruminant prohibition would be less effective than the proposed measure, because it would be more administratively difficult to enforce. Thus, this alternative would not reduce the expected value of the

BSE-related costs as much as the proposal. Again, however, the exact difference cannot be estimated, but would vary depending on the likely level of compliance under the alternative.

C. Industry Impacts

The ERG study examines the composition, size, and scale of economic activity for the various affected industry sectors and provides estimates of the cost and high and low market impacts (depending on the size of the price change for restricted meat and bone meal of five regulatory options (see Table 1).

TABLE 1.—ESTIMATED COSTS OF ALTERNATIVE REGULATORY PROHIBITIONS [1]

	Mammalian-to-ruminant	Ruminant-to-ruminant (proposal)	Partial ruminant-to-ruminant	Sheep/Mink-to-ruminant	Sheep/Goat-to-ruminant
Annualized Impacts	($ million)				
Low Market Impact Scenario ($25/ton)					
Capital Costs	8.8	1.0	3.2	0.0	0.0
Operating/Disposal Costs	10.1	0.1	14.4	5.1	0.2
Transportation	10.7	7.6	5.3	0.0	0.0
Documentation	1.9	1.5	0.5	0.0	0.0
Substitution Costs	9.7	8.0	3.7	0.0	0.0
Renderer Revenue Losses	76.4	63.2	28.8	4.2	0.1
Nonruminant Gains	(72.6)	(60.0)	(27.4)	0.0	0.0
Totals	45.0	21.4	28.5	9.3	0.3
High Market Impact Scenario ($100/ton)					
Capital Costs	8.8	8.2	4.9	0.0	0.0
Operating/Disposal Costs	10.1	10.1	16.9	5.1	0.2
Transportation	10.7	7.6	5.3	0.0	0.0
Documentation	1.9	1.8	0.7	0.0	0.0
Substitution Costs	9.7	8.0	3.7	0.0	0.0
Renderer Revenue Losses	305.6	252.8	115.4	4.2	0.1
Nonruminant Gains	(290.3)	(240.2)	(109.6)	0.0	0.0
Totals	56.5	48.3	37.3	9.3	0.3

[1] Totals may not match text due to rounding error.

1. The Proposed Rule

The proposed alternative would prohibit the use of ruminant and mink protein in ruminant feeds. Currently, only about 10 percent of the meat and bone meal supply is used in ruminant feed, but over 80 percent of the meat and bone meal contains some ruminant material. ERG forecast that because no mixed-species slaughtering or rendering establishments would find it profitable to separate ruminant from nonruminant offal, most would continue to contain ruminant material. ERG estimated that affected renderers and feedmills would incur total direct compliance costs ranging from $10.2 to $27.6 million per year. Renderers would bear annual costs of about $6.3 million and feed mills would bear annual costs of from $3.8 to $21.3 million. Arrayed by compliance category, transportation costs were estimated at $7.6 million; documentation costs for activities to ensure control of ruminant feed constituents ranged from $1.5 to $1.8 million; and capital costs and operating costs ranged from $1.0 to $8.2 million and $0.1 to $10.1 million, respectively, due primarily to the need for some feedmills to expand their capacity to offer both ruminant and nonruminant feed products under a high market impact scenario.

Because consumer response to the rule is uncertain, ERG could not develop a precise projection of future meat and bone meal prices. ERG estimated, however, that the regulatory prohibition of marketing ruminant meat and bone meal to ruminants would lower the price of this product by from $25 to $100 per ton, decreasing rendering industry revenues by from $63.2 to $252.8 million per year. In contrast, a lower MBM price would increase sales of meat and bone meal to the nonruminant sector and the resulting increased profits for that sector would offset, at an aggregate level, most revenue losses. Although ERG did not quantify this effect, FDA determined that the assumption of a fixed supply of meat and bone meal and a linear demand for nonruminant feed implies that purchasers of mixed-species meat and bone meal for nonruminant uses would save from $60.0 to $240.2 million annually, because of the lower meat and bone meal costs. This estimate assumes a total meat and bone meal supply of 2.5 million tons, changes in price ranging from $25 to $100 per ton, and an increase in nonruminant consumption of meat and bone meal of about 250,000 tons. In addition, manufacturers of ruminant feed would incur higher costs if they could not use ruminant proteins. In an analysis prepared for the feed industry, protein substitutes, such as soybean meal and other minerals necessary to provide the same nutritional level as that provided by the meat and bone meal, were estimated to cost approximately $31.75 per ton more than meat and bone meal (Ref. 125). FDA believes that this estimate is overstated, because it assumes that soybean meal alone sells for $20 per ton more than meat and bone meal. In fact, their respective market prices are currently similar. Nevertheless, FDA used the reported $31.75 per ton differential to estimate that the higher price of alternative proteins would increase ruminant feed costs by about $8.0 million per year.

