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WASHINGTON, DC

WHEN: February 18, 1997 at 9:00 am

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Reader Aids
Additional information, including a list of public laws, telephone numbers, reminders, and finding aids, appears in the Reader Aids section at the end of this issue.

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CFR PARTS AFFECTED IN THIS ISSUE

A cumulative list of the parts affected this month can be found in the Reader Aids section at the end of this issue.

Rules and Regulations

Federal Register
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DEPARTMENT OF AGRICULTURE

Federal Crop Insurance Corporation

7 CFR Parts 433 and 457

RIN 0563–AB02

Common Crop Insurance Regulations, Dry Bean Crop Insurance Provisions; and Dry Bean Crop Insurance Regulations

AGENCY: Federal Crop Insurance Corporation, USDA.

ACTION: Final rule.

SUMMARY: The Federal Crop Insurance Corporation (FCIC) finalizes specific crop provisions for the insurance of dry beans. 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 dry bean crop insurance regulation with the Common Crop Insurance Policy for ease of use and consistency of terms, and to restrict the effect of the current dry bean crop insurance regulation to the 1996 and prior crop years.

EFFECTIVE DATE: February 11, 1997.

FOR FURTHER INFORMATION CONTACT: Arden Routh, Program Analyst, Research and Development, Product Development Division, Federal Crop Insurance Corporation, United States Department of Agriculture, 9435 Holmes Road, Kansas City, MO 64131, 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, has not been reviewed by OMB.

Paperwork Reduction Act of 1995

Following publication of the proposed rule, the public was afforded 60 days to submit written comments, data, and opinions on information collection requirements previously approved by OMB under OMB control number 0563–0003 through September 30, 1998. No public comments were received.

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. The effect of this regulation on small entities will be no greater than on larger entities. Under the current regulations, a producer is required to complete an application and an 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.

The insured must also annually certify to the previous years production if adequate records are available to support the certification. The producer must maintain the production records to support the certified information for at least three years. 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 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 part 11 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

On Tuesday, November 26, 1996, FCIC published a proposed rule in the Federal Register at 61 FR 60049–60057 to add to the Common Crop Insurance Regulations (7 CFR part 457) a new section, 7 CFR 457.150, Dry Bean Crop Provisions. The new provisions will be

effective for the 1997 and succeeding crop years. These provisions will replace and supersede the current provisions for insuring dry beans found at 7 CFR part 433 (Dry Bean Crop Insurance Regulations). FCIC also amends 7 CFR part 433 to limit its effect to the 1996 and prior crop years. FCIC will later publish a regulation to remove and reserve part 433.

Following publication of the proposed rule, the public was afforded 30 days to submit written comments, data, and opinions. A total of 80 comments were received from the crop insurance industry and FCIC. The comments received, and FCIC's responses, are as follows:

Comment: The crop insurance industry questioned if consideration had ever been given to having two bean polices, one for contract seed beans and one for dry beans. It would be easier for policyholders to have crop provisions that address only the kind of beans they are insuring.

Response: FCIC will consider this option for a future rule. However, there is not sufficient time to divide this policy for the 1997 crop year. Therefore, no change has been made.

Comment: The crop insurance industry recommended defining ''properly handled.''

Response: The requirements for handling seed beans are contained in the seed bean processor contract. Therefore, it would be difficult for FCIC to define ''properly handled'' due to the differing requirements of seed bean companies. However, FCIC will amend the definition of ''actual value'' to clarify that production must be handled in accordance with requirements contained in the seed bean processor contract.

Comment: The crop insurance industry recommended that the definition of ''Base price'' be amended to exclude any bonus offered when the germination percentage is above the minimum required by the seed contract.

Response: FCIC agrees with the comment and has amended the definition accordingly.

Comment: The crop insurance industry expressed confusion with the definitions of ''beans,'' ''dry beans,'' and ''contract seed beans.'' The definition of ''contract seed beans,'' is also covered by the ''dry beans'' definition which makes the definition of ''beans'' seem redundant. The commenter questions if the definition for ''dry beans'' needs to include the intended use of the production.

Response: Throughout these provisions the term ''beans'' applies to both dry beans and contract seed beans. The term ''dry beans'' includes all classes of beans included in The United States Standards for Beans. The term ''contract seed beans'' distinguishes dry beans grown under a contract for the specific purpose of producing seed for a subsequent crop year. The definition of ''dry beans'' was changed to exclude contract seed beans.

Comment: The crop insurance industry agreed that the definition for ''county'' should be deleted in these provisions so that the definition in the Basic Provisions will be effective. The commenter emphasized that if these provisions are approved for the 1997 crop year, these changes and subsequent procedures need to be issued soon enough for companies to provide training to their agents, rearrange APH data bases for units that previously included land in another county, and to allow policyholders to decide whether to insure any land in another county in which they have an interest.

Response: FCIC will provide instructions for changing the data bases for units that previously included land in another county. These instructions will be made available at the time the policy is released. FCIC does not anticipate that a large number of producers farm in more than one county and, therefore, does not expect a large number of data base revisions to be necessary.

Comment: The crop insurance industry was concerned with the definition of ''Good farming practices,'' which makes reference to ''generally recognized by the Cooperative Extension Service.'' The commenters indicated that there are areas or situations where good, accepted farming practices may not necessarily be recognized by the Extension Service.

Response: FCIC has removed the word ''generally'' from this part of the definition. However, the Cooperative State Research, Education, and Extension Service recognizes most farming practices that are considered acceptable for producing beans. The use of practices not recognized as acceptable by the Cooperative State Research, Education, and Extension Service provides no standards by which to measure performance.

Comment: The crop insurance industry recommended adding the words ''and quality'' after the word ''quantity'' in the definition of ''irrigated practice.'

Response: Water quality is an important issue. However, since no standards or procedures have been developed to measure water quality for insurance purposes, quality cannot be included in the definition. Therefore, no change has been made.

Comment: A representative of FCIC recommended changing the second sentence in the definition of ''local market price'' to ''Moisture and factors * * *'' and delete ''such as moisture content.''

Response: FCIC agrees with the comment and has amended the definition accordingly.

Comment: The crop insurance industry recommended changing the definition of ''net price'' to read, ''The dollar value of dry bean production received or that could have been received * * *''

Response: FCIC agrees with comment and has amended the definition accordingly.

Comment: One comment received from the insurance industry recommended changing the definition of ''pick'' to consider defects based on the original grade of the beans.

Response: Dockage does not include defects to the beans and, therefore, should not be included in any calculation of the pick, which applies only to defects of the beans. Therefore, no change has been made.

Comment: The crop insurance industry recommended adding a final sentence to the definition of ''prevented planting,'' which would require the insured to have past history of the bean type which the insured is declaring as being prevented from being planted.

Response: FCIC cannot penalize new producers of a bean type, who can prove that they had the inputs available to plant that particular bean type, by denying them prevented planting coverage. Therefore, no change has been made.

Comment: A representative of FCIC recommended replacing the reference to ''Special Provisions'' in the definition of ''Production guarantee (per acre)'' with ''Actuarial Table,'' since the adjustment factors are in the Actuarial Table and not the Special Provisions.

Response: FCIC agrees with the comment and has amended the definition accordingly.

Comment: The crop insurance industry questioned if the term ''production guarantee'' applies only to dry beans and if the term ''amount of insurance'' is used only for contract seed beans. If so, it would be helpful to identify dry beans in the definition of ''production guarantee'' and include a definition for ''amount of insurance'' for contract seed beans.

Response: The term ''production guarantee'' applies to both dry beans and contract seed beans. The amount of insurance for contract seed beans is

obtained by using the production guarantee per acre for each contract seed bean variety in the unit, as provided in section 3(b) of these provisions. Therefore, no change has been made.

Comment: The crop insurance industry recommended changing the definition of ''Replanting.'' The commenter indicated that the wording ''* * * replace the bean seed and then replacing the bean seed * * *'' is confusing and awkward.

Response: FCIC agrees with the comment and will clarify the definition accordingly. Comment: The crop insurance industry and a representative of FCIC indicated that the definition of ''Seed company'' should not limit the seed company to only being a corporation.

Response: FCIC agrees with the comments and has amended the definition.

Comment: The crop insurance industry questioned if the term ''type'' applies only to dry edible beans. If so, the definition should be clarified.

Response: For the purpose of establishing insurability of the crop, FCIC's Special Provisions identify classes of all beans as types. Contract seed beans are a specific type under a seed bean processor contract.

Comment: The crop insurance industry recommended clarifying the language of section 2(a) of the proposed rule by substituting language similar to that contained in section 2(a) of the Sugar Beet Crop Provisions. The wording of this section would be ''Unless limited by the Special Provisions, a unit (basic unit) as defined in section 1 (Definitions) of the Basic Provisions (§ 457.8), may be divided * * *''

Response: FCIC agrees with the comment and has amended section 2(a) of the proposed rule to indicate that a unit as defined in the Basic Provisions is a basic unit.

Comment: A comment from the crop insurance industry asked the following: (1) Are optional units available by type or variety for contract seed beans; (2) if an insured has a processor contract for one seed variety and another processor contract for another seed variety, would each variety be eligible for a separate unit; and (3) if the contract specifies an amount of production rather than the number of acres, are optional units available?

Response: Optional units are only available for contract seed beans if the contract specifies a number of acres under contract and all acreage under the seed bean processor contract will be included in the optional unit. There are no separate optional units by type for contract seed beans. Optional units are not available for contract seed beans if the seed bean processor contract specifies an amount of production. Section 2 has been amended to clarify the available optional units for contract seed beans.

Comment: The crop insurance industry recommended that section 2(c) of the proposed rule be clarified to indicate that it affects only optional units by section and irrigated or non-irrigated practices and does not authorize separate optional units for different types of seed beans.

Response: Types of contract seed beans do not qualify for optional units. Optional units by type, section, or irrigation practice are available for contract seed beans if the seed bean processor contract specifies the number of acres under contract. The provisions in section 2 have been amended accordingly.

Comment: Representatives of FCIC questioned the need for the provisions contained in section 2(c) of the proposed rule, since the definitions of ''base price,'' ''contract seed beans,'' and ''seed bean processor contract,'' specify that acreage is not eligible to be insured as seed beans if the total production is not contracted. The commenter recommended deleting section 2(c) of the proposed rule.

Response: Section 2(c) of the proposed rule is necessary to protect the integrity of the program. The insured production is determined based on the number of acres under contract. If FCIC allows optional units when the contract only specifies an amount of production, this amount of production is prorated over the optional units to determine the per unit amount of insurance. If the value of the production from any unit is less than the amount of insurance for that unit, an indemnity is paid, even though the insured may have fulfilled all obligations under the contract from production in other units. This will result in FCIC insuring amounts in excess of that under contract, which would adversely affect the actuarial soundness of the program.

Comment: The crop insurance industry and a representative of FCIC recommended clarifying the last sentence of section 2(d) of the proposed rule. The commenter believes that the current wording may lead the insured to believe that premium may be refunded any time optional units are combined. Premium is refunded when there are no optional units within a basic unit. One of the comments recommended changing the provisions to read as follows: ''If failure to comply with the provisions is determined to be inadvertent and if all of the optional units within a basic unit are combined, that portion of the premium paid for the purpose of electing optional units will be refunded to you.''

Response: FCIC agrees with the comment and has amended the provision in redesignated section 2(e).

Comment: A representative of FCIC recommended clarifying the language in section 2(e) of the proposed rule to indicate that optional units not planted in the current crop year need not be identified on the acreage report.

Response: FCIC has clarified this provision in redesignated section 2(f) to indicate that only those optional units established for the specific crop year need be identified on the acreage report.

Comment: The insurance industry indicated that provisions in section 2(f)(4)(i) of the proposed rule authorize optional units by type for dry beans. The commenter questioned if optional units by bean type are available for contract seed beans, since the definition of ''bean'' suggests it applies to all types of dry beans. This language needs to be more clearly distinguished. The commenter recommended that contract seed beans and other dry beans should be handled as separate basic units since procedures will be more complicated under these provisions. Production of one type would count against the guarantee of another type if insured as one basic unit, which creates difficulties. The commenter also questioned if the premium rates are being adjusted to reflect the change from basic to optional units by type (will the premium rates be 10–11 percent higher than last year's premium rates)? Policyholders must be provided the necessary information and advance time to decide how to accommodate the extra costs and requirements involved.

Response: Optional units by type are only applicable to dry beans and the provision has been amended for clarification. Contract seed beans qualify as a basic unit. If the policyholder elects to obtain optional units, the premium rates will be adjusted to reflect any additional risk of loss. Any changes in the insurance coverage, including premium rates, will be available on or before the contract change date. This should provide the policyholder with ample time to make their business decisions. The provisions in section 2 have been amended accordingly.

Comment: The crop insurance industry and a representative of FCIC questioned if the language in section 2(f)(4)(ii) of the proposed rule should be amended to read ''In addition to, or instead of * * *'' or if that phrase

should be omitted since the possibility of ''besides or instead'' is covered by the statement in section 2(f)(4) of the proposed rule that ''one or more'' of these criteria must be met for each optional unit.

Response: FCIC agrees that the phrase ''In addition to, or instead of'' should be incorporated into the first sentence of redesignated section 2(g)(4)(ii), and has modified this provision accordingly.

Comment: The crop insurance industry had the following comments regarding the provisions in section 3(a). The provisions allow different price election percentages by dry bean type, which is not consistent with other crop provisions unless each type is treated as a separate crop. Based on the provisions of section 3(a), one comment questioned the change that no longer allows dry bean basic units by type. The comment indicated that if different price election percentages are allowed, each type should continue to be a separate basic unit. One of the comments questioned if other crops will be changed to permit different price percentages within the same basic unit and how the computer edits will handle these situations.

Response: Producers can elect optional units for different types of dry beans. However, in those cases where multiple types are in a single unit, FCIC has provided producers the flexibility to select a different percentage of the maximum price election for each type. The costs to produce different types of dry beans can vary considerably as can the economic significance of each to the producer. It may be necessary for some insurance providers to reprogram computer systems to allow this variation in price election percentages.

Comment: The crop insurance industry questioned the new requirement that the producer submit a copy of the seed bean processor contract at acreage reporting time. What would happen if an acreage report is received without a copy of the processor contract? This requirement could lead to policyholders waiting until acreage reporting time to decide if they want to insure the crop as contract seed beans.

Response: FCIC has always required the seed bean processor contract to be executed on or before the acreage reporting date. Now, FCIC requires the insured to submit a copy of the contract no later than that date in order to ensure that such contract exists, prior to any likely loss. Thus, there is no greater effect upon the producer's decision as to how to insure the beans. If a copy of the contract is not provided at the time acreage is reported, the beans may be insurable as dry beans, but not as contract seed beans.

Comment: The crop insurance industry questioned the language of section 7(a)(2)(i), which references dry beans. The commenter explained that the definition of ''dry beans'' seems to include both dry edible beans and contract seed beans instead of distinguishing between the two.

Response: Contract seed beans are defined separately from dry beans so that they may be identified and treated differently in several sections of the policy, including price election determination, unit division, insured crop, and loss calculations. FCIC agrees that some contract seed beans would qualify under the definition of dry beans. Therefore, FCIC has amended the definition of dry beans to exclude contract seed beans.

Comment: A representative of FCIC stated that section 7(a)(3) of the proposed rule is not necessary because section 8(b)(4) of the Basic Provisions states that we do not insure volunteer crops.

Response: FCIC agrees and has deleted this provision and renumbered the remaining provisions.

Comment: The crop insurance industry questioned the reference to other ''types of beans'' in section 7(c) and whether it applies only to dry edible beans or if it also applies to contract seed beans.

Response: The reference to other ''types of beans'' in section 7(c) applies to classes of dry beans not listed as a type of dry beans in the Special Provisions. Section 7(c) has been amended to specify ''dry beans.''

Comment: The crop insurance industry recommended putting a period at the end of section 8(a) and deleting the word ''or.'' As written, this provisions could be misunderstood to mean that as long as the rotation requirements are met, the insured would not have to replant even if practical, or vice versa. Presumably, each of the statements in section 8 (a) and (b) stand alone.

Response: The use of ''or'' has the effect of making these stand alone requirements as written, if the insured fails to comply with either requirement, the acreage would be uninsurable. Therefore, no change will be made.

Comment: The crop insurance industry asked the following questions: (1) Whether dry bean acreage that is replanted to another bean type would be insured as a separate optional unit, and if so, would there be an additional premium charged; (2) how the actual production history (APH) yield for the following year would be affected; and (3) whether the guarantee will be based on the type of dry bean originally planted or the type of dry bean that was replanted. They also had the following recommendations: (1) keep the original guarantee for acreage that is replanted to another bean type; (2) that no additional premium be charged for the new optional unit; (3) that the APH form be updated based on the replanted type; and (4) by adding a sentence stating ''If the crop is replanted, the price of the replanted type will determine your price election.''

Response: The guarantee and premium must be based on the actual production capability and risks associated with the type planted and produced to maintain the actuarial soundness of the program. Optional unit division will be available for the replanted type in accordance with the provisions of section 2. Production from the replanted acreage will be used to update APH records for the type replanted. The original planted type will not be included in the APH data base for that particular year. Section 11(d) has been added to specify that the guarantee and premium amount for the replanted acreage will be based on the replanted type when acreage is replanted to a different insurable type. No premium will be due for the original type when acreage is replanted to a different type.

Comment: The crop insurance industry questioned if replanting payments are available for contract seed bean varieties.

Response: Provisions in section 11 allow a replanting payment for ''the bean crop'' which includes both dry beans and contract seed beans.

Comment: The crop insurance industry indicated that language in section 13(b) is not as clear as in other crop provisions. The comment recommended that the provisions start as 13(b)(1) ''For each dry bean type:'' followed by sub-items for the calculations in (1)–(3); then section 13(b)(2) would be ''For each contract seed bean variety:'' etc.

Response: The provisions were written in this format to demonstrate how to settle a claim when both dry beans and contract seed beans are insured in one unit. If a unit contains only contract seed beans or only dry beans the provisions that pertain to the kinds of beans that are not in the unit are disregarded. Therefore, no change has been made.

Comment: The crop insurance industry recommended revising section 13(c)(1)(i) to read ''Multiply the actual value received, actual value at time of adjustment, or base price per pound, whichever is greater, by the price election percentage you selected; and''

Response: Adding the suggested language would be redundant with the language contained in the definition of ''actual value.'' In addition, not all insurance providers require that the insured select a percentage. Therefore, no change has been made.

Comment: The crop insurance industry recommended adding the word ''harvestable'' to section 13(d)(1) so that it would read, ''All appraised harvestable production as follows:''

Response: When making an appraisal, the loss adjuster considers whether the crop can be harvested. Therefore, no change has been made.

Comment: The crop insurance industry recommended clarifying section 13(d)(1)(i)(D). It is not necessary to use the word ''acceptable'' twice in this section.

Response: FCIC agrees with the comments and has amended the provision accordingly.

Comment: The crop insurance industry questioned whether the reference in section 13(d)(1)(iii), to ''dry beans'' excludes contract seed beans.

Response: The provisions allow adjustment for quality deficiencies and excess moisture for mature unharvested dry beans only.

Comment: The crop insurance industry recommended that section 13(d)(1)(iv) be revised as follows: (1) Add the phrase ''harvestable beans'' to section 13(d)(1)(iv)(A) which would make the section read: ''* * * (The amount of production to count for such acreage will be based on the harvested production or appraisals of harvestable beans from the samples at the time harvest should have occurred * * *'' (2) Add the phrase ''of harvestable beans'' to section 13(d)(1)(iv)(B), which would make this section read: ''If you elect to continue to care for the crop, the amount of production to count for the acreage will be the harvested production, or our reappraisal of harvestable beans if additional damage occurs and the crop is not harvested; and'' The comment also questioned the advisability of ''leaving representative samples'' when agreement on the appraised amount of production can not be reached. The commenter recommended the use of Arbitration (section 17 of the Basic Provisions) as the preferable process when agreement on the appraised amount of production can not be reached.

Response: The ability to harvest the crop is considered when making appraisals of the crop. Representative samples are the most accurate method available to determine an accurate representation of production when the parties disagree on the amount of appraised production and it allows the insured to put most of the acreage to another use. If it is not practical to leave representative samples the insurance provider does not have to require such samples be left. Therefore, no change has been made.

Comment: The crop insurance industry recommended changing the order of the last two sentences of section 13(e) so the exclusion of these adjustments for contract seed beans does not interrupt the information that applies to dry edible beans.

Response: FCIC agrees with the comment and has amended the provision accordingly.

Comment: A representative of FCIC recommended deleting any reduction in the amount of production to count due to ''pick'' since it is not a term used in ''The United States Standards for Beans'' upon which quality adjustment is based. The reason for an excessive amount of ''pick'' in the beans (other than damage) is generally due to farming or cultural practices. ''Pick'' is normally controllable by the producer. ''Pick'' charts are never the same two years in a row and different charts are used each year by different bean dealers. ''Pick'' is driven by the market and supply and demand, depending on the size of the crop in a given area. The commenter further stated that numerous studies have been made on whether ''pick'' should be used as a reduction of production to count, and each time it has been determined that it is not feasible.

Response: ''Pick'' currently is used for quality adjustment procedures in certain areas and has been found to be an acceptable method to establish quality. It is defined in the rule. Therefore, no change has been made.

Comment: The crop insurance industry recommended adding the phrase: ''and the beans are to be sold at time of adjustment or sold based on the original grade;'' at the end of both sections 13(e)(2) (i) and (ii).

Response: Neither FCIC nor the insurance provider can require the insured to sell the production at the time of adjustment as a condition of obtaining quality adjustment. Quality adjustments are applied at the time of loss adjustment. Any further damage, whether the crop is sold or not, is not covered. Therefore, no change has been made.