As a result, FDA estimates that the aggregated annualized costs of this proposal, comprised of both the direct compliance costs and the various indirect gains and losses, would total

from $21.4 to $48.2 million. Although the greatest initial burden would fall on the rendering and feed manufacturing sectors, ERG noted that the final distribution of these impacts would shift; renderers would pass back the economic impacts to slaughterers, who, in turn, would pass them back to cattle producers. FDA judged, however, that of the small renderers dependent upon farmers' and ranchers' dead stock for their raw materials, 20 to 25 would be likely to close. ERG also forecast that these impacts would cause a decline in prices for slaughter-weight cattle of $1 to $5 per head. In the long run, ERG foresaw a modest reduction in the size of the U.S. cattle herd.

In response to its ANPRM, FDA received comments on the possible impacts of the proposal from both individuals and industry. The submission from the American Feed Industry Association (AFIA) contained an analysis of the animal feed market that was based on the assumption that the proposal would taint the safety of all meat and bone meal (both ruminant and nonruminant), to the extent that even nonruminant animal producers would refuse to purchase the product. This loss of wholesale value was estimated at $523 million. Further, the AFIA comment estimated the cost for disposing of this meat and bone meal at $349 million and for substituting to higher priced feeds at $74 million annually.

FDA questions the conclusions of the AFIA report, largely because the proposed rule does not prohibit the use of ruminant proteins in nonruminant feeds and there is no evidence that this market would disappear. As noted earlier, nonruminant feed use currently constitutes about 90 percent of the meat and bone meal market. While some nonruminant producers may be wary of ruminant MBM after the proposal becomes final, the broad media coverage of BSE in the United Kingdom and the voluntary prohibition of ruminant MBM in ruminant feeds have already provided nonruminant producers with substantial information on the relevant risks. The implications of the ERG study are that most of the major nonruminant sectors that use ruminant meat and bone meal in their feeds would continue this practice, particularly at sharply lower MBM prices. Because ERG believed that all stocks of meat and bone meal would find a commercial outlet within the nonruminant feed sector, they projected no additional disposal costs and far smaller revenue losses than AFIA.

2. Partial Ruminant-to-Ruminant Prohibition

ERG also estimated the economic impact of a partial ruminant-to-ruminant prohibition, which would prohibit only the use of proteins from designated ruminant tissues in ruminant feeds. ERG projected that cattle packer/renderers and approximately one-half of the large cattle packers would choose to separate the designated and nondesignated tissues. As shown in Table 1, this change in processing would lead to increased costs from capital investments, increases in operating and transportation expenses, training, and documentation activities. Further, ERG projected, under the high market impact scenario, that some feedmills would expand their facilities to offer both restricted and nonrestricted meat and bone meal. They estimated the annualized direct compliance costs for this option at from $23.5 to $27.9 million. In addition, ERG projected that this option would cause price declines of from $25 to $100 per ton for the meat and bone meal derived from designated tissues, leading to decreases in renderer revenues of from $28.8 to $115.4 million per year. As discussed previously, FDA again assumed a fixed supply of meat and bone meal and a linear demand for nonruminant feed to calculate that purchasers of mixed-species meat and bone meal for nonruminant uses would save from $27.4 million to $109.6 million annually because of the lower meat and bone meal costs. Adding additional protein substitution costs of $3.7 million and other indirect costs raises the estimated net aggregate costs for this alternative to $28.6 to $37.4 million.

3. Mammalian-to-Ruminant Prohibition

The third option assessed was the prohibition of mammalian protein in ruminant feeds. ERG projected that slaughtering and rendering establishments would have no reason to separate offal because very few of these establishments process both mammals and nonmammals. They estimated annualized direct compliance costs for this option at $31.6 million. ERG forecast that, regardless of the size of the price decline for restricted meat and bone meal, some feedmills would expand their capacity to offer both restricted and nonrestricted meat and bone meal, resulting in increased capital and plant operating costs. The majority of the remaining regulatory costs are composed of documentation costs. Assuming that a regulatory prohibition on marketing restricted meat and bone meal to ruminants would cause the price of the restricted meat and bone meal to fall by from $25 to $100 per ton, ERG projected that this option would reduce renderer revenues by from $76.4 to $305.6 million per year. Alternatively, under the same assumptions as applied above, FDA found that purchasers of mixed-species meat and bone meal for nonruminant uses would save from $72.6 million to $290.3 million annually, because of the lower meat and bone meal costs. Adding additional protein substitution costs of $9.7 million and other indirect costs raises the estimated net aggregate costs for this third option to from $45.1 to $56.6 million.

4. Other Regulatory Alternatives

FDA also considered two less restrictive options for controlling the spread of an outbreak of BSE in the United States: A prohibition of all sheep, goat, mink, deer, and elk proteins in ruminant feed; and a prohibition of sheep and goat proteins in ruminant feed. The first of these alternatives would require that ruminants not be fed proteins from any species in which a TSE was diagnosed in the United States, which includes sheep, goats, mink, deer, and elk. ERG anticipated minimal regulatory impacts for sheep, lamb, and goat producers because most renderers already require that sheep, lamb, and goat offal be excluded from mixed species meat and bone meal. ERG estimated that this alternative could restrict the use of up to 34,150 tons of offal annually from the various species, or about 0.3 percent of all mammalian offal rendered. Using an estimated cost of $150/ton for landfill disposal, ERG calculated that the disposal costs for this alternative could equal $5.1 million. Furthermore, ERG estimated that the meat and bone meal and tallow manufactured from offal generates revenues of about $500/ton of processed material. Under this option, meat and bone meal production would fall by 8,450 tons per year, reducing industry revenues by an estimated $4.2 million annually.

The final alternative would restrict only sheep and goat protein from use in ruminant feed. This alternative is similar to the agency's 1994 proposal, which pertained only to adult sheep and goats. Most sheep and goats are currently excluded by renderers from being rendered into mixed species meat and bone meal. ERG estimated that this alternative would restrict the use of up to 1,200 tons of offal, or about 0.01 percent of all mammalian offal rendered. At $150/ton for landfill disposal, the disposal costs would equal $0.2 million. ERG calculated that

production of meat and bone meal under this option would be restricted by only 300 tons per year, leading to revenue losses of about $0.1 million.

ERG noted that the disposal costs presented for the latter two alternatives are high-end estimates because of the likelihood of onsite disposal for deer and elk taken by hunters. Further, these alternatives were not expected to have a measurable effect on the price of meat and bone meal because they would affect only 0.3 percent and 0.01 percent of the meat and bone meal markets, respectively. In contrast to the first three options, these rules would not change the demand for meat and bone meal, but would restrict the supply of meat and bone meal. Any postregulation increase in price, therefore, would increase revenues of renderers and costs of purchasers of meat and bone meal by an almost equal amount. ERG reported that this decrease in supply would have a negligible effect on meat and bone meal prices.

D. Small Business Impacts

The Regulatory Flexibility Act requires agencies to prepare a regulatory flexibility analysis if a rule would have a significant impact on a substantial number of small entities. The discussion in this section, as well as in other sections of this document, and the ERG report, constitute the agency's compliance with this requirement.

The Regulatory Flexibility Act asks for a succinct statement of the purpose and objectives of the rule. As explained previously in this document, FDA is proposing this measure to address the risk to U.S. livestock associated with feeding ruminant proteins to ruminants. Existing epidemiological evidence suggests a link between an outbreak of BSE in the United Kingdom and the practice of feeding products to cattle that included ruminant proteins. This rule would prohibit that practice. Thus, the need for regulatory action is based on the need to prevent the spread of BSE and thereby to protect the health of animals and to minimize any risk that might be posed to humans from BSE.

The Regulatory Flexibility Act also requires a description of the affected small entities. The ERG study includes counts of entities in each class of industry that are involved in ruminant production and meat preparation. The vast majority of all of these firms are considered small businesses according to size standards set by the Small Business Administration. There are 282 rendering plants, of which 204 have fewer than 500 employees, including all of the 152 independent renderers. ERG also estimated that 30,000 feedmills, all with fewer than 500 employees, could be affected by this rule. An estimated 1.4 million enterprises are engaged in ruminant production. These include businesses engaged in the production of beef and dairy cattle, including farmers and ranchers, stocker operators, and cattle feeders, and other ruminant producers. The slaughtering industry contains more than 4,000 establishments. Of this total, however, only 130 are packer/renderers that could have compliance requirements and about 52 of these establishments have fewer than 500 employees. ERG estimated that almost 300,000 small establishments are engaged in meat processing. These businesses would have no direct compliance activities, but could be affected indirectly by altered renderer practices. Also, about 150,000 small producers of nonruminant animals could gain from lower feed costs.

The RFA also requires a description of the recordkeeping requirements of the proposed rule. The ERG report presents detailed estimates of these costs. ERG found that the rule would require certain feed manufacturers to develop new written operating procedures. In addition, affected firms would have to retain invoices but FDA believes this activity is already generally accepted business practice.