Comment; The crop insurance industry questioned if it was necessary to say both ''damaged'' and ''badly damaged'' in section 13(e)(2)(ii). The commenter recommended just the term ''damage'' should suffice.

Response: The provisions are consistent with different degrees of damage defined in ''The United States Standards for Beans.'' Therefore, no change has been made.

Comment: The crop insurance industry stated that dry beans are rarely stored in most states. The adjuster would be required to obtain a sample of the beans prior to or during harvest. Most samples of beans are provided by the facility storing or purchasing the beans. It is therefore unlikely that they are a ''disinterested third party,'' as stated in section 13(e)(3)(iii). The commenter recommended that the language be revised to include the ''place of storage or sale if the company feels the sample is consistent with the quality of beans in the surrounding area.''

Response: All samples must be obtained by disinterested third parties to assure that such samples are genuinely representative of the total production. If the insurance provider believes the samples were not obtained in this manner, or that they are not representative, they should not accept the results. Therefore, no change has been made.

Comment: The crop insurance industry recommended adding the phrase ''based on the applicable grade or pick which the production is to be sold or sold at time of adjustment;'' at the end of section 13(e)(4)(i).

Response: As stated above, the insurance provider cannot require the sale of the production at the time of loss adjustment or at any other time. The amount of loss, including any quality adjustments, are made at the time of loss adjustment and any subsequent damage is not covered, so the time of sale should not affect this determination. Therefore, no change has been made.

Comment: The crop insurance industry stated that conversion factors adopted for several crops have provided the industry with consistent quality adjustment, generally unaffected by the marketplace, and questions whether FCIC intends to establish conversion charts for all states in which dry beans are insurable.

Response: FCIC agrees that studies should be made to determine if similar conversion charts for dry beans can be developed. Until this can be further analyzed, no change will be made.

Comment: The crop insurance industry: (1) Recommended adding ''based on the applicable grade or pick for the production which you will receive * * *'' at the end of the first sentence and after the word ''production'' in the second sentence of section 13(e)(4)(ii)(A); and (2)

questioned whether the current year's maximum price election for the type should be used when a processor refuses to quote a No. 2 price.

Response: The price should be determined based on the quality and quantity of the production as it was originally delivered and the provisions clearly indicate that the value of the damaged production is used in this calculation. Therefore, the recommended change has not been made. Further, the current year's maximum price election is used only when a local market price is not available. A local market price may be established using price quotes from usual marketing outlets in the area. Refusal of one processor to quote a price does not automatically mean a local market price is not available.

Comment: One comment received from the crop insurance industry recommended adding ''(to include trading tare for grade to obtain a higher grade and price),'' after the word ''processing'' in section 13(e)(4)(ii)(A)(*3*).

Response: FCIC agrees with the comment and has amended the provisions accordingly.

Comment: The crop insurance industry recommended that late and prevented planting coverage should not be provided on crops grown under contract with a processor. The processor determines what the producer does if the insured crop is not planted during the normal planting period.

Response: The inclusion of late and prevented planting is appropriate for contract seed beans. As the comment indicates, the processor may or may not allow planting within the late planting period. Congress has determined that marketing windows should be a factor in determining whether a crop has been prevented from planting. The contracted planting period, and intended harvest period, is considered as a marketing window. However, if planting is allowed under the contract, and the crop can reach maturity, coverage should be provided. Therefore, no change has been made.

Comment: The crop insurance industry recommended adding the phrase ''to a type for which you have history'' after the word ''planted'' in section 14(c)(1).

Response: Changing the provision to require past history of the bean type would prevent a new producer from obtaining late planting coverage or diversifying their production. To protect the integrity of the program, the insurance provider should require the producer to prove that the producer had the inputs available to plant the new bean type. Therefore, no change has been made.

Comment: The crop insurance industry recommended adding the phrase ''type for which you have history'' after the words ''insured crop'' in the second and last sentences of section 14(d)(1)(ii) and at the end of the first sentence of section 14(d)(1)(iii)(B).

Response: Changing the provision as suggested would prevent a new producer from having late or prevented planting coverage or diversifying their production. Therefore, no changes has been made.

Comment: The crop insurance industry and a representative of FCIC recommended eliminating late and prevented planting provisions that reference participating in a USDA program that limits acreage planted, compliance with conservation plans, and base acreage. These do not apply.

Response: FCIC agrees that acreage limiting programs and base acreage do not apply to dry beans and has amended the appropriate provisions. However, conservation plans may allow the insurance provider to verify an intent to produce or not produce the crop. Therefore, provisions regarding the use of conservation plans have not been changed.

Comment: The crop insurance industry and a representative of FCIC asked whether the prevented planting coverage available when a substitute crop is planted will be dropped, or at least revised, for all affected crops for the 1997 crop year, and whether it is possible to remove (or revise) redesignated sections 14(d)(1)(iii)(B) and 14(d)(2)(iii)(B).

Response: The provisions that allow a prevented planting guarantee when a substitute crop is planted are under review for all affected crops for the 1998 crop year. Any changes will be made in a separate rule for all affected crop provisions. No change will be made in these provisions to maintain consistency with prevented planting provisions for other crops.

Comment: The crop insurance industry questioned if the provisions in section 14(d)(4)(ii) apply to dry beans only since ''dry beans'' are referenced, or if this carryover prevented planting coverage would be different for contract seed beans due to the requirement that they are to be grown under a contract with a processor.

Response: The Federal Crop Insurance Act requires the insurance period for prevented planting to begin on the sales closing date for the previous crop year if coverage has been continuous. Therefore, this ''tail coverage'' would apply if any beans, including contract seed beans, were insured previously. This provision has been clarified by replacing the term ''dry beans'' with the term ''beans.''

Comment: The crop insurance industry recommended limiting the number of contract seed bean acres eligible for prevented planting to the number of acres that are under the processor contract for the crop year.

Response: FCIC agrees with the comment and has amended the provisions in section 14(d)(5)(iv)(A) to limit the number of acres eligible for prevented planting to those specified in the seed bean processor contract or the number needed to produce the contracted production based on the APH yield for the acreage.

Comment: The crop insurance industry asked whether the language contained in section 14(d)(5)(iv)(E) regarding double-cropping would be liberalized or if proof that the acreage has a history of double-cropping in each of the last four years would still be required. The comment recommended changing the words ''* * * the acreage has a history * * *'' to ''* * * the farm has a history * * *''

Response: The recommended change would allow double benefits on an entire farm even though a very small number of acres may have been double-cropped in the past. Therefore, no change has been made.

Comment: The crop insurance industry recommended revising section 14(d)(5)(v) if the current language allows use of total acreage from both dry edible beans and contract seed beans for determining eligible prevented planting acreage. The proposed provision could result in a prevented planting payment for more than the acreage under contract for contract seed beans.

Response: FCIC has revised section 14(d)(5)(iv)(A) to limit the number acres of contract seed beans that are eligible for prevented planting to the number of acres under contract in the current year.

Comment: The crop insurance industry suggested combining the provisions contained in section 15(e) with the provisions in section 15(a).

Response: Approval of written agreements requested after the sales closing date is the exception, not the rule. Therefore, these provisions should be kept separate.

Comment: The crop insurance industry recommended that the requirement for a written agreement to be renewed each year be removed. Terms of the agreement should be stated in the agreement to fit the particular situation for the policy, or if no substantive changes occur from one year

to the next, allow the written agreement to be continuous.

Response: Written agreements are intended to change policy terms or permit insurance in unusual situations where such changes will not increase risk. If such practices continue year to year, they should be incorporated into the policy or Special Provisions. It is important to minimize exceptions to assure that the insured is well aware of the specific terms of the policy. Therefore, no change will be made.

In addition to the changes described above, FCIC has made the following changes to the Dry Bean Provisions:

1. Section 1—Amended the definition of ''practical to replant'' to specify that it will not be considered practical to replant contract seed beans unless production from the replanted acreage can be delivered under the terms of the seed bean processor contract.

2. Section 14(d)(3)-Clarified that the insured must have possessed the inputs to plant and produce the insured crop.

3. Revised part 433 to restrict its effect to the 1996 and prior crop years.

Good cause is shown to make this rule effective upon publication in the Federal Register. This rule improves the dry bean insurance coverage and brings it under the Common Crop Insurance Policy Basic Provisions for consistency among policies. The earliest contract change date that can be met for the 1997 crop year is February 15, 1997. It is therefore imperative that these provisions be made final before that date so that the reinsured companies and insureds may have sufficient time to implement these changes. Therefore, public interest requires the agency to act immediately to make these provisions available for the 1997 crop year.

List of Subjects in 7 CFR Parts 433 and 457

Crop insurance, Dry bean crop insurance regulations, Dry bean.

Final Rule

Accordingly, for the reasons set forth in the preamble, the Federal Crop Insurance Corporation hereby amends 7 CFR parts 433 and 457 as follows:

PART 433—DRY BEAN CROP INSURANCE REGULATIONS

1. The authority citation for 7 CFR part 433 continues to read as follows:

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

2. The subpart heading preceding § 433.1 is revised to read as follows:

Subpart—Regulations for the 1986 Through 1996 Crop Years

3. Section 433.7 is amended by revising the introductory text of paragraph (d) to read as follows:

§ 433.7 The application and policy.

* * * * *

(d) The application for the 1986 and succeeding crop years is found at subpart D or part 400—General Administrative Regulations (7 CFR 400.37, 400.38). The provisions of the Dry Bean Insurance Policy for the 1986 through 1996 crop years are as follows:

* * * * *

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. Section 457.150 is added to read as follows:

§ 457.150 Dry bean crop insurance provisions.

The Dry Bean Crop Insurance Provisions for the 1997 and succeeding crop years are as follows:

FCIC policies:

Department of Agriculture

Federal Crop Insurance Corporation

Reinsured policies:

(Appropriate title for insurance provider)

Both FCIC and reinsured policies:

Dry Bean 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

Actual value—The dollar value received, or that could be received, for contract seed beans under a seed bean processor contract if the contract seed bean production is properly handled in accordance with the requirements of such contract.

Base price—The price per pound (excluding any discounts or incentives that may apply) that is stated in the seed bean processor contract and that will be paid to the producer for at least 50 percent of the total production under contract with the seed company.

Beans—Dry beans and contract seed beans.

Combining—A harvesting process that uses a machine to separate the beans from the pods and other vegetative matter and place the beans into a temporary storage receptacle.

Contract seed beans—Dry beans grown under the terms of a seed bean processor contract for the purpose of producing seed to be used for producing dry beans or vegetable beans in a future crop year.

Days—Calendar days.

Dry beans—The crop defined by The United States Standards for Beans excluding contract seed beans.

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

Final planting date—The date contained in the Special Provisions for the insured crop by which the crop must initially be planted in order to be insured for the full production guarantee.

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

Harvest—Combining the beans. Beans which are swathed or knifed prior to combining are not considered harvested.

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 to produce at least the yield used to establish the irrigated production guarantee on the irrigated acreage planted to the insured crop.

Late planted—Acreage planted to the insured crop during the late planting period.

Late planting period—The period that begins the day after the final planting date for the insured crop and ends 25 days after the final planting date.

Local market price—The cash price per hundredweight for the U.S. No. 2 grade of dry beans of the insured type offered by buyers in the area in which you normally market the dry beans. Moisture content and factors not associated with grading under the United States Standards for Beans will not be considered in establishing this price.

Net price—The dollar value of dry bean production received, or that could have been received, after reductions in value due to insurable causes of loss.

Pick—The percentage, on a weight basis, of defects including splits, damaged (including discolored) beans, contrasting types, and foreign material that remains in the dry beans after dockage has been removed by the proper use of screens or sieves.

Planted acreage—Land in which 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. Beans must initially be planted in rows far enough apart to permit cultivation to be considered planted. Acreage planted in any other manner will not be insurable unless otherwise provided by the Special Provisions or by written agreement.

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, time to crop maturity, and marketing window, that replanting the insured crop will allow the crop to attain maturity prior to the calendar date for the end of the insurance period. It will not be considered practical to replant after the end of the late planting period unless replanting is generally occurring in the area. For contract seed beans, it will not be considered practical to replant unless production from the replanted acreage can be delivered under the terms of the seed bean processor contract or the seed company agrees to accept such production.

Prevented planting—Inability to plant the insured crop with proper equipment by the final planting date designated in the Special Provisions for the insured crop in the county or the end of the late planting period. You must have been unable to plant the insured crop due to an insured cause of loss that has prevented the majority of producers in the surrounding area from planting the same crop.

Production guarantee (per acre)—The number of pounds determined by multiplying the approved yield per acre by the coverage level percentage you elect, and multiplying the result by any applicable adjustment factor specified in the Actuarial Table.

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

Seed bean processor contract—A written agreement between the contract seed bean producer and the seed company, containing at a minimum:

(a) The contract seed bean producer's promise to plant and grow one or more specific varieties of contract seed beans, and deliver the production from those varieties to the seed company;

(b) The seed company's promise to purchase all the production stated in the contract; and

(c) A base price, or a method to determine such price based on published independent information, that will be paid to the contract seed bean producer for the production stated in the contract.

Seed company—Any business enterprise regularly engaged in the processing of seed beans, that possesses all licenses and permits for marketing seed beans required by the State in which it operates, and that possesses or has contracted for facilities, with enough drying, screening and bagging or packaging equipment to accept and process the seed beans within a reasonable amount of time after harvest.

Swathing or knifing—Severance of the bean plant from the ground, including the pods and beans, and placing them into windrows.

Timely planted—Planted on or before the final planting date designated in the Special Provisions for the insured crop in the county.

Type—A category of beans identified as a type in the Special Provisions.

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

2. Unit Division

(a) In addition to section 1 (Definitions) of the Basic Provisions (§ 457.8), (basic unit) all acreage of contract seed beans qualifies as a separate basic unit. For production based seed bean processor contracts, the unit will consist of all the acreage needed to produce the amount of production under contract, based on the actual production history of the acreage. For acreage based seed bean processor contracts, the unit will consist of all acreage specified in the contract.

(b) Unless limited by the Special Provisions, a unit as defined in section 1 (Definitions) of the Basic Provisions (§ 457.8), (basic unit) and section 2(a) of these crop provisions, may be divided into optional units if, for each optional unit, you meet all the conditions of this section or if a written agreement to such division exists.

(c) Basic units may not be divided into optional units on any basis including, but not limited to, production practice, variety, and planting period, other than as described in this section.

(d) Contract seed beans may only qualify for optional units as specified in section 2(g) of these Crop Provisions if the seed bean processor contract specifies the number of acres under contract. Contract seed beans produced under a seed bean processor contract that specifies only an amount of production are not eligible for optional units.

(e) 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 additional premium paid for the optional units that have been combined will be refunded to you.

(f) All optional units you selected for the crop year must be identified on the acreage report for that crop year.

(g) 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 used to determine your production guarantee;

(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) Subject to section 2(d) each optional unit must meet one or more of the following criteria, as applicable:

(i) *Optional Units by bean type:* A separate optional unit may be established for each bean type shown in the Special Provisions.

(ii) *Optional Units by Section, Section Equivalent, or FSA Farm Serial Number:* In addition to, or instead of, establishing optional units by type, optional units may be established if each optional unit is 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.

(iii) *Optional Units on Acreage Including Both Irrigated and Non-irrigated Practices:* In addition to, or instead of, establishing optional units by type, section, section equivalent, or FSA Farm Serial Number, optional units may be based on irrigated acreage or non-irrigated acreage if both are located in the same section, section equivalent, or FSA Farm Serial Number. To qualify as separate irrigated and non-irrigated optional units, the non-irrigated acreage may not continue into the irrigated acreage in the same rows or planting pattern. The irrigated acreage may not extend beyond the point at which your irrigation system can deliver the quantity of water needed to produce the yield on which the guarantee is based, except the corners of a field in which a center-pivot irrigation system is used will be considered as irrigated acreage if separate acceptable records of production from the corners are not provided. If the corners of a field in which a center-pivot irrigation system is used do not qualify as a separate non-irrigated optional unit, they will be a part of the unit containing the irrigated acreage. However, non-irrigated acreage that is not a part of a field in which a center-pivot irrigation system is used may qualify as a separate optional unit provided that all requirements of this section are met.

3. Insurance Guarantees, Coverage Levels, and Prices for Determining Indemnities

(a) In addition to the requirements of section 3(b) (Insurance Guarantees, Coverage Levels, and Prices for Determining Indemnities) of the Basic Provisions (§ 457.8), you may select only one price election for all the dry beans in the county insured under this policy unless the Special Provisions provide different price elections by type, in which case you may select one price election for each dry bean type designated in the Special Provisions. The price elections you choose for each type are not required to have the same percentage relationship to the maximum price offered by us for each type. For example, if you choose 100 percent of the maximum price election for one type, you may also choose 75 percent of the maximum price election for another type.

(b) For contract seed beans only, the dollar amount of insurance is obtained by multiplying the production guarantee per

acre for each variety in the unit by the insured acreage of that variety, times the applicable base price, and times the price election percentage you selected. The total of these results will be the amount of insurance for contract seed beans in the unit.

4. Contract Changes

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

State and county	Cancellation and termination dates
California	February 28.
All other States	March 15.

6. Report of Acreage

For contract seed beans only, in addition to the requirements of section 6 (Report of Acreage) of the Basic Provisions (§ 457.8), you must submit a copy of the seed bean processor contract on or before the acreage reporting date.

7. Insured Crop

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

(1) In which you have a share;

(2) That are planted for harvest as:

(i) Dry beans; or

(ii) If applicable, contract seed beans, if the seed bean processor contract is executed on or before the acreage reporting date; and

(3) That are not (unless allowed by the Special Provisions or by written agreement):

(i) Interplanted with another crop; or

(ii) Planted into an established grass or legume.

(b) For contract seed beans only:

(1) An instrument in the form of a ''lease'' under which you retain control of the acreage on which the insured crop is grown and that provides for delivery of the crop under substantially the same terms as a seed bean processor contract may be treated as a contract under which you have an insurable interest in the crop; and

(2) We will not insure any acreage of contract seed beans produced by a seed company.

(c) In addition to the types of dry beans designated in the Special Provisions, we will insure other types if:

(1) The type you intend to plant has been demonstrated to be adapted to the area. Evidence of adaptability must include:

(i) Results of test plots for 2 years and recommendations by a university or seed company; or

(ii) Two years of production reports that indicate your experience producing the type in your production area;

(2) You submit on or before the sales closing date your production reports and prices received, or the test plot results, and evidence of market potential, including the price buyers are willing to pay for the type; and

(3) Both parties (you and us) enter into a written agreement allowing insurance on the type in accordance with section 15.

(d) Any acreage of beans that is destroyed and replanted to a different insurable type of beans will be considered insured acreage in accordance with section 11.

8. Insurable Acreage

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

(a) We will not insure any acreage that does not meet the rotation requirements contained in the Special Provisions; or

(b) Any acreage of the insured crop damaged before the final planting date, to the extent that the majority of growers in the area would normally not further care for the crop, must be replanted unless we agree that replanting is not practical. We will not require you to replant if it is not practical to replant to the same type of beans as originally planted.

9. Insurance Period

In accordance with the provisions of section 11 (Insurance Period) of the Basic Provisions (§ 457.8), the calendar date for the end of the insurance period is the date immediately following planting as follows:

(a) October 15 in Oklahoma, New Mexico, and Texas;

(b) November 15 in California; and

(c) October 31 in all other States.

10. Causes of Loss

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:

(a) Adverse weather conditions;

(b) Fire;

(c) Insects, but not damage due to insufficient or improper application of pest control measures;

(d) Plant disease, but not damage due to insufficient or improper application of disease control measures;

(e) Wildlife;

(f) Earthquake;

(g) Volcanic eruption; or

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

11. Replanting Payments

(a) In accordance with section 13 (Replanting Payment) of the Basic Provisions (§ 457.8), a replanting payment is allowed if the bean crop is damaged by an insurable cause of loss to the extent that the remaining stand will not produce at least 90 percent of the production guarantee for the acreage and it is practical to replant.

(b) The maximum amount of the replanting payment per acre will be the lesser of 10 percent of the production guarantee for the type to be replanted or 120 pounds multiplied by your price election for the type to be replanted and by your insured share.

(c) When beans are replanted using a practice that is uninsurable as an original planting, the liability for the unit will be reduced by the amount of the replanting payment. The premium amount will not be reduced.

(d) The guarantee and premium for acreage replanted to a different insurable type will be based on the replanted type and will be calculated in accordance with sections 3 (Insurance Guarantees, Coverage Levels, and Prices for Determining Indemnities) and 7 (Annual Premium) of the Basic Provisions (§ 457.8) and section 3 of these Crop Provisions.

12. Duties in the Event of Damage or Loss

In accordance with the requirements of section 14 (Duties in the Event of Damage or Loss) of the Basic Provisions (§ 457.8), representative samples of the unharvested crop must be at least 10 feet wide and extend the entire length of each field in the unit. The samples must not be harvested or destroyed until the earlier of our inspection or 15 days after harvest of the balance of the unit is completed.

13. 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 units, we will combine all optional units for which such production records were not provided; or

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

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

(1) Multiplying the insured acreage of each dry bean type by its respective production guarantee;

(2) Multiplying each result in section 13(b)(1) by the respective price election for each insured type;

(3) Totaling the results in section 13(b)(2);

(4) Multiplying the insured acreage of each contract seed bean type by its respective production guarantee;

(5) Multiplying each result in section 13(b)(4) by the applicable base price;

(6) Multiplying each result in section 13(b)(5) by your selected price election percentage;

(7) Totaling the results in section 13(b)(6);

(8) Totaling the results in section 13(b)(3) and section 13(b)(6);

(9) Multiplying the total production to be counted of each dry bean type if applicable, (see section 13(d)) by the respective price election;

(10) Totaling the value of all contract seed bean production (see section 13(c));

(11) Totaling the results in section 13(b)(9) and section 13(b)(10);

(12) Subtracting the total in section 13(b)(11) from the total in section 13(b)(8); and

(13) Multiplying the result by your share.