Finally, the Regulatory Flexibility Act asks for an evaluation of any regulatory overlaps and regulatory alternatives that would minimize costs to small entities. FDA is unaware of any significant regulatory conflicts with other Federal rules. FDA examined five regulatory alternatives in addition to no action: (1) The ruminant-to-ruminant prohibition; (2) the partial ruminant-to-ruminant prohibition; (3) the mammalian-to-ruminant prohibition; (4) the prohibition of all sheep, goat, mink, deer, and elk proteins in ruminant feed; and (5) the prohibition of specified sheep and goat proteins in ruminant feed. The ERG report provides a detailed comparison of the respective impacts of these alternatives and found that the estimated direct compliance costs are lower under the proposed rule ($10.2 to $27.6 million) than under two of the alternative rules ($23.5 to $27.9 million for the partial ruminant-to-ruminant option, $31.6 million for the mammalian-to-ruminant option). The other alternatives would not be nearly as effective at reducing the risk of an outbreak and spread of BSE, but are considerably less costly. As many of the above projections are uncertain, FDA particularly invites additional data or comment on the effects of the proposed and alternative rules on any group of small businesses.

E. Unfunded Mandates Analysis

Based on the ERG study, FDA estimated that aggregate expenditures by the private sector that result from the proposed rule, issued under 21 CFR 589.2000, will range from $10.2 to $27.6 million per year. As described in section IX.B. of this document, the benefits of this measure accrue both to the general public (through decreased risks to health) and to the livestock and associated industries. The costs of the measure are borne by the private sector, primarily the rendering and animal feed industries. Because FDA anticipates no significant additional costs to State, local, or tribal governments, this regulatory action does not require an assessment under the Unfunded Mandates Reform Act.

X. The Paperwork Reduction Act of 1995

This proposed rule contains recordkeeping requirements that are subject to public comment and review by OMB under the Paperwork Reduction Act of 1995 (Pub. L. 104–13). Therefore, in accordance with 5 CFR part 1320, a description of reporting requirements is given in Table 2 of this document, with an estimate of the annual collection of information burden. Included in the estimate is the time for reviewing instructions, gathering and maintaining the data needed, and completing and reviewing the collection of information.

With respect to the following collection of information, FDA is soliciting comments on: (1) Whether the proposed collection of information is necessary for proper performance of FDA's functions, including whether the information will have practical utility; (2) the accuracy of FDA's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on those who are to respond, including through the use of automated collection techniques or other forms of information technology, when appropriate.

Title: Substances Prohibited from Use in Animal Food or Feed; Animal Proteins Prohibited in Ruminant Feed.

Description: The proposed rule (§ 589.2000) provides that protein derived from ruminant and mink tissues is not GRAS for use in ruminant feed and is a food additive subject to section 409 of the act. Proteins derived from

animal tissues contained in such feed ingredients in distribution cannot be readily determined by recipients engaged in the manufacture, processing and distribution, and use of animal feeds and feed ingredients. To achieve the public and animal health objectives of this proposed rule, the agency believes that manufacturers, processors, distributors, and users must be responsible for ensuring and appropriately maintaining the identity of the specific nature of the components of animal protein products and animal feeds containing these products.

Thus, under the agency's authority in section 701(a) (21 U.S.C. 371(a)) of the act to issue regulations for the efficient enforcement of the act, this proposed rule places three general requirements on persons that manufacture, blend, process and distribute products that contain or may contain protein derived from ruminant and mink tissues, and feeds made from such products. The first requirement is for cautionary labeling of these products with direct language developed by FDA. The second requirement is for these establishments to provide FDA with access to their purchase and sales invoices for compliance purposes. FDA believes that maintenance of such records is a usual and customary part of normal business activities for such firms. These two requirements are not within the scope of the Paperwork Reduction Act. The third requirement is recordkeeping which requires that the firms develop standard operating procedures if they intend to keep ruminant and mink material separate from nonruminant material. The agency is aware that the certification procedures provided in § 589.2000(d) of the regulation could be interpreted as imposing a paperwork burden on certain industry segments. However, the agency notes that the certification procedures apply only where new technology (e.g., a deactivation method) is developed. The agency was unable to estimate when such technology might be developed, what its characteristics and costs would be, and other essential information needed to make realistic estimates of any paperwork burden. Therefore, such costs are not included in this proposed rule. However, the agency specifically requests comments and information related to the factors that would determine the extent of any paperwork burden.

The recordkeeping burden in Table 2 has been estimated using the typical average size establishment that is expected to handle animal protein from both ruminant and nonruminant sources, or feeds containing these products, and intend to keep them separate. FDA's preliminary estimate is that only a fraction of feed manufacturers and distributors will separate their products. Independent renderers were excluded from the burden estimates based on information provided for the economic estimate. Packer/renderers were excluded because they are single species processors.

Under these recordkeeping requirements, for which records must be made available for FDA inspection, an estimated 2,000 feed mills would handle both restricted and nonrestricted products and would develop standard operating procedures for keeping ruminant and mink material separate from nonruminant material from the time of receipt to time of shipment. The estimate in the burden chart is based on the time required to develop and establish the written procedures and is a one time requirement. The 2,000 firms will also incur annual operating cost estimated at $10 million, because of the flushing, sequencing and other procedures that will be required. It is estimated that 1,000 of the firms may incur capital cost for the construction of separate facilities. These costs have been annualized for 10 years, at $7.119 million per year. The remaining firms are expected to be able to meet the regulation's requirements without incurring capital cost.

The agency has submitted copies of the proposed rule to OMB for its review of these requirements. Interested persons are requested to send comments regarding this collection of information by February 18, 1997, but not later than March 4, 1997 to the Office of Information and Regulatory Affairs, OMB (address above), Attn: Desk Officer for FDA.

Description of Respondents: Distributors, feed manufacturers, blenders and renderers.

TABLE 2.—ESTIMATED ANNUAL RECORDKEEPING BURDEN [1]

21 CFR section	No. of record keepers/ firms	Frequency	Total annual records	Hours per record	Total hours	Capital cost (annualized)	Operating cost (yearly)
589.2000 (e)(1)(iv)	2,000	1	2,000	14	28,000	$7,119,000	$10,000,000

[1] Costs are only incurred under the high-impact scenario.

XI. Federalism

FDA has analyzed this proposal in accordance with the principles and criteria set forth in Executive Order 12612 and has determined that this proposal does not warrant the preparation of a Federalism Assessment.

XII. References

The following references have been placed on display in the Dockets Management Branch (address above) and may be seen by interested persons between 9 a.m. and 4 p.m., Monday through Friday.

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XIII. Request for Comments

Interested persons may, on or before February 18, 1997, submit to the Dockets Management Branch (address above) written comments regarding this proposal. Two copies of any comments are to be submitted, except that individuals may submit one copy. Comments are to be identified with the docket number found in brackets in the heading of this document. Received comments may be seen in the office above between 9 a.m. and 4 p.m., Monday through Friday.

List of Subjects in 21 CFR Part 589

Animal feeds, Animal foods, Food additives.

Therefore, under the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner of Food and Drugs, it is proposed that 21 CFR part 589 be amended as follows:

PART 589—SUBSTANCES PROHIBITED FROM USE IN ANIMAL FOOD OR FEED

1. The authority citation for 21 CFR part 589 continues to read as follows:

Authority: Secs. 201, 402, 409, 701 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 321, 342, 348, 371).

2. New § 589.2000 is added to subpart B to read as follows:

§ 589.2000 Animal proteins prohibited in ruminant feed.

(a) *Definitions.* (1) *Protein derived from ruminant and mink tissues* means any protein-containing portion of ruminant animals or mink, excluding blood from bovines, milk proteins and gelatin.

(2) *Renderer* means any firm or individual that processes slaughter byproducts, animals unfit for human consumption, meat scraps or food waste. The term includes persons who collect such materials and subject them to minimal processing, or distribute them to firms other than renderers whose intended use for the products may include animal feed. The term includes renderers that also blend animal protein products.

(3) *Blender* means any firm or individual which obtains processed animal protein from more than one source or from more than one species, and subsequently mixes (blends) or redistributes an animal protein product.

(4) *Feed manufacturer and distributor* includes manufacturers and distributors of complete and intermediate feeds intended for animals, and includes on-farm in addition to off-farm feed manufacturing and mixing operations.

(5) *Nonruminant protein* includes protein from nonruminant animals and from vegetable sources.

(b) *Food additive status.* The Food and Drug Administration has determined that protein derived from ruminant and mink tissues is not generally recognized as safe for use in ruminant feed because it may contain transmissible spongiform encephalopathy (TSE)-infective material, and is a food additive subject to section 409 of the Federal Food, Drug, and Cosmetic Act (the act). In the absence of a regulation providing for its safe use as a food additive under section 409 of the act, the use or intended use in ruminant feed of any material that contains protein derived from ruminant and mink tissues causes the feed to be adulterated and in violation of the act, unless it is the subject of an effective notice of claimed investigational exemption for a food additive under § 570.17 of this chapter. The Food and Drug Administration has determined that ruminant and mink derived protein is not prior sanctioned for use in ruminant feeds.