(c) The value of contract seed bean production to count for each type in the unit will be determined as follows:

(1) For production meeting the minimum quality requirements contained in the seed bean processor contract and for production that does not meet such requirements due to uninsured causes:

(i) Multiplying the actual value or base price per pound, whichever is greater, by the price election percentage you selected; and

(ii) Multiplying the result by the number of pounds of such production.

(2) For production not meeting the minimum quality requirements contained in the seed bean processor contract due to insurable causes:

(i) Multiplying the actual value by the price election percentage you selected; and

(ii) Multiplying the result by the number of pounds of such production.

(d) The total bean production to count (in pounds) from all insurable acreage on the unit will include:

(1) All appraised production as follows:

(i) Not less than the production guarantee per acre for acreage:

(A) That is abandoned;

(B) That is put to another use without our consent;

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

(D) For which you fail to provide production records that are acceptable to us;

(ii) Production lost due to uninsured causes;

(iii) Unharvested production (mature unharvested production of dry beans may be adjusted for quality deficiencies and excess moisture in accordance with section 13(e)); 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) If you do not elect to continue to care for the crop, we may give you consent to put the acreage to another use if you agree to leave intact, and provide sufficient care for, representative samples of the crop in locations acceptable to us (The amount of production to count for such acreage will be based on the harvested production or appraisals from the samples at the time harvest should have occurred. If you do not leave the required samples intact, or fail to provide sufficient care for the samples, our appraisal made prior to giving you consent to put the acreage to another use will be used to determine the amount of production to count); or

(B) If you elect to continue to care for the crop, the amount of production to count for the acreage will be the harvested production, or our reappraisal if additional damage occurs and the crop is not harvested; and

(2) All harvested production from the insurable acreage.

(e) Mature dry bean production to count may be adjusted for excess moisture and quality deficiencies. If moisture adjustment is applicable, it will be made prior to any adjustment for quality. Adjustment for excess moisture and quality deficiencies will not be applicable to contract seed beans.

(1) Production will be reduced by 0.12 percent for each 0.1 percentage point of moisture in excess of 18 percent. We may obtain samples of the production to determine the moisture content.

(2) Production will be eligible for quality adjustment if:

(i) A pick is designated in the Special Provisions and the pick of the damaged production exceeds this designation; or

(ii) A pick is not designated in the Special Provisions and deficiencies in quality, in accordance with the United States Standards for Beans, result in dry beans not meeting the grade requirements for U.S. No. 2 (grades U.S. No. 3 or worse) because the beans are damaged or badly damaged; or

(iii) Substances or conditions are present that are identified by the Food and Drug Administration or other public health organizations of the United States as being injurious to human or animal health.

(3) Quality will be a factor in determining your loss only if:

(i) The deficiencies, substances, or conditions resulted from a cause of loss against which insurance is provided under these crop provisions and which occurs within the insurance period;

(ii) The deficiencies, substances, or conditions result in a net price for the damaged production that is less than the local market price;

(iii) All determinations of these deficiencies, substances, or conditions are made using samples of the production obtained by us or by a disinterested third party approved by us; and

(iv) The samples are analyzed by a grader licensed to grade dry beans under the authority of the United States Agricultural Marketing Act or the United States Warehouse Act with regard to deficiencies in quality, or by a laboratory approved by us with regard to substances or conditions injurious to human or animal health. (Test weight for quality adjustment purposes may be determined by our loss adjuster.)

(4) Dry bean production that is eligible for quality adjustment, as specified in sections 13(e) (2) and (3), will be reduced:

(i) If a conversion factor is designated by the Special Provisions, by multiplying the number of pounds of eligible production by the conversion factor designated in the Special Provisions for the applicable grade or pick; or

(ii) If a conversion factor is not designated by the Special Provisions as follows:

(A) The market price of the qualifying damaged production and the local market price will be determined on the earlier of the date such quality adjusted production is sold or the date of final inspection for the unit. If a local market price is not available for the insured crop year, the current years' maximum price election available for the applicable type will be used. The price for the qualifying damaged production will be the market price for the local area to the extent feasible. We may obtain prices from any buyer of our choice. If we obtain prices from one or more buyers located outside your local market area, we will reduce such prices by the additional costs required to deliver the dry beans to those buyers. Discounts used to establish the net price of the damaged production will be limited to those that are usual, customary, and reasonable. The price of the damaged production will not be reduced for:

(*1*) Moisture content;

(*2*) Damage due to uninsured causes; or

(*3*) Drying, handling, processing, including trading tare for grade to obtain a higher grade and price, or any other costs associated with normal harvesting, handling, and marketing of the dry beans; except, if the price of the damaged production can be increased by conditioning, we may reduce the price of the production after it has been conditioned by the cost of conditioning but not lower than the value of the production before conditioning;

(B) The value per pound of the damaged or conditioned production will be divided by the local market price to determine the quality adjustment factor; and

(C) The number of pounds remaining after any reduction due to excessive moisture (the moisture-adjusted gross pounds (if appropriate)) of the damaged or conditioned production will then be multiplied by the quality adjustment factor to determine the net production to count.

(f) Any production harvested from plants growing in the insured crop may be counted as production of the insured crop on a weight basis.

14. Late Planting and Prevented Planting

(a) In lieu of provisions contained in the Basic Provisions (§ 457.8), regarding acreage initially planted after the final planting date and the applicability of a Late Planting Agreement Option, insurance will be provided for acreage planted to the insured crop during the late planting period (see section 14(c)), and acreage you were prevented from planting (see section 14(d)). These coverages provide reduced production guarantees. The premium amount for late planted acreage and eligible prevented planting acreage will be the same as that for timely planted. If the amount of premium you are required to pay (gross premium less our subsidy) for late planted acreage or prevented planting acreage exceeds the liability on such acreage, coverage for those acres will not be provided, no premium will be due, and no indemnity will be paid for such acreage.

(b) You must provide written notice to us not later than the acreage reporting date if you were prevented from planting.

(c) Late Planting

(1) For bean acreage planted during the late planting period, the production guarantee or

amount of insurance for each acre will be reduced for each day planted after the final planting date by:

(i) One percent per day for the 1st through the 10th day; and

(ii) Two percent per day for the 11th through the 25th day.

(2) In addition to the requirements of section 6 (Report of Acreage) of the Basic Provisions (§ 457.8), you must report the dates the acreage is planted within the late planting period.

(3) If planting of beans continues after the final planting date, or you are prevented from planting during the late planting period, the acreage reporting date will be the later of:

(i) The acreage reporting date contained in the Special Provisions for the insured crop; or

(ii) Five days after the end of the late planting period.

(d) Prevented Planting (Including Planting After the Late Planting Period)

(1) If you were prevented from timely planting beans, you may elect:

(i) To plant beans during the late planting period. The production guarantee or amount of insurance for such acreage will be determined in accordance with section 14(c)(1);

(ii) Not to plant this acreage to any crop except a cover crop not for harvest. You may also elect to plant the insured crop after the late planting period. In either case, the production guarantee or amount of insurance for such acreage will be 50 percent of the production guarantee for timely planted acres. For example, if your production guarantee for timely planted acreage is 1,500 pounds per acre, your prevented planting production guarantee would be 750 pounds per acre (1,500 pounds multiplied by 0.50). If you elect to plant the insured crop after the late planting period, production to count for such acreage will be determined in accordance with section 13; or

(iii) Not to plant the intended crop but plant a substitute crop for harvest, in which case:

(A) No prevented planting production guarantee will be provided for such acreage if the substitute crop is planted on or before the 10th day following the final planting date for the insured crop; or

(B) A production guarantee equal to 25 percent of the production guarantee for timely planted acres will be provided for such acreage, if the substitute crop is planted after the 10th day following the final planting date for the insured crop. If you elected the Catastrophic Risk Protection Endorsement or excluded this coverage, and plant a substitute crop, no prevented planting coverage will be provided. For example, if your production guarantee for timely planted acreage is 30 bushels per acre, your prevented planting production guarantee would be 7.5 bushels per acre (30 bushels multiplied by 0.25). You may elect to exclude prevented planting coverage when a substitute crop is planted for harvest and receive a reduction in the applicable premium rate. If you wish to exclude this coverage, you must so indicate, on or before the sales closing date, on your application or on a form approved by us. Your election to exclude this coverage will remain in effect from year to year unless you notify us in writing on our form by the applicable sales closing date for the crop year for which you wish to include this coverage. All acreage of the crop insured under this policy will be subject to this exclusion.

(2) Production guarantees for timely, late, and prevented planting acreage within a unit will be combined to determine the production guarantee for the unit. For example, assume you insure one unit in which you have a 100 percent share. The unit consists of 150 acres, of which 50 acres were planted timely, 50 acres were planted 7 days after the final planting date (late planted), and 50 acres were not planted but are eligible for a prevented planting production guarantee or amount of insurance. The production guarantee for the unit will be computed as follows:

(i) For the timely planted acreage, multiply the per acre production guarantee or amount of insurance for timely planted acreage by the 50 acres planted timely;

(ii) For the late planted acreage, multiply the per acre production guarantee or amount of insurance for timely planted acreage by 93 percent and multiply the result by the 50 acres planted late; and

(iii) For prevented planting acreage, multiply the per acre production guarantee or amount of insurance for timely planted acreage by:

(A) Fifty percent and multiply the result by the 50 acres you were prevented from planting, if the acreage is eligible for prevented planting coverage, and if the acreage is left idle for the crop year, or if a cover crop is planted not for harvest. Prevented planting compensation hereunder will not be denied because the cover crop is hayed or grazed; or

(B) Twenty five percent and multiply the result by the 50 acres you were prevented from planting, if the acreage is eligible for prevented planting coverage, and if you elect to plant a substitute crop for harvest after the 10th day following the final planting date for the insured crop. (This paragraph (B) is not applicable, and prevented planting coverage is not available under these crop provisions, if you elected the Catastrophic Risk Protection Endorsement or you elected to exclude prevented planting coverage when a substitute crop is planted (see section 14(d)(1)(iii)). Your premium will be based on the result of multiplying the per acre production guarantee or amount of insurance for timely planted acreage by the 150 acres in the unit.

(3) You must have the inputs available to plant and produce the intended crop with the expectation of at least producing the production guarantee or amount of insurance. Proof that these inputs were available may be required.

(4) In addition to the provisions of section 11 (Insurance Period) of the Basic Provisions (§ 457.8), the insurance period for prevented planting coverage begins:

(i) On the sales closing date contained in the Special Provisions for the insured crop in the county for the crop year the application for insurance is accepted; or

(ii) For any subsequent crop year, on the sales closing date for the insured crop in the county for the previous crop year, provided continuous coverage has been in effect since that date. For example: If you make application and purchase insurance for beans for the 1997 crop year, prevented planting coverage will begin on the 1997 sales closing date for beans in the county. If the bean coverage remains in effect for the 1998 crop year (is not terminated or canceled during or after the 1997 crop year), prevented planting coverage for the 1998 crop year began on the 1997 sales closing date. Cancellation for the purpose of transferring the policy to a different insurance provider when there is no lapse in coverage will not be considered terminated or canceled coverage for the purpose of the preceding sentence.

(5) The acreage to which prevented planting coverage applies will not exceed the total eligible acreage on all FSA Farm Serial Numbers in which you have a share, adjusted for any reconstitution that may have occurred on or before the sales closing date. Eligible acreage for each FSA Farm Serial Number is determined as follows:

(i) The number of acres planted to beans on the FSA Farm Serial Number during the previous crop year; or

(ii) One hundred percent of the simple average of the number of acres planted to beans during the crop years that you certified to determine your yield.

(iii) Acreage intended to be planted under an irrigated practice will be limited to the number of acres for which you had adequate irrigation facilities prior to the insured cause of loss which prevented you from planting.

(iv) A prevented planting production guarantee or amount of insurance will not be provided for any acreage:

(A) Of contracted seed beans in excess of the number of acres required to be grown in the current crop year under a seed bean processor contract executed on or before the acreage reporting date, or the number of acres needed to produce the amount of contracted production, based on the APH yield for the acreage.

(B) That does not constitute at least 20 acres or 20 percent of the acreage in the unit, whichever is less (Acreage that is less than 20 acres or 20 percent of the acreage in the unit will be presumed to have been intended to be planted to the insured crop planted in the unit, unless you can show that you had the inputs available before the final planting date to plant and produce another insured crop on the acreage);

(C) For which the actuarial table does not designate a premium rate unless a written agreement designates such premium rate;

(D) Used for conservation purposes or intended to be left unplanted under any program administered by the United States Department of Agriculture;

(E) On which another crop is prevented from being planted, if you have already received a prevented planting indemnity, guarantee or amount of insurance for the same acreage in the same crop year, unless you provide adequate records of acreage and production showing that the acreage was double-cropped in each of the last 4 years in which the insured crop was grown on the acreage;

(F) On which the insured crop is prevented from being planted, if any other crop is

planted and fails, or is planted and harvested, hayed or grazed on the same acreage in the same crop year, (other than a cover crop as specified in section 14 (d)(2)(iii)(A), or a substitute crop allowed in section 14 (d)(2)(iii)(B)), unless you provide adequate records of acreage and production showing that the acreage was double-cropped in each of the last 4 years in which the insured crop was grown on the acreage;

(G) When coverage is provided under the Catastrophic Risk Protection Endorsement if you plant another crop for harvest on any acreage you were prevented from planting in the same crop year, even if you have a history of double-cropping. If you have a Catastrophic Risk Protection Endorsement and receive a prevented planting indemnity, guarantee, or amount of insurance for a crop and are prevented from planting another crop on the same acreage, you may only receive the prevented planting indemnity, guarantee, or amount of insurance for the crop on which the prevented planting indemnity, guarantee, or amount of insurance is received; or

(H) For which planting history or conservation plans indicate that the acreage would have remained fallow for crop rotation purposes.

(v) For the purpose of determining eligible acreage for prevented planting coverage, acreage for all units will be combined and be reduced by the number of bean acres timely planted and late planted. For example, assume you have 100 acres eligible for prevented planting coverage in which you have a 100 percent share. The acreage is located in a single FSA Farm Serial Number which you insure as two separate optional units consisting of 50 acres each. If you planted 60 acres of beans on one optional unit and 40 acres of beans on the second optional unit, your prevented planting eligible acreage would be reduced to zero (*i.e.,* 100 acres eligible for prevented planting coverage minus 100 acres planted equals zero).

(6) In accordance with the provisions of section 6 (Report of Acreage) of the Basic Provisions (§ 457.8), you must report by unit any insurable acreage that you were prevented from planting. This report must be submitted on or before the acreage reporting date. For the purpose of determining acreage eligible for a prevented planting production guarantee, the total amount of prevented planting and planted acres cannot exceed the maximum number of acres eligible for prevented planting coverage. Any acreage you report in excess of the number of acres eligible for prevented planting coverage, or that exceeds the number of eligible acres physically located in a unit, will be deleted from your acreage report.

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, the guarantee, premium rate, and price election;

(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.

Signed in Washington, D.C., on February 6, 1997.

Kenneth D. Ackerman,

Manager, Federal Crop Insurance Corporation.

[FR Doc. 97–3327 Filed 2–10–97; 8:45 am]

BILLING CODE 3410–FA–P

Agricultural Marketing Service

7 CFR Part 984

[Docket No. FV96–984–1 FIR]

Walnuts Grown in California; Assessment Rate

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Final rule.

SUMMARY: The Department of Agriculture (Department) is adopting as a final rule, without change, the provisions of an interim final rule establishing an assessment rate for the Walnut Marketing Board (Board) under Marketing Order No. 984 for the 1996–97 and subsequent marketing years. The Board is responsible for local administration of the marketing order which regulates the handling of walnuts grown in California. Authorization to assess walnut handlers enables the Board to incur expenses that are reasonable and necessary to administer the program.

EFFECTIVE DATE: August 1, 1996.

FOR FURTHER INFORMATION CONTACT: Mary Kate Nelson, Marketing Assistant, California Marketing Field Office, Fruit and Vegetable Division, AMS, USDA, 2202 Monterey Street, suite 102B, Fresno, CA 93721, telephone 209–487–5901, FAX 209–487–5906, or Martha Sue Clark, Program Assistant, Marketing Order Administration Branch, Fruit and Vegetable Division, AMS, USDA, PO. Box 96456, room 2525–S, telephone 202–720–9918, FAX 202–720–5698. Small businesses may request information on compliance with this regulation by contacting: Jay Guerber, Marketing Order Administration Branch, Fruit and Vegetable Division, AMS, USDA, PO. Box 96456, room 2525–S, Washington, DC 20090–6456; telephone 202–720–2491; FAX 202–720–5698.

SUPPLEMENTARY INFORMATION: This rule is issued under Marketing Agreement and Order No. 984, both as amended (7 CFR part 984), regulating the handling of walnuts grown in California, hereinafter referred to as the ''order.'' The marketing agreement and order are effective under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601–674), hereinafter referred to as the ''Act.''

The Department is issuing this rule in conformance with Executive Order 12866.

This rule has been reviewed under Executive Order 12988, Civil Justice Reform. Under the marketing order now in effect, California walnut handlers are subject to assessments. Funds to administer the order are derived from such assessments. It is intended that the assessment rate as issued herein will be applicable to all assessable walnuts beginning August 1, 1996, and continuing until amended, suspended, or terminated. This rule will not preempt any State or local laws, regulations, or policies unless they present an irreconcilable conflict with this rule.

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

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

The purpose of the RFA is to fit regulatory actions to the scale of business subject to such actions in order

that small businesses will not be unduly or disproportionately burdened. Marketing orders issued pursuant to the Act, and the rules issued thereunder, are unique in that they are brought about through group action of essentially small entities acting on their own behalf. Thus, both statutes have small entity orientation and compatibility.

There are approximately 5,000 producers of walnuts in the production area and approximately 55 handlers subject to regulation under the marketing order. Small agricultural producers have been defined by the Small Business Administration (13 CFR 121.601) as those having annual receipts less than $500,000, and small agricultural service firms are defined as those whose annual receipts are less than $5,000,000. The majority of California walnut producers and handlers may be classified as small entities.

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

The Board met on September 6, 1996, and unanimously recommended 1996–97 expenditures of $2,301,869 and an assessment rate of $0.0117 per kernelweight pound of merchantable walnuts certified. In comparison, last year's budgeted expenditures were $2,280,175. The assessment rate of $0.0117 is $0.0001 higher than last year's established rate. Major expenditures recommended by the Board for the 1996–97 year include $232,684 for general expenses, $150,508 for office expenses, $1,840,677 for research expenses, $48,000 for a production research director, and $30,000 for the reserve. Budgeted expenses for these items in 1995–96 were $246,847, $140,908, $1,828,420, $34,000, and $30,000, respectively.

The assessment rate recommended by the Board was derived by dividing anticipated expenses by expected merchantable certifications of California walnuts. Walnut shipments for the year are estimated at 198,000,000 kernelweight pounds which will yield $2,316,600 in assessment income, which will be adequate to cover budgeted expenses. Unexpended funds may be used temporarily to defray expenses of the subsequent marketing year, but must be made available to the handlers from whom collected within five months after the end of the year.

An interim final rule regarding this action was published in the November 29, 1996, issue of the Federal Register (61 FR 60512). That rule provided for a 30-day comment period. No comments were received.

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

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

Although this assessment rate is effective for an indefinite period, the Board will continue to meet prior to or during each marketing year to recommend a budget of expenses and consider recommendations for modification of the assessment rate. The dates and times of Board meetings are available from the Board or the Department. Board meetings are open to the public and interested persons may express their views at these meetings. The Department will evaluate Board recommendations and other available information to determine whether modification of the assessment rate is needed. Further rulemaking will be undertaken as necessary. The Board's 1996–97 budget and those for subsequent marketing years will be reviewed and, as appropriate, approved by the Department.

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

Pursuant to 5 U.S.C. 553, it is also found and determined that good cause exists for not postponing the effective date of this rule until 30 days after publication in the Federal Register because: (1) The Board needs to have sufficient funds to pay its expenses which are incurred on a continuous basis; (2) the 1996–97 marketing year began on August 1, 1996, and the marketing order requires that the rate of assessment for each marketing year apply to all assessable walnuts handled during such marketing year; (3) handlers are aware of this action which was unanimously recommended by the Board at a public meeting and is similar to other assessment rate actions issued in past years; and (4) an interim final rule was published on this action and provided for a 30-day comment period; no comments were received.

List of Subjects in 7 CFR Part 984

Marketing agreements, Nuts, Reporting and recordkeeping requirements, Walnuts.

For the reasons set forth in the preamble, 7 CFR part 984 is amended as follows:

PART 984—WALNUTS GROWN IN CALIFORNIA

Accordingly, the interim final rule amending 7 CFR part 984 which was published at 61 FR 60512 on November 29, 1996, is adopted as a final rule without change.

Dated: February 5, 1997.

Robert C. Keeney

Director, Fruit and Vegetable Division.

[FR Doc. 97–3284 Filed 2–10–97; 8:45 am]

BILLING CODE 3410–02–P

Food Safety and Inspection Service

9 CFR Part 391

[Docket No. 96–013C]

RIN 0583–AC13

Fee Changes for Inspection Services

AGENCY: Food Safety and Inspection Service, USDA.

ACTION: Correcting amendments.

SUMMARY: This document contains corrections to the final regulation, ''Fee Increase for Inspection Services,'' which was published on December 13, 1996 (61 FR 65459). The final rule changed the fees charged to meat and poultry establishments, importers, and exporters for providing voluntary inspection, identification, and certification services; overtime and holiday services; and laboratory services.

EFFECTIVE DATE: February 11, 1997.

FOR FURTHER INFORMATION CONTACT: William L. West, Director, Budget and Finance Division, Administrative Management, (202) 720–3367.

SUPPLEMENTARY INFORMATION: On December 13, 1996, FSIS published ''Fee Increase for Inspection Services'' (61 FR 65459). Although the preamble discussion of the fee changes was correct, the regulatory amendments were incorrect. The regulation continues to list the old fees. This notice corrects this oversight.

List of Subjects in 9 CFR Part 391

Fees and charges, Meat inspection, Poultry products inspection.

PART 391—FEES AND CHARGES FOR INSPECTION SERVICES

Accordingly, 9 CFR 391 is corrected by making the following correcting amendments:

1. The authority citation for part 391 continues to read as follows:

Authority: 7 U.S.C. 138f; 7 U.S.C. 394, 1622, and 1624; 21 U.S.C. 451 *et seq.*; 21 U.S.C. 601–695; 7 CFR 2.18 and 2.53.

2. Sections 391.2, 391.3, and 391.4 are revised to read as follows:

§ 391.2 Base time rate.

The base time rate for inspection services provided pursuant to §§ 350.7, 351.8, 351.9, 352.5, 354.101, 355.12, and 362.5 shall be $32.88 per hour, per program employee.

§ 391.3 Overtime and holiday rate.

The overtime and holiday rate for inspection services provided pursuant to §§ 307.5, 350.7, 351.8, 351.9, 352.5, 354.101, 355.12, 362.5, and 381.38 shall be $33.76 per hour, per program employee.

§ 391.4 Laboratory services rate.

The rate for laboratory services provided pursuant to §§ 350.7, 351.9, 352.5, 354.101, 355.12, and 362.5 shall be $48.56 per hour, per program employee.

Done at Washington, DC, on February 5, 1997.

Thomas J. Billy,

Administrator.

[FR Doc. 97–3371 Filed 2–10–97; 8:45 am]

BILLING CODE 3410–DM–P

COMMODITY FUTURES TRADING COMMISSION

17 CFR Parts 15, 18 and 19

Reports by Large Traders; Cash Position Reports in Grains (including Soybeans) and Cotton

AGENCY: Commodity Futures Trading Commission.

ACTION: Final rulemaking.

SUMMARY: The Commodity Futures Trading Commission (Commission) is amending Parts 15, 18 and 19 of the regulations under the Commodity Exchange Act (''Act''), 17 CFR Parts 15, 18 and 19 (1996). The amendments to Part 18 require that traders who hold reportable futures or option positions file the CFTC Form 40, ''Statement of Reporting Trader,'' only upon request by the Commission or its designee. The amendments to Parts 15 and 19 provide that monthly cash position reports are required only if a trader's net long or net short combined futures and futures equivalent options position exceeds the levels specified in rule 150.2. The proposal to amend Parts 15, 18 and 19 was included with a number of other proposed amendments that primarily concerned option large trader reports. The Commission has determined to proceed with the changes to Parts 15, 18 and 19 immediately and will consider the remaining changes separately at a later time. Consideration of final rules on those changes relating to options reporting are dependent, in part, on the completion of upgrades to the Commission's computer system.

EFFECTIVE DATE: April 14, 1997.

FOR FURTHER INFORMATION CONTACT: Lamont Reese, Commodity Futures Trading Commission, Division of Economic Analysis, Three Lafayette Centre, 1155 21st Street, N.W., Washington, D.C. 20581.

SUPPLEMENTARY INFORMATION:

I. Background

On July 18, 1996, the Commission published a notice of proposed rulemaking in the Federal Register that affects reports from large traders filed pursuant to rules 18.04 and 19.01(a)(1). *See* 61 FR 37409 (July 18, 1996). The amendments to Parts 18 and 19 were included with a number of other proposed amendments to the Commission's reporting rules that primarily concerned options large trader reports. Consideration of final rules with respect to option reporting is dependent, in part, on implementation of certain upgrades to the Commission's computer system.

Under Commission rule 18.04, traders who become reportable in futures must file a CFTC Form 40, ''Statement of Reporting Trader,'' within ten business days following the day that the trader's position equals or exceeds specified levels.[1] Additional filings are required to be made annually as specified in rule 18.04(d). 17 CFR 18.04 (1996). Traders who become reportable in options are required to file the Form 40 only in response to a special call by the Commission. The Form 40 requires the disclosure of information about ownership and control of futures and option positions held by the reporting trader as well as the trader's use of the markets for hedging.

As explained in the Notice of Proposed Rulemaking, when an account first becomes reportable in futures, the futures commission merchant, clearing member or foreign broker reporting the account files a CFTC Form 102 that identifies all persons having a ten percent or more financial interest in the account and those persons who control the trading of the account. Although all persons named on the Form 102 may be considered a ''trader'' according to the Commission's definition, as a matter of administrative practice Commission staff has not initiated requests for initial and updated Form 40s from all such traders. Generally staff has taken action against traders only if the traders had failed to respond to the staff's written request. 61 FR 37414 (July 18, 1996). In view of this, the Commission proposed to amend rule 18.04 to codify this practice by requiring that traders file Form 40s only in response to a special call and to delegate the authority to make these calls to the Director of the Division of Economic Analysis.

With regard to Part 19, the Commission requires that persons owning or controlling futures positions in commodities for which the Commission has established speculative limits file reports concerning their long and short cash positions, *i.e.*, stocks of the commodities owned and the quantity of their fixed-price purchase and sale commitments. *See* 17 CFR Part 19 (1996). These commodities include the grains, the soybean complex and cotton. *See* 17 CFR Part 150 (1996). The primary purpose for these reports is to determine if the futures and option positions of traders that exceed the Commission's speculative limits qualify as hedging as defined in section 1.3(z) of the Commission's regulations. Although the speculative limits set forth in rule 150.2 apply to the net long or net short combined futures and futures equivalent option position of a trader, the Commission's definition of a reportable position contained in rule 15.00 considers only the futures position to determine if a trader is reportable for purposes of reports filed

[1] A reportable position is any open position held or controlled by a trader at the close of business in any one futures contract of a commodity traded on any one contract market that is equal to or in excess of the quantities fixed by the Commission in § 15.03 of the regulations, 17 CFR § 15.03 (1996).

pursuant to rule 19.01(a)(1).[2] The Commission proposed amendments to rules 15.00 and 19.00 so that a trader's net futures and futures-equivalent option position would be considered in determining whether the subject reports must be filed.[3]

II. Review of Comments

The Commission received eight comment letters concerning its proposals published in the July 18, 1996 Federal Register. Most comments addressed that part of the Commission's proposed rulemaking concerning options large trader reporting. Three commentors addressed the proposed changes to Parts 15, 18 and 19. One commentor supported adoption of the amendments as proposed, and the others had no objection to their adoption. In view of this, the Commission is adopting the amendments as proposed.

III. Related Matters

A. The Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA), 5 U.S.C. §§ 601 *et seq.*, requires that agencies consider the impact of these rules on small businesses. The Commission has previously determined that large traders and futures commission merchants are not ''small entities'' for purposes of the Regulatory Flexibility Act, 47 FR 18618–18621 (April 30, 1982). Therefore, the Chairperson, on behalf of the Commission, hereby certifies, pursuant to 5 U.S.C. § 605(b), that the action taken herein will not have a significant economic impact on a substantial number of small entities.

B. Paperwork Reduction Act (PRA)

When publishing final rules, the Paperwork Reduction Act of 1995, Pub. L. 104–13 (May 13, 1995), imposes certain requirements on Federal agencies (including the Commission) in connection with their conducting or sponsoring any collection of information as defined by the Paperwork Reduction Act. In compliance with the Act, these final rules and/or their associated information collection requirements inform the public of:

1. The reasons the information is planned to be and/or has been collected; (2) the way such information is planned to be and/or has been used to further the proper performance of the functions of the agency; (3) an estimate, to the extent practicable, of the average burden of the collection (together with a request that the public direct to the agency any comments concerning the accuracy of this burden); (4) whether responses to the collection of information are voluntary, required to obtain or retain a benefit, or mandatory; (5) the nature and extent of confidentiality to be provided, if any; and (6) the fact that an agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

The Commission previously submitted these rules in proposed form and their associated information collection requirements to the Office of Management and Budget. The Office of Management and Budget approved the collection of information associated with these rules on November 26, 1996, and assigned OMB control number 3038–0009 to these rules. The burden associated with this entire collection, including these final rules is as follows:

Average burden hours per response: .3607 hour.

Number of Respondents: 6181.

Frequency of response: Daily.

The burden associated with these specific final rules, is as follows:

Average burden hours per response: .5991 hour.

Number of Respondents: 5399.

Frequency of response: On occasion.

Persons wishing to comment on the information required by these final rules should contact the Desk Officer, CFTC, Office of Management and Budget, Room 10202, NEOP, Washington, DC 20503, (202) 395–7340. Copies of the information collection submission to OMB are available from the CFTC Clearance Officer, 1155 21st Street NW, Washington, DC 20581, (202) 418–5160.

List of Subjects

17 CFR Part 15

Brokers, Reporting and recordkeeping requirements.

17 CFR Part 18

Brokers, Commodity futures, Reporting and recordkeeping requirements.

17 CFR Part 19

Brokers, Commodity futures, Reporting and recordkeeping requirements.

In consideration of the foregoing, and pursuant to the authority contained in the Commodity Exchange Act (Act), and in particular, sections 4g, 4i, 5 and 8a of the Act, 7 U.S.C. §§ 6g, 6i, 7 and 12a (1994), the Commission hereby amends chapter I of Title 17 of the Code of Federal Regulations as follows:

PART 15—REPORTS—GENERAL PROVISIONS

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

Authority: 7 U.S.C. 2, 4, 5, 6a, 6c(a)–(d), 6f, 6g, 6i, 6k, 6m, 6n, 7, 9, 12a, 19 and 21; 5 U.S.C. 552 and 552(b).

2. Section 15.00 is amended by revising paragraph (b)(1)(ii) to read as follows:

§ 15.00 Definitions of terms used in parts 15 to 21 of this chapter.

* * * * *

(b) * * *

(l) * * *

(ii) For the purposes of reports specified in § 19.00(a)(1) of this chapter, any combined futures and futures-equivalent option open contract position as defined in part 150 of this chapter in any one month or in all months combined, either net long or net short in any commodity on any one contract market, excluding futures positions against which notices of delivery have been stopped by a trader or issued by the clearing organization of a contract market, which at the close of the market on the last business day of the week exceeds the net quantity limit in spot, in single or in all-months fixed in § 150.2 of this chapter for the particular commodity and contract market.

* * * * *

3. Section 15.01 is amended by revising paragraph (d) to read as follows:

15.01 Persons required to report.

* * * * *

(d) Persons, as specified in part 19 of this chapter, either:

(1) Who hold or control futures and option and positions that exceed the amounts set forth in § 150.2 of this chapter for the commodities enumerated in that section, any part of which constitutes bona fide hedging positions (as defined in § 1.3(z) of this chapter); or

(2) Who are merchants or dealers of cotton holding or controlling positions for future delivery in cotton that equal

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[2] Commission rules 150.1(f)–(h) define futures equivalent long and short positions as follows:

(f) Futures-equivalent means an option contract which has been adjusted by the previous day's risk factor, or delta coefficient, for that option which has been calculated at the close of trading and published by the applicable exchange under § 16.01 of this chapter.

(g) Long positions means a long call option, a short put option or a long underlying futures contract.

(h) Short positions means a short call option, a long put option or a short underlying futures contract.

[3] Conforming amendments were proposed to rule 15.01(d). See 17 CFR 15.01(d) (1996). These amendments are adopted as proposed.

or exceed the amount set forth in § 15.03.

PART 18—REPORTS BY TRADERS

4. The authority citation for part 18 continues to read as follows:

Authority: 7 U.S.C. 2, 4, 6a, 6c, 6f, 6g, 6i, 6k, 6m, 6n, 12a, and 19; 5 U.S.C. 552 and 552(b) unless otherwise noted.

5. Part 18 is amended by adding a new § 18.03 as follows:

§ 18.03 Delegation of authority to the Director of the Division of Economic Analysis.

The Commission hereby delegates, until the Commission orders otherwise, the authority to make special calls on traders for information as set forth in §§ 18.00, 18.04 and 18.05 to the Director of the Division of Economic Analysis to be exercised by the Director or by such other employee or employees of the Director as may be designated from time to time by the Director. The Director of the Division of Economic Analysis may submit to the Commission for its consideration any matter which has been delegated in this paragraph. Nothing in this paragraph prohibits the Commission, at its election, from exercising the authority delegated in this paragraph.

6. Section 18.04 is amended by removing paragraph (d) and by revising the introductory text to read as follows:

§ 18.04 Statement of reporting trader.

Every trader who holds or controls a reportable options or futures position shall after a special call upon such trader by the Commission or its designee file with the Commission a ''Statement of Reporting Trader'' on the Form 40 at such time and place as directed in the call. All traders shall complete part A of the Form 40 and, in addition, shall complete:

Part B—If the trader is an individual, a partnership or a joint tenant.

Part C—If the trader is a corporation or type of trader other than an individual, partnership, or joint tenant.

* * * * *

PART 19—REPORTS BY PERSONS HOLDING BONA FIDE HEDGE POSITIONS PURSUANT TO § 1.3(z) OF THIS CHAPTER AND BY MERCHANTS AND DEALERS IN COTTON

7. The authority section for part 19 continues to read as follows:

Authority: U.S.C. 6g(a), 6i, and 12a(5), unless otherwise noted.

8. Section 19.00 is amended by revising paragraph (a)(1) to read as follows:

§ 19.00 General provisions.

(a) * * *

(1) All persons holding or controlling options or futures positions that are reportable pursuant to § 15.00(b)(1)(ii) of this chapter and any part of which constitute bona fide hedging positions as defined in § 1.3(z) of this chapter,

* * * * *

Issued in Washington, D.C., January 31, 1997 by the Commission.

Catherine D. Dixon,

Assistant to the Secretary of the Commission.

[FR Doc. 97–3395 Filed 2–10–97; 8:45 am]

BILLING CODE 6351–01–P

SOCIAL SECURITY ADMINISTRATION

20 CFR Part 404

RIN 0960–AE31

Cycling Payment of Social Security Benefits

AGENCY: Social Security Administration (SSA).

ACTION: Final rules.

SUMMARY: Historically, Social Security benefits generally have been paid on the 3rd of each month. As a result of our ongoing efforts to improve service to our customers, we are establishing additional days throughout the month on which Social Security benefits will be paid. Current beneficiaries are not affected.

EFFECTIVE DATE: These final rules are effective May 1, 1997.

FOR FURTHER INFORMATION CONTACT: Lois Berg, Legal Assistant, Division of Regulations and Rulings, Social Security Administration, 6401 Security Boulevard, Baltimore, MD 21235, (410) 965–1713. For information on eligibility, claiming benefits, or coverage of earnings, call our national toll-free number, 1–800–772–1213.

SUPPLEMENTARY INFORMATION:

Background

The second phase of the National Performance Review (NPR), the Federal Reinventing Government effort, was announced by the President and Vice President on December 19, 1994. It was designed to focus attention on what each agency does, examining its mission and looking at its programs and functions to see if there are ways to provide better service to the public and, at the same time, do business in a more cost-effective manner, i.e., ''make government work better and cost less.'' Each agency was asked to assemble a team to review its own programs and functions. SSA's team worked closely with a team of representatives from NPR and the Office of Management and Budget (OMB) to develop recommendations for the Vice President's consideration.

On April 11, 1995, the White House formally approved SSA's reinvention proposals and officially announced them the next day. One of these proposals was to cycle the payment of benefits.

Recipients of Old-Age, Survivors and Disability Insurance (OASDI) benefits and Supplemental Security Income (SSI) payments currently are paid in the first few days of each month. While these specific payment days have never been required by the Social Security Act (the Act), which in §§ 205(i) and 1631(a)(1) commits the time for making benefit payments to the discretion of the Commissioner of Social Security, it has been our longstanding administrative practice to make payment on these days. Monthly benefits are paid to all OASDI beneficiaries on the same day (generally the 3rd day of each month for the preceding month) and to all SSI beneficiaries on the same day (generally the 1st day of each month for which the payment is due).

Over the years, a trend has developed that has resulted in deterioration of services we provide face-to-face or over the telephone on and around our payment days. This phenomenon is described fully below and is of particular concern to us in light of the Agency's commitment to provide ''world class'' service to our beneficiaries and customers.

Executive Order 12862, issued on September 11, 1993, mandates that the standard of quality for services provided to the public for all government agencies shall be ''customer service equal to the best in the business.'' This standard has been incorporated into SSA's goal of providing ''world class'' public service. For example, when you conduct business with us, we have set as goals that:

- When you make an appointment to talk with someone at one of our field offices, we will serve you within 10 minutes to the scheduled time.
- When you call our toll-free 800 number, you will get through to it within 5 minutes of your first try.

SSA's current practice of paying 47 million beneficiaries within the first 3 days of each month results in a large surge of work during the first week of each month. This surge includes a large number of visitors to field offices and calls to our toll-free 800 number to report nonreceipt of a check, question the amount paid, or ask about other payment-related issues. Approximately

9 percent of all calls during check week concern nonreceipt, compared to 3 percent during the rest of the month. As an example of the surge that occurs around the current payment days, on April 3, 1995, 1,091,282 calls were placed to SSA's 800 number. On April 14, 1995, the number of calls placed to our 800 number decreased to 229,022.

It is important to beneficiaries and customers to be able to reach SSA with fewer busy signals, and we have pledged to enable callers to get through to the 800 number within 5 minutes of their original attempt. However, in fiscal year (FY) 1994, during peak periods, customers encountered busy signals on SSA's 800 number 40–63 percent of the time and had to wait more than 5 minutes to get through about 30 percent of the time. This delay often occurs at a time when it may be the most critical for the individual to reach us, to report a lost check, for example. Anyone who experiences a delay in reaching us to report a lost check also faces a delay in receiving a replacement check. Since many beneficiaries rely solely on their Social Security benefits, this can be a real hardship for them.

Our goal is for our customers to have minimal waits for service when visiting a Social Security field office. Today, SSA does not always meet this goal. In FY 1994 there were 24 million visitors to our field offices. While the average wait during check week for individuals with an appointment was 8 minutes, some individuals with appointments had to wait over 2 hours. Thirty-two percent of the visitors to our offices without appointments in FY 1994 (typically people who have questions related to their payments or who want to report payment delivery problems) had to wait more than 30 minutes after arriving to be served. The average wait during check week for individuals without appointments was 16 minutes, although some individuals without appointments had to wait over 3 hours. This can be a particular hardship to those who are elderly or disabled, as well as to people who might take off from work to come to our offices.

The demographic and resource challenges we will face over the next 25 years will make it even more difficult for us to meet our service-delivery objectives. Currently, we pay 47 million OASDI and SSI beneficiaries within the first three days of each month. Due to the aging of the ''baby boomer'' generation, by the year 2020, we will be paying about 75 million beneficiaries, a 60 percent increase over today's beneficiary population. This will place an unprecedented demand on our benefit delivery system.

We are concerned that, in the next 25 years, with the prospect of about 75 million beneficiaries all receiving their payments on single days, there will be a serious deterioration in our service to the public, and we will not be able to provide the kind of service to which we are committed. The growth in beneficiary population is expected to place an even greater strain on SSA's resources at the beginning of the month. At the same time that the number of SSA customers is growing, SSA's resources are being reduced. Public Law 103–226 mandates an overall 12 percent reduction of Federal staffing levels by 1999, and this will impact SSA's resources. As a result, we are particularly concerned that we will not be able to cope with the monthly workload peaks and still maintain our goal of being readily accessible to the public unless we make significant changes in the way in which we deliver service.

In the future, the increased number of beneficiaries and customers plus the mandated reduction of Federal staffing levels will have a real impact on the public's ability to contact us. This will be especially hard on individuals during check week (currently the first week in each month that benefits are paid) when the system will be overloaded. Check week is the time that beneficiaries often have the most urgent need to reach us to report nonreceipt or other problems related to their payment, and to request a replacement check.

Each attempted phone contact by an SSA beneficiary, whether over or under age 65, may represent a personal crisis due, for example, to nonreceipt of benefits. Social Security benefits affect, in particular, nearly all individuals age 65 and over in the United States (U.S.). For a significant proportion of individuals over age 65, the benefits represent 90 percent or more of their total income. For these beneficiaries, nonreceipt is not an abstract concept or statistic. It may represent the difference between paying rent or mortgage payments on time or late. It may mean the ability to purchase food. It may represent lack of gasoline or busfare to get to a medical appointment. A phone contact or visit may be by a recent widow(er) who is reporting the death of her/his spouse. One successful telephone call may be all that is necessary to enable SSA to convert retirement benefits as a spouse into higher widow(er)'s benefits. An unsuccessful phone contact could prevent us from holding back payments to the deceased individual and scheduling benefits to the newly widowed beneficiary. When individuals are unsuccessful at reaching us by telephone, either they, or a friend or family member, may take time off from work to come into a field office. Any additional delay waiting in the field office causes them to lose even more time from work.

Today, we are attempting to cope with the uneven workload pattern in order to maintain our level of service through a series of administrative and management initiatives. For example, at the beginning of the month, we redeploy staff from other work to handle the increase in telephone inquiries which sometimes exceeds two million calls a day. While this practice has been generally successful so far, it will not continue to be as effective in the future when the number of beneficiaries increases substantially and our staffing decreases.

We are considering all our options in preparing for this increase in SSA's workloads and staff reductions and, accordingly, are looking for ways to reengineer our various processes to allow us to achieve our world class customer service goals and, at the same time, increase efficiency and productivity to the maximum extent possible. It is clear, though, that SSA's goal to achieve a level of world class customer service cannot be realized unless our workloads are evened out. This is critical to providing better access to SSA's services for our beneficiaries and customers.