(c) *Requirements for renderers that are not included in paragraph (e) of this section.* (1) Renderers that manufacture products that contain or may contain protein derived from ruminant and mink tissues and that are intended for use in animal feed shall take the following measures to ensure that materials identified in paragraph (b) of this section are not used in the feed of ruminants:

(i) Label the materials as follows: ''Contains (or may contain) protein derived from ruminant and mink tissues. Do not feed to ruminant animals, and do not use to manufacture feed intended for ruminant animals''; and

(ii) Maintain copies of sales invoices for the materials, and make the copies available for inspection and copying by the Food and Drug Administration.

(2) Renderers described in paragraph (c)(1) of this section will be exempted from the requirements of paragraphs (c)(1)(i) and (c)(1)(ii) of this section if they:

(i) Use exclusively a manufacturing method that has been validated by the Food and Drug Administration to deactivate the agent that causes TSE's and whose design has been made available to the public; or

(ii) Use routinely a test method that has been validated by the Food and Drug Administration to detect the presence of the agent that causes TSE's and whose design has been made available to the public. Products found to contain the agent that causes TSE's shall be labeled ''Not for Use in Animal Feed.'' Records of the test results shall be made available for inspection by the Food and Drug Administration.

(3) Renderers described in paragraph (c)(1) of this section who are not exempted under paragraph (c)(2)(i) or paragraph (c)(2)(ii) of this section will be exempted from the requirements of paragraph (c)(1)(ii) of this section if they use a permanent method, approved by FDA, to mark the presence of the materials. If the marking is by the use of an agent that cannot be detected on visual inspection, the renderer must use an agent whose presence can be detected by a method that has been validated by the Food and Drug Administration and whose design has been made available to the public.

(d) *Requirements for protein blenders, and feed manufacturers and distributors, that are not included in paragraph (e) of this section.* (1) Protein blenders, and feed manufacturers and distributors, that manufacture, blend, process and distribute products that contain or may contain protein derived from ruminant and mink tissues shall:

(i) Comply with paragraph (c)(1) of this section, and

(ii) Maintain copies of invoices for purchase of animal protein products or feeds containing such products, and make copies available for inspection and copying by the Food and Drug Administration.

(2) Protein blenders, and feed manufacturers and distributors, shall be exempt from paragraphs (d)(1)(i) and (d)(1)(ii) of this section if they:

(i) Purchase animal protein products from renderers that certified compliance with paragraph (c)(2) of this section or purchase such materials from parties

that certify that the materials were purchased from renderers that certified compliance with paragraph (c)(2); or

(ii) Comply with the requirements of paragraph (c)(2) of this section where appropriate.

(3) Protein blenders, and feed manufacturers and distributors, shall be exempt from paragraph (c)(1)(ii) of this section if they:

(i) Purchase animal protein products that are marked or purchase such materials from renderers that certified compliance with paragraph (c)(3) of this section, or purchase such materials from parties that certify that the materials were purchased from renderers that certified compliance with paragraph (c)(3) of this section; or

(ii) Comply with the requirements of paragraph (c)(3) of this section where appropriate.

(4) Copies of certifications as described in paragraphs (d)(2) and (d)(3) of this section, shall be made available for inspection and copying by the Food and Drug Administration.

(e) *Requirements for persons that intend to separate ruminant/mink and nonruminant/mink materials.* (1) Renderers, protein blenders, feed manufacturers and distributors, haulers and others that manufacture, process, blend and distribute both protein products derived from ruminant and mink tissues or feeds containing such products, and protein products from other animal tissues or feeds containing such products, and that intend to keep those products separate shall:

(i) Comply with paragraphs (c)(1) or (d)(1) of this section as appropriate except that the labeling requirement shall apply only to products derived from ruminant and mink tissues or feeds containing such products;

(ii) In the case of a renderer, obtain nonruminant (excluding mink) materials only from single-species facilities;

(iii) Provide for measures to avoid commingling or cross-contamination:

(A) Maintain separate equipment or facilities for the manufacture, processing, or blending of such materials; or

(B) Use clean-out procedures or other means adequate to prevent carry-over of ruminant and mink derived protein into animal protein products or feeds that may be used for ruminants; and

(iv) Maintain written procedures specifying the clean-out procedures or other means, and specifying the procedures for separating ruminant and mink materials from nonruminant materials (excluding mink) from the time of receipt until the time of shipment.

(2) Renderers, blenders, and feed manufacturers and distributors will be exempted from appropriate requirements of paragraph (e)(1) of this section, if they meet the appropriate criteria for exemption under paragraphs (c)(2) or (c)(3), and (d)(2) or (d)(3) of this section.

(f) *Requirements for establishments and individuals that are responsible for feeding ruminant animals.* Establishments and individuals that are responsible for feeding ruminant animals shall maintain copies of purchase invoices and labeling for all feeds received, and make the copies available for inspection and copying by the Food and Drug Administration.