The release of all OASDI and SSI payments on single days also has an adverse effect on certain sectors of the economy. Based on meetings we held with representatives of the banking and business community, the Department of the Treasury (DT), the Federal Reserve System (FRS) and the U.S. Postal Service (USPS), it is clear that the large, once-a-month OASDI and SSI payment files are creating many problems. The banking and business community, the DT, FRS and the USPS all have to bear the expense of providing sufficient resources and processing capacity to deal with OASDI and SSI payments as they flow through the national payment system at the beginning of the month. This capacity is not needed throughout the remainder of the month.

Equally significant is the growing operational risk that is associated with SSA's current payment pattern. Representatives from several large financial institutions made it clear that when the Social Security direct deposit payment file becomes available for processing from FRS, they stop all other business and devote their entire operation to ensuring the file is processed quickly and accurately.

Because of the inordinately large number of payments involved, these institutions must ensure that nothing goes wrong as the file passes through the national payment system and is deposited into individual customers' accounts. Any event that adversely affects the operational capacity of DT, FRS or a large financial institution in the 1 to 4 day window prior to the 3rd of the month may result in the delay or nonreceipt of literally millions of Social Security benefit payments which could create hardship for SSA beneficiaries. Leveling the Social Security payment files through cycling will help prevent this operational risk and resulting hardship.

In order to improve our service to the public, both now and in the future, we will spread the payment of OASDI benefits throughout the month, rather than continue to make all benefit payments on single days at the beginning of the month. That is, we will establish several additional payment days for each month, and pay the full monthly benefit to some beneficiaries on the first of those payment days, to other beneficiaries on the second of those payment days, and so forth. The payment day, or cycle, on which a beneficiary is paid generally will not be changed, so that if you are paid on the second payment day in one month you will be paid on the second payment day in each succeeding month as well. This approach, which we call ''cycling of payments,'' will level the workload peaks associated with our current practice of paying all benefits on the same day. Since calls and visits associated with receipt of the monthly benefit payment will be distributed throughout the month, rather than concentrated in a few days, there will be shorter waiting times for assistance and we will be able to achieve or sustain our world class service to the public.

It is important to note that payment cycling will not change the way benefits are computed. We will continue to follow the same rules in determining month of entitlement and the payment amount. People whose benefits are cycled will receive the same amount they would receive if they were paid on the 3rd of the month.

The benefits to society of implementing payment cycling are potentially significant but extremely difficult to estimate. Cycling will benefit members of the public in that they will have better access to SSA services, including shorter waiting times in field offices and when calling the 800 number, as SSA's workloads increase in the future. Cycling will benefit the business and banking communities in that they will be better able to utilize their resources throughout the month, processing Social Security payments on a weekly basis. Cycling will also reduce the risk involved in processing large once-a-month files. If we continue to pay all beneficiaries on single days once-a-month, SSA's service to the public will deteriorate, and the adverse impact that the once-a-month payments have on the business and financial community will continue, as will the growing operational risk that goes along with processing all benefit payments at one time.

After considering how best to implement the reinvention proposal to cycle the timing of benefit payments, we have decided the following:

1. We will establish three additional payment days throughout the month (i.e., the second, third and fourth Wednesdays of the month) on which individuals may be paid. This schedule will alleviate to the maximum extent possible the current Monday workload peak which is also now being experienced by SSA's toll-free 800 number and field offices when the payment day falls on Friday, Saturday, Sunday or Monday, which occurs more than half of the time.

2. We will implement payment cycling prospectively only for new OASDI beneficiaries whose claims are filed on or after May 1, 1997. Payments to current beneficiaries will not be cycled, as they are already in the established pattern of receiving their benefits on the third of the month.

In the notice of proposed rulemaking (NPRM) we indicated that we proposed to implement payment cycling by January 1997. However, we are delaying implementation because we anticipate heavy workloads between December 1996 and March 1997 due to recently enacted legislation, and we believe it would be unwise to begin payment cycling during that time. The May 1, 1997 implementation date was also selected to allow SSA, DT and FRS, who share responsibility for delivery of SSA's payments, sufficient time to complete the essential modifications required before cycling can begin. Moreover, publishing the final regulation several months in advance of the implementation date allows the business and financial community lead time to prepare for cycling.

3. We will assign one of the newly established payment days to each new OASDI beneficiary based on the date of birth of the person on whose record entitlement is established (the insured individual). Generally, new OASDI beneficiaries who receive auxiliary or survivors benefits on an insured individual's record will be assigned to the payment day based on the insured individual's date of birth. Insured individuals born on the 1st through the 10th of the month will be paid on the second Wednesday of each month. Insured individuals born on the 11th through the 20th of the month will be paid on the third Wednesday of each month. Insured individuals born after the 20th of the month will be paid on the fourth Wednesday of each month. With the few exceptions described below, no new OASDI beneficiaries will receive payments on the 3rd of the month.

Individuals who are being paid benefits on one record on the 3rd of the month, and who become entitled on another record after April 30, 1997 without a break in entitlement, will continue to receive all benefits on the 3rd of the month.

After April 30, 1997, individuals who become entitled on one record and later entitled on another record, without a break in entitlement, will be paid all benefits to which they are entitled no later than their current payment day. They will not be assigned a later payment day as long as they remain continuously entitled. We believe this change from our proposed rule is desirable to ensure that those individuals who have become accustomed to receiving their payments on a certain day are not required to wait an additional 1 to 2 weeks for payment when the second entitlement begins. We have had to establish an interim process to implement this change until such time as systems enhancements can fully support a permanent process. Under the interim process, these individuals will be assigned a payment day based on the new entitlement situation or, if that is later than the current payment day, they will be paid on the 3rd of the month. Under the permanent process, individuals will be assigned whichever payment day is earlier: the current payment day or the payment day which would be assigned based on the new entitlement situation.

4. We may accommodate some beneficiaries currently being paid on the 3rd of the month who voluntarily wish to change to the payment day that would be selected by the date of birth criteria described above, in order to accelerate the workload leveling effect of cycling. For example, we plan to allow them to volunteer to switch if only one person is being paid on the record or, if there are other beneficiaries being paid on the same record, all others agree, in writing, to the change. However, once a volunteer is assigned to a new payment day, that day will be

permanent and the person will not be allowed to change back to the 3rd of the month. We will not allow beneficiaries being paid on one of the three new days to switch to a different payment day.

5. We will not include persons receiving SSI payments, and persons concurrently entitled to both OASDI and SSI benefits, in payment cycling. Since SSI is a needs-based program, we believe we should continue to pay these individuals as early in the month as possible. Concurrently entitled individuals who lose eligibility for SSI will continue to be paid on the 3rd.

6. We will not apply payment cycling to OASDI beneficiaries whose income is deemed to SSI beneficiaries. The reason is that most deeming cases involve family members who receive Federal income maintenance benefits. Those family units should continue to receive payments as early in the month as possible. Likewise, payment cycling will not apply to OASDI beneficiaries who, due to their income and/or resources, are not entitled to SSI but the State in which they live covers their Medicare premium. The Health Care Financing Administration requested that these OASDI beneficiaries be paid early in the month.

7. Payment cycling will not apply to beneficiaries living in a foreign country. For those beneficiaries who will be paid by check because SSA does not have direct deposit arrangements with the country in which they reside, foreign check delivery is often unreliable. However, with one delivery day on the 3rd of the month it is easier to target when checks should be received than if they were sent four times throughout the month. Also, since foreign beneficiaries do not have access to the 800 number or to SSA's field offices in the country where they reside, these facilities will not be adversely affected if we continue to pay foreign beneficiaries on the 3rd of the month. The presence of a foreign address for any beneficiary on a Social Security record will mean that all beneficiaries on that record will be paid on the 3rd of the month. The reason is that, for operational purposes, we are assigning a single payment day for all individuals who receive benefits on the earnings record of a particular individual. Once a beneficiary has reported a foreign address and all individuals receiving benefits on that account are changed to the 3rd of the month, the payment day for all of them will remain the 3rd of the month even if the person with the foreign address returns to the U.S. This is to prevent potential confusion caused by beneficiaries frequently leaving and entering the U.S.

8. We will notify affected beneficiaries in writing of the particular monthly payment day that is assigned to them. However, the assignment of a payment day is not an initial determination and is not appealable. Beneficiaries have never been able to choose their payment day and will not be able to choose a payment day under payment cycling except under very specific and limited circumstances.

Early Consultations

Prior to publishing the NPRM, we conducted 10 focus group meetings at 5 locations around the country to solicit comments and obtain reaction from the public to cycling payments throughout the month. Two meetings were held in each location: one with current beneficiaries age 21 and over and one with future beneficiaries age 21 and over. After we described our future workload projections and resultant service delivery deterioration, the vast majority of future beneficiaries with whom we met said they would not mind being paid later in the month.

We also conducted a series of separate meetings with stakeholders including representatives from the business community, financial community, other government agencies and advocacy groups. The overwhelming consensus of opinion among all stakeholders who participated was that SSA should implement some form of payment cycling.

Comments on NPRM

On January 26, 1996, we published proposed regulations in the Federal Register at 61 FR 2654 and provided a 60-day period for interested individuals to comment. On February 15, 1996 we held an informational briefing for representatives of groups and organizations, and any others, who were interested in attending, to provide details and to answer questions on how SSA proposed to implement payment cycling.

In response to the NPRM, we received comments from 17 commenters. Most of the comments came from financial institutions, financial trade associations, and State and local human services agencies, as well as DT. Several comments came from individuals who did not identify themselves as representing any particular organization or advocacy group.

The comments on the proposed rules were overwhelmingly favorable. Fifteen commenters, including both organizations and individuals, fully supported payment cycling. Only two individuals expressed opinions against the proposed change. The majority of commenters also agreed with SSA's decision not to cycle current beneficiaries.

Most of the financial institutions who commented indicated that payment cycling would help them to provide better customer service on or around payment days. One also mentioned payment cycling easing concerns they currently have for the safety of bank employees and customers on payment days due to the large amount of cash they have on hand on those days.

One commenter who identified herself as a future beneficiary who would be covered by payment cycling said she supported it because she wants SSA to be able to provide the best possible service for current beneficiaries and for her when she is eligible to file for benefits. A human services agency that supported payment cycling said it is aware of the problems clients currently encounter getting through to SSA on or around payment days. The agency also mentioned cycling as being a crime deterrent, since it is well known that checks arrive on the 3rd.

Only two commenters from the financial community responded to SSA's request for information from the business and financial community about the incremental cost or savings to them. One of these two commenters, who fully supported payment cycling, said ''* * * gradual enrollment of beneficiaries and anticipated increase in the number of beneficiaries make it difficult to determine the costs the banking industry will be able to avoid as a result of the adoption of this policy.'' This commenter said, ''In addition to eventual long-term cost savings, there are also payment system risk reduction effects flowing from this proposal.'' The other commenter who responded to this request from SSA, and who also fully supported payment cycling, said since it applies prospectively to new beneficiaries, it will not reduce their current expenses and that it is difficult to quantify future savings at this time.

Some of those who supported payment cycling suggested changes in some of the specific details about cycling. One of the two individuals who were not in favor of payment cycling also submitted comments. Following are summaries of those suggested changes and comments and our responses to them:

Comment: One commenter said that instead of SSA's toll free 800 number being busy at the beginning of the month (and SSA having the rest of the month to get caught up with its other work), the toll free 800 number will be consistently busy throughout the month.

This will make it more difficult for SSA to get caught up with its work.

Response: In cycling benefit payments, SSA's objective is to improve public service by reducing the inordinate workload peak that now occurs when all payments are delivered at the beginning of the month. By leveling SSA's workload, the public will be able to get a consistent level of quality service at any time of the month.

It is true that eventually payment cycling will have an effect upon SSA's workforce. Employees may receive more telephone inquiries and field office contacts in the last 2 weeks of the month than occur today. Again, this is the purpose of payment cycling. By leveling workloads, the public is better served because it consistently has better access to SSA services. At the same time, SSA is in a position to make better use of its available resources.

Comment: The same commenter was concerned that there will be additional work and expense for SSA because someone who now receives two types of benefits (one on his/her own record and one on a spouse's record) will now receive two checks. Receiving one check later in the month will cause more people to call with inquiries about receipt of the second check. This will also cost SSA more (i.e., the costs associated with disbursing two checks).

Response: SSA's intent is to pay each entitled beneficiary all monies due on one day regardless of whether they are dually entitled on their own work record and that of a spouse. For example, a woman who receives benefits on her husband's record, but is also entitled on her own work record, would receive benefits on the payment date assigned based on her birth date. On that date, she would receive a payment reflecting the combined amount of her own benefits and the excess due for the ''wife's benefit.''

Comment: This same commenter was concerned that payment cycling is more favorable to someone whose birthday is earlier in the month. Some people will not receive their payment until 3 or 4 weeks after the month for which they are due, whereas someone whose payment is not cycled receives it only 3 days after the month for which it is due.

Response: There are two issues mentioned. First, it is true that in using the method of cycling based on birth dates, individuals born early in the month receive their benefits earlier each month. But any formula designed to evenly distribute future beneficiaries' payments throughout the month (e.g., using the last 2 digits of a person's social security number) will produce the same result. The birth date formula was unanimously favored by members of the public who participated in SSA's focus groups in that it was the easiest for them to relate to and understand.

Second, this raises an issue of perception. Beneficiaries who are paid on the second, third and fourth Wednesdays of the month for the previous month's entitlement may perceive that they are not receiving the same level of service as someone who is paid on the 3rd of the month. This was not an issue that concerned participants in SSA's focus groups. These individuals indicated that because they had not yet begun receiving Social Security benefits, it was not of concern whether their future benefits were paid on the 3rd of the month or on the second, third or fourth Wednesdays because once their payments start, they would be paid consistently at the same monthly interval. Further, these same focus group participants recognized that unless SSA did something to level workloads that now occur at the beginning of the month, their ability to file a claim, have a question answered or otherwise receive prompt service was being jeopardized as the Agency's workloads increased.

Comment: The above commenter also believed it is unfair to pay SSI recipients and OASDI beneficiaries who qualify for Qualified Medicare Beneficiary (QMB) payments early in the month while paying all other OASDI beneficiaries later in the month, particularly since some of these OASDI beneficiaries miss qualifying for SSI by a small amount. In a similar vein, another commenter recommended that two additional groups of individuals be excluded from payment cycling: those living below 200% of the poverty level and those who would face ''undue hardship'' if they received their benefits after the 3rd of the month.

Response: SSA can readily identify SSI recipients as those individuals of limited means. Accordingly, we will exempt anyone who receives SSI from having their payment cycled. However, we have no information relating to the economic circumstances of anyone receiving OASDI benefits to enable us to determine who is of limited means. Even if we did, we would have to establish a benchmark at some level. Whatever benchmark SSA established, there would be individuals who fall just below the mark and those who fall just above the mark. Therefore, we continue to believe that the use of the SSI means test is appropriate from both a policy and operational perspective.

We do not believe that creating additional criteria for an ''undue hardship'' test is necessary. Indeed, people who otherwise would have been paid on the 3rd of the month will now be paid later in the month as a result of payment cycling. However, we believe the improved access to SSA's services for all beneficiaries and customers, as well as the benefits to the banking and business community which will enable them to provide better customer service, and the reduction of the risk involved in processing large once-a-month files outweigh the effects of being paid later in the month. Moreover, as mentioned by many of the focus group participants, individuals paid consistently on the second Wednesday of the month from the inception of their entitlement are receiving the same level of service as individuals paid on the 3rd of the month from the inception of their entitlement. In addition, already limited SSA staff and resources would have to be assigned to administer an ''undue hardship'' test.

Comment: One commenter thought SSA should assign the payment day for cycled payments based on something other than the date of birth. The commenter believed using the date of birth means banks would need to know the customer's date of birth in order to process customer inquiries. The commenter also indicated the banking industry does not know a customer's date of birth and some customers will not give out that information or do not know it. A suggestion was to use the first initial of the customer's last name to assign the payment day. However, another commenter said that using birthdays to determine distribution ''makes a great deal of sense in evening out the workload.'' And still another commenter suggested giving beneficiaries a sticker showing the payment day which they could place in a prominent place in their house so the date would be easily available.

Response: SSA considered a number of options in developing a means of evenly distributing payments throughout the month. In addition to the alpha formula suggested in this comment, SSA considered using the last 2 digits of the individual's Social Security number. Any of these methods would result in a random distribution of payments. However, the fact that people's surnames often change makes using the alpha formula more complex.

SSA selected the birth date formula based on the unanimous endorsement of this method by those members of the public who participated in the Agency's focus groups. All participants expressed their belief that the public would relate best to a formula based on a person's date of birth.

To do all it can to minimize potential problems like those cited in this comment, SSA plans to provide all new beneficiaries with a written notice informing the individual of his or her assigned payment date. Included with the written notice will be a pamphlet explaining payment cycling and a calendar providing the individual with the scheduled payment dates.

Comment: Several commenters urged SSA to consider requiring all benefits to be paid by direct deposit.

Response: Since these comments were made, Public Law 104–134, the Omnibus Consolidated Rescissions and Appropriations Act of 1996, has been signed. This law requires, with limited exceptions, anyone who files for government benefits after July 25, 1996, to be paid by direct deposit. In addition, with certain limited exceptions, the legislation requires that by 1999, all government benefits be paid by direct deposit, even for those who began receiving payments before July 26, 1996. However, without payment cycling, SSA and the financial community will still experience workload surges the first 10 days of the month in terms of direct deposits all occurring at the same time, calls to SSA and to the financial institutions concerning crediting of the direct deposit, the amount of the deposit, or many other issues related to the benefit, as well as bank customers wanting to make withdrawals as soon as the direct deposit is made.

Comment: Several commenters thought SSA should schedule the delivery of cycled benefits on assigned payment dates rather than the planned Wednesday schedule. They believed this would be less confusing for customers than having to remember which Wednesday is their payment day. However, another commenter, a non-profit electronic banking trade association, said its members supported paying on Wednesdays. The commenter said many beneficiaries currently become confused about when they will receive their payments if the 3rd is on a holiday or weekend. The commenter believed Wednesday payments will clear up this confusion.

Response: SSA gave the payment schedule under cycling a great deal of consideration. We decided on the Wednesday schedule for the following reasons:

- If the objective of payment cycling is to improve service by providing the public with better access to SSA through a leveling of workloads, then Wednesday payments offer the best opportunity to achieve this. Any fixed date schedule (e.g., the 10th, 17th and 24th of the month) will fall on a Friday, Saturday, Sunday or Monday 57 percent of the time. This is likely to exacerbate the workload peaks now experienced by SSA every Monday;
- A Wednesday schedule avoids the problem of having to adjust payment dates because the date coincides with a Saturday or Sunday; and
- A Wednesday schedule avoids the problem of having to adjust payment dates because the date coincides with a Federal holiday to the maximum extent possible.

Again, SSA plans to provide payment schedules to both the financial community and the public to minimize questions or confusion regarding the date on which beneficiaries will be paid.

Comment: One commenter said that SSA should clarify how these payments should be counted for means-tested programs, such as AFDC, food stamps and AFDC-related Medicaid.

Response: We do not issue rules governing these other programs and have no authority to decide how our payments should be counted for those programs. It is not clear, however, that any changes are necessary. Certainly, SSA will provide any additional guidance to State and local governments that may be needed about our procedures. As it has done for the past 56 years, Social Security will continue to pay future OASDI beneficiaries in the month following the month of entitlement.

Comment: Two commenters wanted an appeals process available for those beneficiaries for whom receiving their benefit payment later in the month creates a hardship.

Response: The payment date has never been appealable and SSA does not plan to make it appealable or establish a new appeals process. This decision is based on a number of considerations. First, all individuals of limited means (i.e., those identified at or below the poverty level through their entitlement to SSI) will not be affected by payment cycling. Accordingly, they will receive both their SSI and Social Security benefits at the beginning of the month.

It is true that people who otherwise would have been paid on the 3rd of the month will now be paid later in the month as a result of payment cycling. However, we believe the improved access to SSA's services for all beneficiaries and customers, as well as the benefits to the banking and business community which will enable them to provide better customer service, and the reduction of the risk involved in processing large once-a-month files outweigh the effects of being paid later in the month. Moreover, SSA's decision reflects the advice given by members of the public who participated in the Agency's focus groups. These individuals expressed a strong belief that someone who has not yet begun to receive Social Security benefits is not disadvantaged if they receive their payment on any of the assigned Wednesdays from the outset of their entitlement.

Establishing an appeals process would place an undue administrative burden on SSA and could defeat the purpose of payment cycling.

Comment: One commenter indicated disapproval of payment cycling but gave no reasons. Therefore, we cannot respond.

Comment: One commenter said that in some States, individuals can be eligible for State payment of their Medicare premium under the QMB and Specified Low Income Medicare Beneficiary programs but not eligible for Medicaid. Therefore, the commenter said the regulations should be clarified to make certain that all individuals whose Medicare premium is paid by the State are excluded from payment cycling.

Response: We are adopting this comment and revising § 404.1807(c)(4) to clarify that all OASDI beneficiaries whose Medicare premiums are paid by the State in which they live are excluded from payment cycling.

Comment: One commenter urged SSA to include current beneficiaries in payment cycling by splitting current recipients into two groups that would be processed as two primary cycles and to add new beneficiaries to two secondary cycles on alternate weeks.

Response: Prior to publishing the NPRM, SSA considered including current beneficiaries in payment cycling. We rejected this option because shifting the payment date of one half of current beneficiaries one week later would disrupt monthly payment arrangements for 22 million current OASDI recipients. Further, without a one-time ''bridge payment'' (a one-time additional payment which would cover the period of time from the 3rd of the month to their first payment day) of up to $3.3 billion, affected beneficiaries would be required to wait more than 5 weeks between benefit payments during the month of transition. Without legislation, SSA does not have authority to issue this type of special adjustment payment. Current beneficiaries who participated in focus groups were unanimous in their opinion that SSA should not change the monthly payment patterns of beneficiaries currently on the rolls. Finally, the majority of

commenters agreed with SSA's decision not to cycle current beneficiaries.

Comment: One commenter recommended that SSA launch a comprehensive educational program to advise all stakeholders of the new payment dates once adopted.

Response: Individual beneficiaries whose benefits are cycled will receive an informational pamphlet explaining payment cycling and a calendar providing them with the scheduled payment dates. Also, SSA is putting together informational material about payment cycling which will be made available to financial institutions and businesses to help them respond to any concerns raised by their customers.

After considering the comments on the proposed regulations, we have changed § 404.1807(c)(4), as discussed above in the response to the public comment. Also, upon further consideration, we have decided to revise § 404.1807(c)(5) to show that individuals who become entitled on one record and later entitled on another record, without a break in entitlement, will be paid all benefits to which they are entitled no later than their current payment day. In addition, we have made several nonsubstantive changes to the proposed regulations. We are, therefore, publishing these regulations as final regulations.

Regulatory Procedures

Executive Order 12866

We have determined that these final regulations meet the criteria for a significant regulatory action under Executive Order 12866. Therefore, we prepared and submitted to OMB an assessment of the potential benefits and costs of this regulatory action. This assessment also contains an analysis of alternative policies we considered and chose not to adopt. It is available for review by members of the public by contacting SSA.

Regulatory Flexibility Act

These final regulations affect when Social Security recipients receive their payments. Recipients are not small entities within the definition of the Regulatory Flexibility Act. Therefore, these final regulations will not have a significant impact on a substantial number of small entities.

Paperwork Reduction Act

These final 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; 96.003 Social Security-Special Benefits for Persons Aged 72 and Over; 96.004 Social Security-Survivors Insurance)

List of Subjects in 20 CFR Part 404

Administrative Practice and Procedure, Blind benefits, Old-Age, Survivors and Disability Benefits; Reporting and recordkeeping requirements; Social Security.

Dated: January 28, 1997.

Shirley S. Chater,

Commissioner of Social Security.

For the reasons set forth in the preamble, subparts J and S of part 404 of chapter III of title 20 of the Code of Federal Regulations are amended as set forth below.

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

Subpart J—[Amended]

1. The authority citation for subpart J of part 404 continues to read as follows:

Authority: Secs. 201(j), 205(a), (b), (d)–(h), and (j), 221, 225, and 702(a)(5) of the Social Security Act (42 U.S.C. 401(j), 405 (a), (b), (d)–(h), and (j), 421, 425 and 902(a)(5)); 31 U.S.C. 3720A; sec. 5, Pub. L. 97–455, 96 Stat. 2500 (42 U.S.C. 405 note); secs. 5, 6 (c)–(e), and 15, Pub. L. 98–460, 98 Stat. 1802 (42 U.S.C. 421 note).

2. Section 404.903 is amended by removing the word ''and'' at the end of paragraph (q), and by removing the period at the end of paragraph (r) and adding a semicolon and the word ''and'' in its place, and adding paragraph (s) to read as follows:

§ 404.903 Administrative actions that are not initial determinations.

* * * * *

(s) The assignment of a monthly payment day (see § 404.1807).

Subpart S—[Amended]

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

Authority: Secs. 205 (a) and (n), 207, 702(a)(5), and 708(a) of the Social Security Act (42 U.S.C. 405 (a) and (n), 407, 902(a)(5) and 909(a)).

4. Section 404.1805 is amended by revising paragraph (a)(3) to read as follows:

§ 404.1805 Paying benefits.

(a) * * *

(3) The time at which the payment or payments should be made in accordance with § 404.1807.

* * * * *

5. Section 404.1807 is added to read as follows:

§ 404.1807 Monthly payment day.

(a) *General.* Once we have made a determination or decision that you are entitled to recurring monthly benefits, you will be assigned a monthly payment day. Thereafter, any recurring monthly benefits which are payable to you will be certified to the Managing Trustee for delivery on or before that day of the month as part of our certification under § 404.1805(a)(3). Except as provided in paragraphs (c)(2) through (c)(6) of this section, once you have been assigned a monthly payment day, that day will not be changed.

(b) *Assignment of payment day.* (1) We will assign the same payment day for all individuals who receive benefits on the earnings record of a particular insured individual.

(2) The payment day will be selected based on the day of the month on which the insured individual was born. Insured individuals born on the 1st through the 10th of the month will be paid on the second Wednesday of each month. Insured individuals born on the 11th through the 20th of the month will be paid on the third Wednesday of each month. Insured individuals born after the 20th of the month will be paid on the fourth Wednesday of each month. See paragraph (c) of this section for exceptions.

(3) We will notify you in writing of the particular monthly payment day that is assigned to you.

(c) *Exceptions.* (1) If you or any other person became entitled to benefits on the earnings record of the insured individual based on an application filed before May 1, 1997, you will continue to receive your benefits on the 3rd day of the month (but see paragraph (c)(6) of this section). All persons who subsequently become entitled to benefits on that earnings record will be assigned to the 3rd day of the month as the monthly payment day.

(2) If you or any other person become entitled to benefits on the earnings record of the insured individual based on an application filed after April 30, 1997, and also become entitled to Supplemental Security Income (SSI) benefits or have income which is deemed to an SSI beneficiary (per § 416.1160), all persons who are or become entitled to benefits on that earnings record will be assigned to the 3rd day of the month as the monthly payment day. We will notify you in writing if your monthly payment day is being changed to the 3rd of the month due to this provision.

(3) If you or any other person become entitled to benefits on the earnings record of the insured individual based on an application filed after April 30,

1997, and also reside in a foreign country, all persons who are or become entitled to benefits on that earnings record will be assigned to the 3rd day of the month as the monthly payment day. We will notify you in writing if your monthly payment day is being changed to the 3rd of the month due to this provision.

(4) If you or any other person become entitled on the earnings record of the insured individual based on an application filed after April 30, 1997, and are not entitled to SSI but are or become eligible for the State where you live to pay your Medicare premium under the provisions of § 1843 of the Act, all persons who are or become entitled to benefits on that earnings record will be assigned to the 3rd day of the month as the monthly payment day. We will notify you in writing if your monthly payment day is being changed to the 3rd of the month due to this provision.

(5) After April 30, 1997, all individuals who become entitled on one record and later entitled on another record, without a break in entitlement, will be paid all benefits to which they are entitled no later than their current payment day. Individuals who are being paid benefits on one record on the 3rd of the month, and who become entitled on another record without a break in entitlement, will continue to receive all benefits on the 3rd of the month.

(6) If the day regularly scheduled for the delivery of your benefit payment falls on a Saturday, Sunday, or Federal legal holiday, you will be paid on the first preceding day that is not a Saturday, Sunday, or Federal legal holiday.

[FR Doc. 97–3205 Filed 2–10–97; 8:45 am]
BILLING CODE 4190–29–P

DEPARTMENT OF VETERANS AFFAIRS

38 CFR Part 17

RIN 2900–AH89

VA Homeless Providers Grant and Per Diem Program Clarification of Per Diem Eligibility

AGENCY: Department of Veterans Affairs.

ACTION: Final rule.

SUMMARY: This document amends the regulations implementing the VA Homeless Providers Grant and Per Diem Program concerning per diem assistance by: Establishing more detailed criteria for determining which entities are eligible for obtaining per diem assistance; establishing a priority for funding eligible entities: Clarifying the requirements for continued receipt of per diem payments; and clarifying the maximum amount payable for per diem assistance. This rule is designed to ensure that the appropriate entities receive the appropriate amount of per diem assistance under fair and objective procedures.

EFFECTIVE DATES: March 13, 1997.

FOR FURTHER INFORMATION CONTACT: Roger Casey, VA Homeless Providers Grant and Per Diem Program, Mental Health Strategic Health Group (116E), Department of Veterans Affairs, 810 Vermont Avenue, NW, Washington, DC 20420; (202) 273–8442. (This is not a toll-free number.)

SUPPLEMENTARY INFORMATION: In the Federal Register of July 16, 1996 (61 FR 37024), VA published a proposal to amend the regulations implementing the VA Homeless Providers Grant and Per Diem Program. Interested persons were invited to submit written comments on or before September 16, 1996. No comments were received. The information presented in the proposed rule document still provides a basis for this final rule. Therefore, based on the rationale set forth in the proposed rule document, we are adopting the provisions of the proposed rule as a final rule with changes discussed below and with nonsubstantive changes.

Paperwork Reduction Act

Information collection and recordkeeping requirements associated with this final rule concerning VA Homeless Providers Grants (38 CFR 17.710–17.714) have been approved by OMB under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501–3520) and have been assigned OMB Control Number 2900–0554. The regulations require that the application for VA Homeless Providers Grants be submitted on VA forms included in the application package. The corresponding form numbers are included in the text of the rule.

Information collection and recordkeeping requirements associated with this final rule concerning the VA Homeless Providers Per Diem have not been approved by OMB under the provisions of the Paperwork Reduction Act. OMB has withheld approval pending review of any comments received. VA intends to obtain OMB control numbers for the information collection requirements concerning VA Homeless Providers Per Diem. Once OMB approval is received, OMB control numbers will be announced by a separate Federal Register document.

VA is not authorized to impose a penalty on persons for failure to comply with information collection requirements which do not display a current OMB control number, if required.

Regulatory Flexibility Act

The Secretary hereby certifies that the provisions of the final rule will not have a significant economic impact on a substantial number of small entities as they are defined in the Regulatory Flexibility Act (RFA), 5 U.S.C. 601–602. In all likelihood, only similar entities that are small entities will participate in the Homeless Providers Grant and Per Diem Program, therefore, pursuant to 5 U.S.C. 605(b), this final rule is exempt from the initial and final regulatory flexibility analysis requirement of sections 603 and 604.

The Catalog of Federal Domestic Assistance program number is 64.024.

List of Subjects in 38 CFR Part 17

Administrative practice and procedure, Alcohol abuse, Alcoholism, Claims, Day care, Dental health, Drug abuse, Foreign relations, Government contracts, Grant programs-health, Grant programs-veterans, Health care, Health facilities, Health professions, Health records, Homeless, Medical and dental schools, Medical devices, Medical research, Mental health programs, Nursing homes, Philippines, Reporting and record-keeping requirements, Scholarships and fellowships, Travel and transportation expenses, Veterans.

Approved: January 31, 1997.

Jesse Brown,

Secretary of Veterans Affairs.

For the reasons set forth in the preamble, 38 CFR part 17 is amended as set forth below:

PART 17—MEDICAL

1. The authority citation for part 17 continues to read as follows:

Authority: 38 U.S.C. 501, 1721, unless otherwise noted.

§ 17.700 [Amended]

2. In § 17.700, paragraph (a) is amended by removing ''17.715(a)'' and adding, in its place, ''17.716''.

3. Sections 17.710 through 17.719 are revised to read as follows:

§ 17.710 Application requirements.

(a) *General.* Applications for grants must be submitted in the form prescribed by VA in the application package, must meet the requirements of this part, and must be submitted within the time period established by VA in the notice of fund availability under

§ 17.708 of this part. The application packet includes exhibits to be prepared and submitted as part of the application process, including:

(1) Justification for the project by addressing items listed in § 17.711(c) of this part;

(2) Site description, design, and cost estimates (VA Forms 10–0362G, 10–0362H);

(3) Documentation on eligibility to receive assistance under this part (VA Form 10–0362J);

(4) Documentation on matching funds committed to the projects (VA Forms 10–0362N, 10–0362M);

(5) Documentation on operating budget and cost sharing (VA Form 10–0362P);

(6) Documentation on supportive services committed to the project (VA Form 10–0362o);

(7) Documentation on site control and appropriate zoning, and on the boundaries of the area or community proposed to be served (VA Form 10–0362Q);

(8) Applicants who are States must submit any comments or recommendations by appropriate State (and areawide) clearinghouses pursuant to E.O. 12372 (3 CFR, 1982 Comp., p. 197) (Standard Form SF 424); and

(9) Reasonable assurances with respect to receipt of assistance under this part that (VA Form 10–0362K):

(i) The project will be used principally to furnish to veterans the level of care for which such application is made; that not more than 25 percent of participants at any one time will be nonveterans; and that such services will meet standards prescribed by VA;

(ii) Title to such site or van will vest solely in the applicant;

(iii) Each recipient will keep those records and submit those reports as VA may reasonably require, within the time frames required; and give VA, upon demand, access to the records upon which such information is based; and

(iv) Adequate financial support will be available for the purchase of the van or completion of the project, and for its maintenance, repair and operation.

(b) *Pre-award expenditures.* Costs incurred for a project after the date VA notifies an applicant that the project is feasible for VA participation are allowable costs if the application is approved and the grant is awarded. These pre-award expenditures include architectural and engineering fees. Such notification occurs when VA requests information for the second submission portion of the application.

(Paperwork requirements were approved by the Office of Management and Budget under control number 2900–0554.)

(Authority: 38 U.S.C. 501, 7721, note)

§ 17.711 Rating criteria for applications.

(a) *General.* Applications will be assigned a rating score and placed in ranked order, based upon the criteria listed in paragraphs (b) through (d) of this section.

(b) *Threshold review.* Applicants will undergo a threshold review prior to rating and ranking, to ensure they meet the following:

(1) *Forms, time, and adequacy.* Applications must be filed in the form prescribed by VA in the application process and within the time established in the Notice of Funding Availability (NOFA).

(2) *Application eligibility.* The applicant and project sponsor, if relevant, must be eligible to apply for the specific program.

(3) *Eligible population to be served.* The population proposed to be served must be homeless veterans and meet other eligibility requirements of the specific program.

(4) *Eligible activities.* The activities for which assistance is requested must be eligible for funding under this part (e.g., new programs or new components of existing programs).

(5) *Outstanding audit findings.* No organization that receives assistance may have an outstanding obligation to VA that is in arrears or for which a payment schedule has not been agreed to, or whose response to an audit is overdue or unsatisfactory.

(c) *Rating and ranking of first submission.* Applicants that pass the threshold review will then be rated using the eight selection criteria listed in paragraphs (c)(1) through (c)(8) of this section. Applicants must receive at least 600 points (out of a possible 1,200) and must receive points under criteria 1, 2, 3, 4, and 8. Applicants that are applying as an innovative supportive housing project must achieve points under the *innovative quality of the proposal* criterion.

(1) Quality of the project—300 points (VA Forms 10–0362A, 10–0362D);.

(2) Targeting to persons on streets and in shelters—150 points (VA Form 10–0362C);

(3) Ability of the applicants to develop and operate a project—200 points (VA Form 10–0362E);

(4) Need for the type of project proposed in the area to be served—150 points (VA Form 10–0362B);

(5) Innovative quality of the proposal—50 points (VA Forms 10–0362A, 10–0362D);

(6) Leveraging—50 points (VA Form 10–0362F);

(7) Cost-effectiveness—100 points (VA Form 10–0362A); and

(8) Coordination with other programs—200 points (VA Form 10–0362D–1).

(d) *Selection criteria*—(1) *Quality of the project.* VA will award up to 300 points based on the extent to which the application presents a clear, well-conceived and thorough plan for assisting homeless veterans to achieve residential stability, increased skills and/or income, and more influence over decisions that affect their lives. Higher ratings will be assigned to those applications that clearly describe:

(i) How program participants will achieve residential stability, including how available supportive services will help participants reach this goal;

(ii) How program participants will increase their skill level and/or income, including how available supportive services will help participants reach this goal;

(iii) How program participants will be involved in making project decisions that affect their lives, including how they will be involved in selecting supportive services, establishing individuals goals and developing plans to achieve these goals so that they achieve greater self-determination;

(iv) How permanent affordable housing will be identified and made available to participants upon leaving the transitional housing, and how participants will be provided necessary follow-up services to help them achieve stability in the permanent housing;

(v) How the service needs of participants will be assessed on an ongoing basis;

(vi) How the proposed housing, if any, will be managed and operated;

(vii) How participants will be assisted in assimilating into the community through access to neighborhood facilities, activities and services;

(viii) How and when the progress of participants toward meeting their individual goals will be monitored and evaluated;

(ix) How and when the effectiveness of the overall project in achieving its goals will be evaluated and how program modifications will be made based on those evaluations; and

(x) How the proposed project will be implemented in a timely fashion.

(2) *Targeting to persons on streets and in shelters.* VA will award up to 150 points based on:

(i) The extent to which the project will serve homeless veterans living in places not ordinarily meant for human habitation (e.g., streets, parks, abandoned buildings, automobiles, under bridges, in transportation

facilities) and those who reside in emergency shelters; and

(ii) The likelihood that proposed plans for outreach and selection of participants will result in these populations being served.

(3) *Ability of applicant to develop and operate a project.* VA will award up to 200 points based on the extent to which those who will be involved in carrying out the project have experience in activities similar to those proposed in the application. Ratings will be assigned based on the extent to which the application demonstrates experience in the following areas:

(i) Engaging the participation of homeless veterans living in places not ordinarily meant for human habitation and in emergency shelters;

(ii) Assessing the housing and relevant supportive service needs of homeless veterans;

(iii) Accessing housing and relevant supportive service resources;

(iv) If applicable, contracting for and/or overseeing the rehabilitation or construction of housing;

(v) If applicable, administering a rental assistance program;

(vi) Providing supportive services for homeless veterans;

(vii) Monitoring and evaluating the progress of persons toward meeting their individual goals; and

(viii) Evaluating the overall effectiveness of a program and using evaluation results to make program improvements.

(4) *Need.* VA will award up to 150 points based on the applicant's demonstrated understanding of the needs of the specific homeless veteran population proposed to be served in the specified area or community. Ratings will be made based on the extent to which applicants demonstrate:

(i) Substantial unmet needs, particularly among the target population living in places not ordinarily meant for human habitation (e.g., streets) and in emergency shelters, based on reliable data from surveys of homeless populations, a Comprehensive Housing Affordability Strategy (CHAS), or other reports or data gathering mechanisms that directly support claims made;

(ii) An understanding of the homeless population to be served and its unmet housing and supportive service needs.

(5) *Innovative quality of the proposal.* Applicants who have indicated in their application that they are applying under the innovative supportive housing component must receive points under this criteria to be eligible for award. VA will award up to 50 points based on the innovative quality of the proposal, when compared to other applications and projects; in terms of:

(i) Helping homeless veterans or homeless veterans with disabilities to be served to reach residential stability, increase their skill level and/or income and increase the influence they have over decisions that affect their lives; and

(ii) A clear link between the innovation(s) and its proposed effect(s); and

(iii) Its ability to be used as a model for other projects.

(6) *Leveraging.* VA will award up to 50 points based on the extent to which resources from other public and private sources, including cash and the value of third party contributions, have been committed to support the project at the time of application. *Note:* Any applicant who wishes to receive points under this criterion must submit documentation of leveraged resources which meets the requirements stated in the application. This is optional; applicants who cannot, or choose not to, provide firm documentation of resources as part of the application will forego any points for leveraging.

(7) *Cost-effectiveness.* VA will award up to 100 points for cost-effectiveness. Projects will be rated based on the cost and number of new supportive housing beds made available or the cost, amount and types of supportive services made available, when compared to other transitional housing and supportive services projects, and when adjusted for high-cost areas. Cost-effectiveness may include using excess government properties (local, State, Federal), as well as demonstrating site control at the time of application.

(8) *Coordination with other programs.* VA will award up to 200 points based on the extent to which applicants demonstrate that they have coordinated with Federal, State, local, private and other entities serving homeless persons in the planning and operation of the project. Such entities may include shelter transitional housing, health care, or social service providers; providers funded through Federal initiatives; local planning coalitions or provider associations; or other programs relevant to the local community. Applicants are required to demonstrate that they have coordinated with the VA medical care facility of jurisdiction and VA Regional Offices of jurisdiction in their area. Higher points will be given to those applicants who can demonstrate that:

(i) They are part of an ongoing community-wide planning process which is designed to share information on available resources and reduce duplication among programs that serve homeless veterans;

(ii) They have consulted directly with other providers regarding coordination of services for project participants. VA will award up to 50 points of the 200 points for this criterion based on the extent to which commitments to provide supportive services are available at the time of application. Applicants who wish to receive points under this optional criterion must submit documentation of supportive service resources.

(Paperwork requirements were approved by the Office of Management and Budget under control number 2900–0554.)

(Authority: 38 U.S.C. 501, 7721, note)

§ 17.712 Selecting applications.

(a) *General.* The highest-ranked applications will be conditionally selected in accordance with their ranked order, as determined under § 17.711 of this part. Each will be requested, as necessary, to provide additional project information, as described in § 17.713 of this part as a prerequisite to a grant from VA.

(b) *Ties between applicants.* In the event of a tie between applicants, VA will use the selecting criterion in § 17.711(d)(4) of this part, need for the type of project proposed in the area to be served, to determine which application should be selected for potential funding.

(c) *Procedural error.* If an application would have been selected but for a procedural error committed by VA, VA will select that application for potential funding when sufficient funds become available if there is no material change in the information that resulted in its selection. A new application will not be required for this purpose.

(Paperwork requirements were approved by the Office of Management and Budget under control number 2900–0554.)

(Authority: 38 U.S.C. 501, 7721, note)

§ 17.713 Obtaining additional information and awarding grants.

(a) *Additional information.* Applicants who have been conditionally selected will be requested by VA to submit additional project information, as described in the second submission of the application, which may include:

(1) Documentation to show that the project is feasible.

(2) Documentation showing the sources of funding for the project and firm financing commitments for the matching requirements described in § 17.706 of this part.

(3) Documentation showing site control, as described in § 17.731 of this part.

(4) Information necessary for VA to ensure compliance with the provisions

of the National Environmental Policy Act of 1969 (42 U.S.C. 4321, *et seq.*), as described in § 17.714 of this part.