(g) *Adulteration and misbranding.* (1) Animal protein products, and feeds containing such products, that are not in compliance with paragraphs (c) through (f) of this section, excluding labeling requirements, will be deemed adulterated under section 402(a)(2)(C) or 402(a)(4) of the act.

(2) Animal protein products, and feeds containing such products, that are not in compliance with the labeling requirements of paragraphs (c) through (f) of this section will be deemed misbranded under section 403(a)(1) of the act.

(h) *Inspection; records retention.* (1) Records that are to be made available for inspection and copying, as required by this section, shall be kept for a minimum of 2 years.

(2) Written procedures required by this section shall be made available for inspection and copying by the Food and Drug Administration.

Dated: December 27, 1996.

David A. Kessler,

Commissioner of Food and Drugs.

Donna E. Shalala,

Secretary of Health and Human Services.

[FR Doc. 97–37 Filed 1–2–97; 8:45 am]

BILLING CODE 4160–01–F

federal register

Friday
January 3, 1997

Part V

The President

Notice of January 2, 1997—Continuation of Libyan Emergency

Federal Register
Vol. 62, No. 2
Friday, January 3, 1997

Presidential Documents

Title 3—

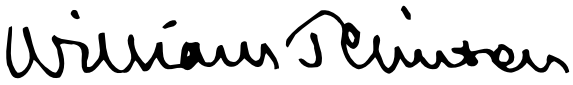
The President

Notice of January 2, 1997

Continuation of Libyan Emergency

On January 7, 1986, by Executive Order No. 12543, President Reagan declared a national emergency to deal with the unusual and extraordinary threat to the national security and foreign policy of the United States constituted by the actions and policies of the Government of Libya. On January 8, 1986, by Executive Order No. 12544, the President took additional measures to block Libyan assets in the United States. The President has transmitted a notice continuing this emergency to the Congress and the Federal Register every year since 1986. The most recent notice appeared in the Federal Register on January 5, 1996.

The crisis between the United States and Libya that led to the declaration of a national emergency on January 7, 1986, has not been resolved. The Government of Libya has continued its actions and policies in support of terrorism, despite the calls by the United Nations Security Council, in Resolutions 731 (1992), 748 (1992), and 883 (1993), that it demonstrate by concrete actions its renunciation of such terrorism. Such Libyan actions and policies pose a continuing unusual and extraordinary threat to the national security and vital foreign policy interests of the United States. For these reasons, the national emergency declared on January 7, 1986, and the measures adopted on January 7 and January 8, 1986, to deal with that emergency, must continue in effect beyond January 7, 1997. Therefore, in accordance with Section 202(d) of the National Emergencies Act (50 U.S.C. 1622(d)), I am continuing the national emergency with respect to Libya. This notice shall be published in the Federal Register and transmitted to the Congress.



THE WHITE HOUSE,
January 2, 1997.

[FR Doc. 97–230
Filed 1–2–97; 10:53 am]
Billing code 3195–01–P

federal register

Friday
January 3, 1997

Part VI

Department of Commerce

International Trade Administration

Certain Iron-Metal Castings from India; Amended Final Results of Countervailing Duty Administrative Review; Notice

DEPARTMENT OF COMMERCE

International Trade Administration

[C–533–063]

Certain Iron-Metal Castings From India; Amended Final Results of Countervailing Duty Administrative Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

ACTION: Notice of amended final results of countervailing duty administrative review.

SUMMARY: On December 6, 1996, the Department of Commerce (''the Department'') published in the Federal Register the final results of the 1992 Administrative Review of the countervailing duty order on Certain Iron Metal Castings from India (''castings'') (61 FR 64676). Based on corrections of ministerial errors, we are now amending the final results of this review. We have corrected these errors and determine the net subsidies to be 0.00 percent *ad valorem* for Dinesh Brothers, Pvt. Ltd., 14.20 percent for Kajaria Iron Castings Pvt. Ltd., and 6.08 percent *ad valorem* for all other companies. We will instruct the U.S. Customs Service to assess countervailing duties as indicated above.

EFFECTIVE DATE: January 3, 1997.

FOR FURTHER INFORMATION CONTACT: Marian Wells, Office of CVD/AD Enforcement I, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, N.W., Washington, D.C. 20230; telephone: (202) 482–6309.

SUPPLEMENTARY INFORMATION:

Background

On December 6, 1996, the Department of Commerce published in the Federal Register the final results of the 1992 Administrative Review of the countervailing duty order on *Certain Iron Metal Castings from India* (61 FR 64676). The period covered by this administrative review is January 1, 1992 through December 31, 1992.