(5) *A site survey performed by a licensed land surveyor.* A description of the site shall be submitted noting the general characteristics of the site. This should include soil reports and specifications, easements, main roadway approaches, surrounding land uses, availability of electricity, water and sewer lines, and orientation. The description should also include a map locating the existing and/or new buildings, major roads, and public services in the geographic area. Additional site plans should show all site work including property lines, existing and new topography, building locations, utility data, and proposed grades, roads, parking areas, walks, landscaping, and site amenities.

(6) Design development (35 percent) drawings.

(i) The applicant shall provide to VA one set of sepias and two sets of prints, rolled individually per set, to expedite the review process. The drawing shall indicate the designation of all spaces, size of the areas and rooms, and indicate in outline the fixed and moveable equipment and furniture. The drawings shall be drawn at ⅛″ or ¼″ scale. Bedroom and toilet layouts, showing clearances and Uniform Federal Accessibility Standards requirements, should be shown at ¼″ scale. The total floor and room areas shall be shown in the drawings. The drawings shall include:

(A) A plan of any proposed demolition work;

(B) A plan of each floor. For renovation, the existing conditions and extent of new work should be clearly delineated;

(C) Elevations;

(D) Sections and typical details;

(E) Roof plan;

(F) Fire protection plans; and

(G) Technical engineering plans, including structural, mechanical, plumbing, and electrical drawings.

(ii) If the project involves acquisition, remodeling, or renovation, the applicant should include the current as-built site plan, floor plans and building sections which show the present status of the building and a description of the building's current use and type of construction.

(7) *Design development outline specifications.* The applicant shall provide eight copies of outline specifications which shall include a general description of the project, site, architectural, structural, electrical and mechanical systems such as elevators, air conditioning, heating, plumbing, lighting, power, and interior finishes (floor coverings, acoustical material, and wall and ceiling finishes).

(8) *Design development cost estimates.* The applicant shall provide three copies of cost estimates showing the estimated cost of the buildings or structures to be acquired or constructed in the project. Cost estimates should list the cost of construction, contract contingency, fixed equipment not included in the contract, movable equipment, architect's fees and construction supervision and inspection.

(9) *A design development conference.* After VA reviews design development documents, a design development conference may be recommended in order to provide applicants and their architects an opportunity to learn VA procedures and requirements for the project and to discuss VA review comments.

(10) Such other documentation as specified by VA in writing to the applicant that confirms or clarifies information provided in the application.

(b) *Receipt of additional information.* The required additional information must be received in acceptable form within the time frame established by VA in a notice of fund availability published in the Federal Register. VA reserves the right to remove any proposed project from further consideration for grant assistance if the required additional project information is not received in acceptable form by the established deadline.

(c) *Grant award.* Following receipt of the additional information in acceptable form (and, where applicable, provided that the environmental review described in § 17.714 of this part indicates that the proposed project is environmentally acceptable to VA), to the extent funds are available VA will approve the application and send a grant agreement for execution to the applicant.

(Paperwork requirements were approved by the Office of Management and Budget under control number 2900–0554.)

(Authority: 38 U.S.C. 501, 7721, note)

§ 17.714 Environmental review requirements.

(a) *General.* Project selection is subject to completion of an environmental review of the proposed site, and the project may be modified or the site rejected as a result of that review. The environmental effects must be assessed in accordance with the requirements of the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321, *et seq.*) as implemented pursuant to the Council on Environmental Quality's applicable regulations (40 CFR parts 1500–1508) and VA's applicable implementing regulations (38 CFR part 26).

(b) *Responsibility for review.* (1) VA will perform the environmental review, in accordance with part 26 of this title, for conditionally selected applications received directly from private nonprofit organizations and governmental entities with special or limited purpose powers. VA is not permitted to approve such applications prior to its completion of this review. Because of time constraints, any applications subject to environmental review by VA that requires an Environmental Impact Statement (EIS) (generally, an application that VA determines would result in a major Federal action significantly affecting the quality of the human environment in accordance with the environmental assessment procedures at 38 CFR part 26) will not be eligible for assistance under this part.

(2) Applicants that are States, metropolitan cities, urban counties, Indian tribes, or other governmental entities with general purpose powers shall include environmental documentation for the project submitting information establishing a Categorical Exclusion (CE), a proposed Environmental Assessment (EA), or a proposed Environmental Impact Statement (EIS). The environmental documentation will require approval by VA before final award of a construction or acquisition grant under this part. (See 38 CFR 26.6 for compliance requirements.) If the proposed actions involving construction or acquisition do not individually or cumulatively have a significant effect on the human environment, the applicant shall submit a letter noting a CE. If construction outside the walls of an existing structure will involve more than 75,000 gross square feet (GSF), the application shall include an EA to determine if an EIS is necessary for compliance with section 102(2)(c) of the National Environmental Policy Act 1969. When the application submission requires an EA, the State shall briefly describe the possible beneficial and/or harmful effect which the project may have on the following impact categories:

(i) Transportation;

(ii) Air quality;

(iii) Noise;

(iv) Solid waste;

(v) Utilities;

(vi) Geology (soils/hydrology/flood plains);

(vii) Water quality;

(viii) Land use;

(ix) Vegetation, wildlife, aquatic, and ecology/wetlands;

(x) Economic activities;

(xi) Cultural resources;
(xii) Aesthetics;
(xiii) Residential population;
(xiv) Community services and facilities;
(xv) Community plans and projects; and
(xvi) Other.

(3) If an adverse environmental impact is anticipated, the action to be taken to minimize the impact should be explained in the EA. An entity covered by this section that believes that it does not have the legal capacity to carry out the responsibilities required by 38 CFR part 26 should contact the VA Homeless Providers Grant and Per Diem Program, Mental Health and Behavioral Sciences Service (111C), U.S. Department of Veterans Affairs, 810 Vermont Avenue NW., Washington, DC 20420, for further instructions. Determinations of legal capacity will be made on a case-by-case basis.

(Paperwork requirements were approved by the Office of Management and Budget under control number 2900–0554.)

(Authority: 38 U.S.C. 501, 7721, note)

§ 17.715 Aid for supportive services and supportive housing.

(a) *Per diem payments.* Aid in the form of per diem payments may be paid to an entity meeting the requirements of the regulations of this part under the heading ''VA Homeless Providers Grant and Per Diem Program,'' including the specific criteria of § 17.716 of this part, if:

(1) VA referred the homeless veteran to a recipient of a grant under this part (or entity eligible for such a grant as described in § 17.716 of this part); or

(2) VA authorized the provision of supportive services or supportive housing for the homeless veteran.

(b) *In-kind assistance.* In lieu of per diem payments under this section, VA may, with approval of the grant recipient (or entity eligible for such a grant as described in § 17.716 of this part), provide in-kind assistance through the services of VA employees and the use of other VA resources, to a grant recipient (or entity eligible for such a grant as described in § 17.716 of this part).

(c) *Selection of per diem applicants.* In awarding per diem assistance, applications from grant recipients and nongrant recipients will be reviewed and ranked separately. Funds will first be awarded to grant recipients who request such assistance. If funds are still available for nongrant recipients, VA will announce funding through a Notice of Funding Availability (NOFA) process as described in § 17.708 of this part. VA will not award per diem payments when doing so would decrease funding to those entities already receiving such payments. For both grant recipients and non-grant recipients, eligibility will be determined by the criteria described in § 17.716 of this part, and applications will be ranked according to scores achieved on the portions of the application described in § 17.716(b)(4) of this part. Applicants must score a minimum of 500 points on these portions to be eligible for per diem. Those applications that meet the eligibility criteria will be conditionally selected for per diem assistance. Funds will be allocated to the highest-ranked, conditionally selected applicants in descending order until funds are expended. Payments will be contingent upon meeting the requirements of a site inspection conducted by VA pursuant to § 17.721 of this part.

(d) *Continued receipt of per diem assistance.* (1) Continued receipt of per diem assistance for both grant recipients and nongrant recipients will be contingent upon maintaining the program for which per diem is provided so that it would score at least the required minimum 500 points as described in § 17.716(b)(4) of this part on the application. VA will ensure compliance by conducting inspections as described in § 17.721 of this part.

(2) Where the recipient fails to comply with paragraph (d)(1) of this section, VA will issue a notice of the Department's intent to discontinue per diem payments. The recipient will then have 30 days to submit documentation demonstrating why payments should not be terminated. After review of any such documentation, VA will issue a final decision on termination of per diem payment.

(3) Continued payment is subject to availability of funds. When necessary due to funding limitations, VA will, in proportion to the decrease in funding available, decrease the per diem payment for each authorized veteran.

(Authority: 38 U.S.C. 501, 7721, note)

§ 17.716 Eligibility to receive per diem payments.

An entity must be formally recognized by VA as eligible to receive per diem payments under this section before per diem payments can be made for the care of homeless veterans, except that per diem payments may be made on behalf of a veteran up to three days prior to this recognition.

(a) A grant recipient will be eligible if it receives the minimum score as described in paragraph (b)(4) of this section.

(b) A nongrant recipient will be eligible if it is an entity eligible to receive a grant, which for the purposes of this section means:

(1) At least 75 percent of persons who are receiving supportive services or supportive housing from the entity are veterans who may be included in computation of the amount of aid payable from VA;

(2) The supportive services or supportive housing program for which per diem payments is requested was established after November 10, 1992;

(3) The entity is a public or nonprofit private entity; and

(4) The entity score at least 500 cumulative points on the following sections of the Grant/Per Diem application: Quality (1); Targeting (2); Ability (3); Description of Need (4); and Coordination with Other Programs (8). These sections correspond to the selection criteria of § 17.711(c) of this part.

(c) For grant recipients, only those programs that provide supportive services or supportive housing (or the portions thereof) created with grant funds will be considered for per diem assistance. For nongrant recipients, only those portions of the supportive services or supportive housing described in the application will be considered for per diem assistance.

(Authority: 38 U.S.C. 501, 7721, note)

§ 17.717 Request for recognition of eligibility.

(a) Requests for recognition of eligibility may be addressed to the VA Homeless Providers Grant and Per Diem Programs, Mental Health Strategic Healthcare Group (116E), U.S. Department of Veterans Affairs, 810 Vermont Avenue NW, Washington, DC 20420.

(b) For nongrant recipients, the receipt of application for per diem will constitute the request for recognition of eligibility. Grant recipients seeking per diem assistance will indicate this request on the application. Grant recipients are not required to complete a separate application for per diem assistance. VA will review those portions of the grant application that pertain to per diem. Those entities already receiving a grant must submit a request for recognition to initiate the scoring of their application for per diem payments.

(Authority: 38 U.S.C. 501, 7721, note)

§ 17.718 Approval of annexes and new facilities.

Separate applications for recognition must be filed for any annex, branch, enlargement, expansion, or relocation of the site of service provision of an eligible entity's facility which is not on

the same or contiguous grounds on which the parent facility is located. When an eligible entity establishes sites which have not been inspected and approved by VA, a request for separate approval of such sites must be made. The prohibitions in § 17.720 of this part are also applicable to applications for aid on behalf of any veterans cared for in a new annex, branch or enlarged, expanded or relocated facility.

(Authority: 38 U.S.C. 501, 7721, note)

§ 17.719 Amount of aid payable.

The per diem amount payable for supportive housing is the current VA State Home Program per diem rate for domiciliary care as set forth in 38 U.S.C. 1741. The per diem amount payable for supportive services, not provided in conjunction with supportive housing, is $1.10 for each half-hour during which supportive services are provided, up to $17.60 per day. These rates will be paid provided, however, the per diem amount for supportive housing or supportive services (not provided in conjunction with supportive housing) does not exceed one-half of the cost to the per diem recipient of providing the services. Also, provided further, per diem payment of supportive housing and supportive services may be lessened because of budget restriction as described in § 17.715(d)(3) of this part. Per diem payments may not be paid for a veteran for both supportive housing and supportive services (not in conjunction with supportive housing).

(Authority: 38 U.S.C. 501, 7721, note)

§ 17.720 [Amended]

(4) In § 17.720, paragraphs (a) introductory text, (a)(1) , and (a)(2) are amended by removing ''17.715(a)'' and adding, in their place, ''17.716''.

[FR Doc. 97–3283 Filed 2–10–97; 8:45 am]

BILLING CODE 8320–01–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[IL154–1a; FRL–5685–7]

Approval and Promulgation of Implementation Plans; Illinois

AGENCY: U.S. Environmental Protection Agency (USEPA).

ACTION: Direct final rule.

SUMMARY: On October 11, 1996, Illinois submitted a negative declaration regarding the need for rules controlling air emissions from sources classified as part of the ''Shipbuilding and Ship Repair Industry'' (SSRI) or ''Marine Coatings'' category in the Standard Industrial Classification (SIC) Manual. This negative declaration indicates that the State of Illinois has determined that there are no major sources (sources with a potential to emit twenty-five or more tons per year of volatile organic material (VOM)) in Illinois' ozone nonattainment areas. In this action, USEPA is approving the State's finding that no additional control measures are needed through a ''direct final'' rulemaking; the rationale for this approval is set forth below. Elsewhere in this Federal Register, USEPA is proposing approval and soliciting comment on this direct final action; if adverse comments are received, USEPA will withdraw the direct final rulemaking and address the comments received in a new final rule; otherwise, no further rulemaking will occur on this requested negative declaration.

DATES: This action will be effective April 14, 1997 unless adverse comments not previously addressed by the State or USEPA are received by March 13, 1997. If the effective date of this action is delayed due to adverse comments, timely notice will be published in the Federal Register.

ADDRESSES: Written comments should be sent to: J. Elmer Bortzer, Chief, Regulation Development Section, Air Programs Branch (AR–18J), U.S. Environmental Protection Agency, 77 West Jackson Boulevard, Chicago, Illinois, 60604.

Copies of the Illinois submittal are available for public review during normal business hours, between 8:00 a.m. and 4:30 p.m., at the above address.

FOR FURTHER INFORMATION CONTACT: Randolph O. Cano, Regulation Development Section, Air Programs Branch (AR–18J), U.S. Environmental Protection Agency, 77 West Jackson Boulevard, Chicago, Illinois, 60604. Telephone: (312) 886–6036.

SUPPLEMENTARY INFORMATION:

I. Background

Section 183(b)(3) of the Clean Air Act requires the Administrator of USEPA to issue a Control Technique Guideline (CTG) for controlling VOM emissions from the Marine Coatings SIC category sources. Illinois was required to adopt rules controlling VOM emissions from sources in this SIC category with a potential to emit twenty-five or more tons per year of VOM (major sources) and located in either of Illinois' ozone nonattainment areas. The Chicago ozone nonattainment area is comprised of Cook, DuPage, Kane, Lake, McHenry, Will Counties and Aux Sable and Goose Lake Townships in Grundy County and Oswego Township in Kendall County. The Metro-East ozone nonattainment area is comprised of Madison, Monroe, and St. Clair Counties. Illinois reviewed the data in its emissions inventory data base and determined that there were no major sources in the marine coatings category located in Illinois ozone nonattainment areas. Illinois also determined that should such a major source exist it would be subject to regulation under the provisions of the State non-CTG rules.

The USEPA has reviewed the documentation on which this Illinois negative declaration is based. The USEPA agrees with the Illinois finding that there are no major sources of VOM from marine coating facilities located in Illinois' Chicago or Metro-East ozone nonattainment areas.

II. Rulemaking Action

The USEPA approves the incorporation of Illinois' negative declaration concerning marine coatings into the Illinois SIP for ozone.

The USEPA is publishing this action without prior proposal because USEPA views this as a noncontroversial revision and anticipates no adverse comments. However, in a separate document in this Federal Register publication, the USEPA is proposing to approve the SIP revision should adverse or critical comments be filed. This action will be effective on April 14, 1997 unless, by March 13, 1997, adverse or critical comments are received.

If the USEPA receives such comments, this action will be withdrawn before the effective date by publishing a subsequent rulemaking that will withdraw the final action. All public comments received will be addressed in a subsequent final rule based on this action serving as a proposed rule. The USEPA will not institute a second comment period on this action. Any parties interested in commenting on this action should do so at this time. If no such comments are received, the public is advised that this action will be effective on April 14, 1997.

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

III. Administrative Requirements

A. Executive Order 12866

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

B. Regulatory Flexibility

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

SIP approvals under section 110 and subchapter I, part D of the Act do not create any new requirements, but simply approve requirements that the State is already imposing. Therefore, because the Federal SIP approval does not impose any new requirements, the Administrator certifies that it does not have a significant impact on any small entities affected. Moreover, due to the nature of the Federal-State relationship under the Act, preparation of a flexibility analysis would constitute Federal inquiry into the economic reasonableness of the State action. The Clean Air Act forbids USEPA to base its actions concerning SIPs on such grounds. *Union Electric Co.* v. *EPA.*, 427 U.S. 246, 256–66 (1976); 42 U.S.C. 7410(a)(2).

C. Unfunded Mandates

Under Section 202 of the Unfunded Mandates Reform Act of 1995, signed into law on March 22, 1995, USEPA must undertake various actions in association with any proposed or final rule that includes a Federal mandate that may result in estimated costs to state, local, or tribal governments in the aggregate; or to the private sector, of $100 million or more. This Federal action affirms a State finding that additional regulations covering marine coatings sources are unnecessary because no major sources of this type are located in the Illinois ozone nonattainment areas. No new Federal requirements are imposed. Accordingly, no additional costs to state, local, or tribal governments, or the private sector, result from this action.

D. Submission to Congress and the General Accounting Office

Under section 801(a)(1)(A) as added by the Small Business Regulatory Enforcement Fairness Act of 1996, USEPA submitted a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives and the Comptroller General of the General Accounting Office prior to publication of the rule in today's Federal Register. This rule is not a major rule as defined by section 804(2).

E. Petitions for Judicial Review

Under section 307(b)(1) of the Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by April 14, 1997. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this rule for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2)).

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Hydrocarbons, Ozone, and Volatile organic compounds.

Dated: January 23, 1997.

Steve Rothblatt,

Acting Regional Administrator.

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

PART 52—[AMENDED]

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

Authority: 42 U.S.C. 7401–7671q.

Subpart O—Illinois

2. Section 52.726 is amended by adding paragraph (n) to read as follows:

§ 52.726 Control strategy: Ozone.

* * * * *

(n) Negative declaration—Shipbuilding and ship repair industry. On October 11, 1996, the State of Illinois certified to the satisfaction of the United States Environmental Protection Agency that no major sources categorized as part of the shipbuilding and ship repair industry are located in the Chicago, Illinois ozone nonattainment area which is comprised of Cook, DuPage, Kane, Lake, McHenry, Will Counties and Aux Sable and Goose Lake Townships in Grundy County and Oswego Township in Kendall County or the Metro-East, Illinois ozone nonattainment area which is comprised of Madison, Monroe, and St. Clair Counties.

* * * * *

[FR Doc. 97–3254 Filed 2–10–97; 8:45 am]

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40 CFR Part 52

[IL153–1a; FRL–5685–1]

Approval and Promulgation of Implementation Plans; Illinois

AGENCY: U.S. Environmental Protection Agency (USEPA).

ACTION: Direct final rule.

SUMMARY: On October 11, 1996, Illinois submitted a negative declaration regarding the need for rules controlling air emissions from sources classified as part of the ''Aerospace Manufacturing and Rework Industry'' (AMRI) or ''Aerospace Coatings'' category in the Standard Industrial Classification (SIC) Manual. This negative declaration indicates that the State of Illinois has determined that there are no major sources (sources with a potential to emit twenty-five or more tons per year of volatile organic material (VOM)) in Illinois' ozone nonattainment areas. In this action, USEPA is approving the State's finding that no additional control measures are needed through a ''direct final'' rulemaking; the rationale for this approval is set forth below. Elsewhere in this Federal Register, USEPA is proposing approval and soliciting comment on this direct final action; if adverse comments are received, USEPA will withdraw the direct final rulemaking and address the comments received in a new final rule; otherwise, no further rulemaking will occur on this requested negative declaration.

DATES: This action is effective April 14, 1997 unless adverse comments not previously addressed by the State or USEPA are received by March 13, 1997. If the effective date of this action is delayed due to adverse comments, timely notice will be published in the Federal Register.

ADDRESSES: Written comments should be sent to: J. Elmer Bortzer, Chief, Regulation Development Section, Air Programs Branch (AR–18J), U.S. Environmental Protection Agency, 77

West Jackson Boulevard, Chicago, Illinois, 60604.

Copies of the Illinois submittal are available for public review during normal business hours, between 8:00 a.m. and 4:30 p.m., at the above address.

FOR FURTHER INFORMATION CONTACT: Randolph O. Cano, Regulation Development Section, Air Programs Branch (AR–18J), U.S. Environmental Protection Agency, 77 West Jackson Boulevard, Chicago, Illinois, 60604. Telephone: (312) 886–6036.

SUPPLEMENTARY INFORMATION:

I. Background

Section 183(b)(3) of the Clean Air Act requires the Administrator of USEPA to issue a Control Technique Guideline (CTG) for controlling VOM emissions from the Aerospace Coatings SIC category sources. Illinois was required to adopt rules controlling VOM emissions from sources in this SIC category with a potential to emit twenty-five or more tons per year of VOM (major sources) and located in either of Illinois' ozone nonattainment areas. The Chicago ozone nonattainment area is comprised of Cook, DuPage, Kane, Lake, McHenry, Will Counties and Aux Sable and Goose Lake Townships in Grundy County and Oswego Township in Kendall County. The Metro-East ozone nonattainment area is comprised of Madison, Monroe, and St. Clair Counties. Illinois reviewed the data in its emissions inventory data base and determined that there were no major sources in the aerospace coatings category located in Illinois ozone nonattainment areas. Illinois also determined that should such a major source exist it would be subject to regulation under the provisions of the State non-CTG rules.