On December 11, 1996, the Department received a timely allegation from respondents that the Department had made clerical errors in its loan calculations with respect to three companies in the final results of this review. In particular, the respondents allege that we did not take account of ''penalty'' interest payments in our calculations. On December 18, 1996, petitioner responded, taking the position that the alleged errors for two of the companies were not clerical in nature.

Applicable Statute and Regulations

Unless otherwise stated, all citations to the statute and to the Department's regulations are references to the provisions as they existed on December 31, 1994.

Scope of the Review

Imports covered by the review are shipments of Indian manhole covers and frames, clean-out covers and frames, and catch basin grates and frames. These articles are commonly called municipal or public works castings and are used for access or drainage for public utility, water, and sanitary systems. During the review period, such merchandise was classifiable under the *Harmonized Tariff Schedule* (HTS) item numbers 7325.10.0010 and 7325.10.0050. The HTS item numbers are provided for convenience and Customs purposes. The written description remains dispositive.

Ministerial Errors in Final Results of Review

Serampore

The respondents allege that we did not take account of ''penalty'' interest payments in our calculations. We have reviewed the calculations in the final results of this review and we agree with respondents that we should have included certain penalty interest payments. Our consistent practice in other reviews has been to include penalty interest as part of the effective cost of the postshipment loans. The Department also notes that in reviewing the calculations, we learned that we failed to adjust the benchmark used for certain loans to reflect inflation. With the inflation adjustment, those loans, which we found not countervailable in our final results, have become countervailable. The Department has corrected the loan calculations for all respondents to include penalty interest, and has made the inflation adjustment to the benchmark for those loans where it was not previously included.

Calcutta Ferrous

In reviewing our calculations, the Department also learned that we had entered the wrong number of days for certain postshipment loans which were outstanding for one respondent, Calcutta Ferrous. We have corrected this error.

Kajaria Iron Castings Pvt. Ltd.

In respect to Kajaria Iron Castings Pvt. Ltd., the respondents allege that the Department failed to take into account the penalty interest on most of the loans that extended into 1993. We have reviewed this calculation and disagree with respondents. The Department did in fact take into account penalty interest on loans that were extended into 1993, but only for those loans where the penalty interest was paid in whole or in part in 1992 (the POR). If a loan was received in 1992 and repaid in 1993, and all of the penalty interest paid in 1993 (outside of the POR), the penalty interest will be accounted for in the 1993 reveiw. Therefore, we do not consider this to be a clerical error and have not adjusted our calculations.

Calculation Methodology for Assessment and Cash Deposit Purposes

Pursuant to *Ceramica Regiomontana, S.A.* v. *United States,* 853 F. Supp. 431, 439 (CIT 1994), Commerce is required to calculate a country-wide CVD rate, *i.e.*, the all-others rate, by ''weight averaging the benefits received by all companies by their proportion of exports to the United States, inclusive of zero rate firms and *de minimis* firms.'' Therefore, we first calculated a subsidy rate for each company subject to the administrative review. We then weighted the rate received by each company using its share of U.S. exports to total Indian exports to the United States of subject merchandise. We then summed the individual companies' weighted rates to determine the weighted-average country-wide subsidy rate from all programs benefitting exports of subject merchandise to the United States.

Because the country-wide rate calculated using this methodology was above *de minimis,* as defined by 19 CFR 355.7 (1994), we proceeded to the next step and examined the net subsidy rate calculated for each company to determine whether individual company rates differed significantly from the weighted-average country-wide rate, pursuant to 19 CFR 355.22(d)(3). Two companies (Kajaria and Dinesh) received significantly different net subsidy rates during the review period. These companies will be treated separately for assessment purposes, while all other companies will be assigned the weighted-average country-wide rate. However, because the *Final Results of the 1992 Administrative Review of the Countervailing Duty Order on Certain Iron Metal Castings from India* (61 FR 64676) was published concurrently with the final results of the

1993 administrative review, the 1993 administrative review will continue to serve as the basis for setting the cash deposit rate.

Amended Final Results of Review

For the period January 1, 1992 through December 31, 1992, we determine the net subsidies to be 0.00 percent *ad valorem* for Dinesh Brothers, Pvt. Ltd., 14.20 percent for Kajaria Iron Castings Pvt. Ltd., and 6.08 percent *ad valorem* for all other companies.

This amendment of final results of reviews and notice are in accordance with section 751(f) of the Act (19 U.S.C. 1675(f)) and 19 CFR 355.28(c).

Dated: December 31, 1996.

Robert S. LaRussa,

Acting Assistant Secretary for Import Administration.

[FR Doc. 97–146 Filed 1–2–97; 11:12 am]

BILLING CODE 3510–DS–P

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