The USEPA has reviewed the documentation on which this Illinois negative declaration is based. The USEPA agrees with the Illinois finding that there are no major sources of VOM from aerospace coating facilities located in Illinois' Chicago or Metro-East ozone nonattainment areas.

II. Rulemaking Action

The USEPA approves the incorporation of Illinois' negative declaration concerning aerospace coatings into the Illinois SIP for ozone.

The USEPA is publishing this action without prior proposal because USEPA views this as a noncontroversial revision and anticipates no adverse comments. However, in a separate document in this Federal Register publication, the USEPA is proposing to approve the SIP revision should adverse or critical comments be filed. This action will be effective on April 14, 1997 unless, by March 13, 1997, adverse or critical comments are received.

If the USEPA receives such comments, this action will be withdrawn before the effective date by publishing a subsequent rulemaking that will withdraw the final action. All public comments received will be addressed in a subsequent final rule based on this action serving as a proposed rule. The USEPA will not institute a second comment period on this action. Any parties interested in commenting on this action should do so at this time. If no such comments are received, the public is advised that this action will be effective on April 14, 1997.

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

III. Administrative Requirements

A. Executive Order 12866

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

B. Regulatory Flexibility

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

SIP approvals under section 110 and subchapter I, part D of the Act do not create any new requirements, but simply approve requirements that the State is already imposing. Therefore, because the Federal SIP approval does not impose any new requirements, the Administrator certifies that it does not have a significant impact on any small entities affected. Moreover, due to the nature of the Federal-State relationship under the Act, preparation of a flexibility analysis would constitute Federal inquiry into the economic reasonableness of the State action. The Clean Air Act forbids USEPA to base its actions concerning SIPs on such grounds. *Union Electric Co.* v. *EPA.*, 427 U.S. 246, 256–66 (1976); 42 U.S.C. 7410(a)(2).

C. Unfunded Mandates

Under Section 202 of the Unfunded Mandates Reform Act of 1995, signed into law on March 22, 1995, USEPA must undertake various actions in association with any proposed or final rule that includes a Federal mandate that may result in estimated costs to state, local, or tribal governments in the aggregate; or to the private sector, of $100 million or more. This Federal action affirms a State finding that additional regulations covering aerospace coating sources are unnecessary because no major sources of this type are located in the Illinois ozone nonattainment areas. No new Federal requirements are imposed. Accordingly, no additional costs to state, local, or tribal governments, or the private sector, result from this action.

D. Submission to Congress and the General Accounting Office

Under 5 U.S.C. 801(a)(1)(A) as added by the Small Business Regulatory Enforcement Fairness Act of 1996, USEPA submitted a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives and the Comptroller General of the General Accounting Office prior to publication of the rule in today's Federal Register. This rule is not a major rule as defined by 5 U.S.C. 804(2).

E. Petitions for Judicial Review

Under section 307(b)(1) of the Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by April 14, 1997. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this rule for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (See Section 307(b)(2)).

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Hydrocarbons, Ozone, Volatile organic compounds.

Dated: January 23, 1997.

Steve Rothblatt,

Acting Regional Administrator.

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

PART 52—[AMENDED]

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

Authority: 42 U.S.C. 7401–7671q.

Subpart O—Illinois

2. Section 52.726 is amended by adding paragraph (o) to read as follows:

§ 52.726 Control strategy: Ozone.

* * * * *

(o) Negative declaration— Aerospace manufacturing and rework industry. On October 11, 1996, the State of Illinois certified to the satisfaction of the United States Environmental Protection Agency that no major sources categorized as part of the Aerospace Manufacturing and Rework Industry are located in the Chicago, Illinois ozone nonattainment area which is comprised of Cook, DuPage, Kane, Lake, McHenry, Will Counties and Aux Sable and Goose Lake Townships in Grundy County and Oswego Township in Kendall County or the Metro-East, Illinois ozone nonattainment area which is comprised of Madison, Monroe, and St. Clair Counties.

[FR Doc. 97–3252 Filed 2–10–97; 8:45 am]

BILLING CODE 6560–50–P

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40 CFR Part 52

[AK14–7102a; FRL–5686–2]

Clean Air Act Approval and Promulgation of Carbon Monoxide Implementation Plan for the State of Alaska: Anchorage and Fairbanks Emission Inventory

AGENCY: Environmental Protection Agency (EPA).

ACTION: Direct final rule.

SUMMARY: EPA is approving the 1990 base year carbon monoxide (CO) emission inventory portion of the Anchorage and Fairbanks, Alaska CO State Implementation Plan (SIP) submitted on December 29, 1993, by the State of Alaska Department of Environmental Conservation (ADEC) for the purpose of bringing about the attainment of the national ambient air quality standard (NAAQS) for CO. Also, ADEC submitted the required Periodic Update to its 1990 base year CO emission inventory on September 27, 1996.

DATES: This action is effective on April 14, 1997 unless adverse or critical comments are received by March 13, 1997. If the effective date is delayed, timely notice will be published in the Federal Register.

ADDRESSES: Written comments should be addressed to: Montel Livingston, SIP Manager, Office of Air Quality (OAQ–107), EPA, 1200 Sixth Avenue, Seattle, Washington 98101.

Copies of material submitted to EPA may be examined during normal business hours at the following locations: EPA, Region 10, Office of Air Quality, 1200 Sixth Avenue (OAQ–107), Seattle, Washington 98101, and Alaska Department of Environmental Conservation, 410 Wiloughby Ave., Room 105, Juneau, Alaska.

FOR FURTHER INFORMATION CONTACT: John Pavitt, EPA Region 10, Alaska Operations Office (AOO/A), 222 W. 7th Avenue, Box #19, Anchorage, AK 99513–7588, (907) 271–5083.

SUPPLEMENTARY INFORMATION:

I. Background

In a letter dated March 1, 1991 to the EPA Region 10 Administrator, the Governor of Alaska recommended the Anchorage and Fairbanks areas be designated as nonattainment for CO as required by section 107(d)(1)(A) of the 1990 Clean Air Act Amendments (CAAA or the Act) (Pub. L. 101–549, 104 Stat. 2399, codified at 42 U.S.C. 7401–7671q). The areas, which include lands within the Municipality of Anchorage and the Fairbanks North Star Borough, were designated nonattainment and classified as ''moderate'' under the provisions outlined in sections 186 and 187 of the CAA. (See 56 FR 56694, November 6, 1991, codified at 40 CFR part 81, § 81.302.)

Because the Anchorage area had a design value of 13.1 ppm (based on 1989 data), it was classified as ''moderate > 12.7 ppm'' (moderate plus). Because the Fairbanks area had a design value of 10.4 (based on 1989 data), it was classified as ''moderate < 12.7 ppm'' (moderate).

Under the Clean Air Act as amended, States have the responsibility to inventory emissions contributing to NAAQS nonattainment, to track these emissions over time, and to ensure that control strategies are being implemented that reduce emissions and move areas towards attainment. Under section 187(a)(1), the CAAA requires moderate CO nonattainment areas to submit a base year CO inventory that represents actual emissions in the CO season by November 15, 1992. Stationary point, stationary area, on-road mobile, and non-road mobile sources of CO are to be included in the inventory. This inventory is for calendar year 1990 and is denoted as the base year inventory. The inventory is to address actual CO emissions for the area during the peak CO season. The peak CO season should reflect the months when peak CO air quality concentrations occur. Moderate CO nonattainment areas are required to submit a periodic inventory that represents actual emissions no later than September 30, 1995, and every three years thereafter until the area is redesignated to attainment (section 187(a)(5)). ADEC submitted its required 1993 Periodic Update. Areas classified as moderate >12.7 ppm are required to submit an attainment demonstration plan by November 15, 1992 that demonstrates attainment by December 31, 1995 (187(a)(7)). To make the attainment demonstration, base year and projected modeling inventories are needed. The base year inventory is the primary inventory from which the periodic and modeling inventories are derived. Further information on these inventories and their purpose can be found in the document ''Emission Inventory Requirements for Carbon Monoxide State Implementation Plans,'' EPA, Office of Air Quality Planning and Standards, Research Triangle Park, North Carolina, March 1991.

II. Today's Action

The EPA is approving the carbon monoxide (CO) base year 1990 emission inventory submitted to EPA on December 29, 1993, based on the Level I, II, and III review findings.

III. Review of State Submittal

A. The Level I and II review process is used to determine that all components of the base year inventory are present. The review also evaluates the level of supporting documentation provided by the State and assesses whether the emissions were developed according to current EPA guidance. Alaska's inventory satisfies both Level I and Level II requirements. The Level III review process is outlined here and consists of 9 points that the inventory must include. For a base year emission inventory to be acceptable it must pass all of the following acceptance criteria:

1. An approved Inventory Preparation Plan (IPP) must be provided and the Quality Assurance (QA) program

contained in the IPP must be performed and its implementation documented.

2. Adequate documentation must be provided that enables the reviewer to determine the emission estimation procedures and the data sources used to develop the inventory.

3. The point source inventory must be complete.

4. Point source emissions inventory must have been prepared or calculated according to the current EPA guidance.

5. The area source inventory must be complete.

6. The area source emissions inventory must have been prepared or calculated according to the current EPA guidance.

7. The method (e.g., Highway Performance Modeling System or a network transportation planning model) used to develop vehicle miles traveled (VMT) estimates must follow EPA guidance. The VMT development methods must be adequately described and documented in the inventory report.

8. The MOBILE model must be correctly used to produce emission factors for each of the vehicle classes.

9. Non-road mobile emissions inventory must be prepared according to current EPA guidance for all of the source categories.

B. The EPA is approving this emission inventory as meeting the requirements of section 187(a)(1) of the Act. The reasons why this submittal meets the Level III criteria are discussed below.

Initially, EPA subjected the Alaska State CO emission inventory to a rigorous review. This review pointed out various deficiencies in the inventory. In their updates to the original emissions inventory submitted on August 27, 1992 (Anchorage) and November 11, 1992 (Fairbanks), ADEC corrected these deficiencies. Corrections were made and submitted on December 29, 1993 and December 1, 1994. The December 1, 1994 submittal was primarily an update to mobile sources emission estimates, replacing model Mobile 4.1 with Mobile 5.0a, which is the EPA approved model consistent with CAAA requirements and transporation conformity regulations.

1. *Inventory Preparation Plan.* Alaska submitted a final Inventory Preparation Plan (IPP) and accompanying final Quality Assurance Plan which satisfied the EPA's requirements, and which were approved in January 1992.

2. *Quality assurance.* Throughout the emissions inventory, ADEC provides documentation of quality assurance. For each source category, ADEC identifies the methodology employed. Where ADEC methods deviate from EPA suggested procedures, the rationale for the alternate method is noted. For each CO source category, ADEC provides the reference from which it excerpted information. When needed, projection equations are provided to show emission amounts beyond the base year.

3. *Point Source Inventory.* ADEC's point source inventory identifies sources whose emissions exceed 10 tons per year of carbon monoxide. There are four CO point sources in the Anchorage nonattainment area and nine in the Fairbanks nonattainment area. The dominant industry with CO point sources for both nonattainment areas is electric utility power generation. While natural gas is the primary fuel used in Anchorage, it is not available in Fairbanks.

To compile the point source inventory, ADEC reviewed emission and fuel use information available from state air operating permits, and information supplied by permitted facilities through operating reports required to be submitted to ADEC. In addition, ADEC contacted Anchorage and Fairbanks area fuel distributors to identify any sources not already issued an operating permit capable of emitting more than 10 tons per year of carbon monoxide. There were no such sources.

ADEC reports that point source emissions for 1990 are 2.35 tons per day for Anchorage and 6.06 tons per day for Fairbanks.

4. *Area Source Inventory.* ADEC submitted a complete inventory for CO area sources divided into the following categories: natural gas combustion (Anchorage only) fuel oil combustion, coal combustion, propane combustion (Fairbanks only), wood combustion, industrial equipment, solid waste incineration, and open burning/structural fires. The largest contributor to CO emissions in both nonattainment areas was wood burning. Emissions for each source category (except as noted above) are calculated for the two nonattainment areas. The inventory provides a discussion per category, and displays equations that were used to develop emissions estimates. Sources of information are provided as needed. In some cases, ADEC's methodology differs from EPA's recommended procedures. When this occurs, ADEC notes the reason for the difference. Usually, ADEC uses data tailored to the local or state area rather than using the national equations or factors. Area source totals for 1990 were 4.96 tons per winter day within the Anchorage CO nonattainment area, and 12.99 tons per day for the Fairbanks CO nonattainment area.

5. *Vehicle Miles Traveled (VMT).* In Fairbanks, the Alaska Department of Transportation and Public Facilities (ADOT&PF) used a combination of actual 1990 traffic count data and QRS2 modeling results for 1990 to provide VMT and travel-weighted speed estimates for each roadway functional class. Traffic counts were obtained from both the Highway Performance Monitoring System (HPMS) and additional sampling locations operated by ADOT&PF. ADOT&PF estimated VMT during an average winter weekday in Fairbanks to be 1,296,041. In Anchorage, the Municipality used MinUTP modeling results for 1990 to provide travel-weighted speed data and VMT for each roadway functional class, generating HPMS-equivalent estimates (based on ADOT&PF guidance). The Municipality estimated VMT during an average winter weekday in Anchorage to be 2,854,000.

The VMT development methods were adequately described and documented in the SIP and satisfy EPA's requirements. (See 60 FR 33727, June 19, 1995.)

6. *Use of the Mobile Model.* The Mobile 4.1 model was used in the original 1992 submittal to EPA, being then the most recent emission factor model, and was retained for the revised 1993 submittal for consistency. In December 1994, ADEC revised the mobile source emission estimates by substituting Mobile 5.0a for Mobile 4.1. Today's approval is based on the December 29, 1993 submittal using Mobile 4.1.

The model was correctly used to produce emission factors for each of the eight separate vehicle classes. Inputs specific to Anchorage and Fairbanks during the base year were used in the model: operating mode fractions (cold/hot/stabilized) =65%/0%/35%; VMT for motorcycles =0%; anti-tampering program in place; compliance rate =91% (Anchorage) and 96% (Fairbanks); annual inspection; decentralized I/M program, etc. A default value was used for the tampering rate. Quality Assurance is provided within the on-road discussion, and methodologies used to determine each of the input variables were presented. On-road mobile sources are 149.99 tons per day for Anchorage and 80.83 tons per day for Fairbanks.

7. *Non-road Inventory.* ADEC describes each category and the methodology employed. When ADEC's methodology deviates from EPA guidance, it is usually because ADEC uses numbers reflective of local scenarios as opposed to national averages. Assumptions, equations, and

sources are noted per source category. Major non-road contributors are aircraft, snowmobiles and railroad sources. Nonroad totals are 13.73 tons per day for Anchorage, and 5.40 tons per day for Fairbanks.

C. Procedural background. The Act requires States to observe certain procedural requirements in developing emission inventory submissions to EPA. Section 110(a)(2) of the Act requires that each emission inventory submitted by a State has to be adopted after reasonable notice and public hearing.[1] CO nonattainment areas with design values greater than 12.7 ppm must submit the entire SIP (emissions inventories, attainment demonstrations, and control strategies) by November 15, 1992, and EPA expects the emissions inventories to have gone through the public hearing process as part of the full CO SIP.[2]

The State of Alaska held numerous public meetings in Anchorage and Fairbanks in 1992 to entertain public comment on air quality control plans, including the 1990 base year emission inventories for the Anchorage and Fairbanks Carbon Monoxide Nonattainment Areas. In both areas, local transportation planning boards (Fairbanks Metropolitan Area Transportation Study (FMATS) and Anchorage Metropolitan Area Transportation Study (AMATS)), including citizen advisory committees, reviewed and took public comment on the control plans and inventories. In 1992, following the public meetings, the Anchorage Assembly and the Fairbanks North Star Borough adopted their respective air quality control plans and inventories. The CO Emission Inventory was submitted to EPA on December 29, 1993 as a proposed revision to the SIP.

IV. Implications of Today's Action

The EPA is approving the Alaska carbon monoxide emission inventory submitted the Alaska SIP on December 29, 1993. The State has submitted a complete inventory containing point, area, on-road, and non-road mobile source data, and documentation. Emissions for these groupings are presented in the following table:

Emission category	Daily emissions (tons/day)	
	Base year 1990 Anchorage	Base year 1990 Fairbanks
Point sources	2.35	6.06
Area sources	4.96	12.99
Non-road mobile sources	13.73	5.40
On-road mobile sources	149.99	80.83
Total	171.03	105.28

This inventory is complete and approvable according to the criteria set out in the November 12, 1992 memorandum from J. David Mobley, Chief Emission Inventory Branch, Technical Support Document (TSD) to G. T. Helms, Chief Ozone/Carbon Monoxide Programs Branch, AQMD.

The EPA is publishing this action without prior proposal because the Agency views this as a noncontroversial amendment and anticipates no adverse comments. However, in a separate document in this Federal Register publication, the EPA is proposing to approve the SIP revision should adverse or critical comments be filed. This action will be effective April 14, 1997 unless, by March 13, 1997, adverse or critical comments are received.

If the EPA receives such comments, this action will be withdrawn before the effective date by publishing a subsequent document that will withdraw the final action. All public comments received will be addressed in a subsequent final rule based on this action serving as a proposed rule. The EPA will not institute a second comment period on this action. Any parties interested in commenting on this action should do so at this time. If no such comments are received, the public is advised that this action will be effective April 14, 1997.

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

V. Administrative Review

A. Executive Order 12866

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

B. Regulatory Flexibility Act

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

SIP approvals under section 110 and subchapter I, Part D of the CAA do not create any new requirements, but simply approve requirements that the state is already imposing. Therefore, because the federal SIP-approval does not impose any new requirements, I certify that it does not have a significant impact on any small entities affected. Moreover, due to the nature of the federal-state relationship under the CAA, preparation of a regulatory flexibility analysis would constitute federal inquiry into the economic reasonableness of state action. The CAA forbids EPA to base its actions concerning SIPs on such grounds. *Union Electric Co.* v. *E.P.A.*, 427 U.S. 246, 256–66 (S.Ct. 1976); 42 U.S.C. 7410(a)(2).

C. Unfunded Mandates

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

EPA has determined that the approval action does not include a Federal mandate that may result in estimated costs of $100 million or more to either

[1] Also Section 172(c)(7) of the Act requires that plan provisions for nonattainment areas meet the applicable provisions of section 110(a)(2).

[2] Memorandum from John Calcagni, Director, Air Quality Management Division, and William G. Laxton, Director, Technical Support Division, to Regional Air Division Directors, Region I–X, ''Public Hearing Requirements for 1990 Base-Year Emission Inventories for Ozone and Carbon Monoxide Nonattainment Areas,'' September 29, 1992.

State, local, or tribal governments in the aggregate, or to the private sector. This Federal action approves pre-existing requirements under State or local law, and imposes no new requirements. Accordingly, no additional costs to State, local, or tribal governments, or to the private sector, result from this action.

D. Submission to Congress and the General Accounting Office

Under 5 U.S.C. 801(a)(1)(A) as added by the Small Business Regulatory Enforcement Fairness Act of 1996, EPA submitted a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives and the Comptroller General of the General Accounting Office prior to publication of the rule in today's Federal Register. This rule is not a ''major rule'' as defined by 5 U.S.C. 804(2).

E. Petitions for Judicial Review

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by April 14, 1997. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this rule for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2), 42 U.S.C. 7607(b)(2).

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Carbon monoxide, Intergovernmental relations, Reporting and recordkeeping requirements.

Dated: January 28, 1997.

Chuck Clarke,

Regional Administrator.

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

PART 52—[AMENDED]

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

Authority: 42 U.S.C. 7401–7671q.

Subpart C—Alaska

2. Section 52.76 is added to read as follows:

§ 52.76 1990 Base Year Emission Inventory.

EPA approves as a revision to the Alaska State Implementation Plan the 1990 Base Year Carbon Monoxide Emission Inventory for the Anchorage and Fairbanks areas designated as nonattainment for CO, submitted by the Alaska Department of Environmental Conservation on December 29, 1993. This submittal consists of the 1990 base year stationary, area, non-road mobile, and on-road mobile sources for the pollutant carbon monoxide.

[FR Doc. 97–3363 Filed 2–10–97; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL MARITIME COMMISSION

46 CFR Parts 502 and 510

[Docket No. 97–03]

Implementation of 21 U.S.C. 862; Denial of Federal Benefits to Drug Traffickers and Possessors

AGENCY: Federal Maritime Commission.

ACTION: Final rule.

SUMMARY: This amends Commission regulations to reflect the redesignation of 21 U.S.C. 853a as 21 U.S.C. 862, which was effected by Public Law 101–647. No substantive change is involved.

EFFECTIVE DATE: February 11, 1997.

FOR FURTHER INFORMATION CONTACT: Joseph C. Polking, Secretary, Federal Maritime Commission, 800 North Capitol Street, NW, Room 1046, Washington, D.C. 20573–0001, (202) 523–5725.

SUPPLEMENTARY INFORMATION: Commission regulations at 46 CFR 502.27 and 510.12 contain requirements for applicants for admission to practice before the Commission and for a freight forwarders license to submit a certification regarding non-conviction for drug offenses and eligibility for federal benefits. The prescribed certification includes a reference to ''21 U.S.C. 853a.'' Subsequent to adoption of these rules 21 U.S.C. 853a was redesignated as 21 U.S.C. 862 by Public Law 101–647, 104 Stat. 4827. This document merely changes the references in Commission rules to reflect this redesignation and involves no substantive change.

List of Subjects

46 CFR Part 502

Administrative practice and procedure.

46 CFR Part 510

Freight forwarders.

For the reason set forth above, parts 502 and 510 of 46 CFR are amended as follows:

PART 502—RULES OF PRACTICE AND PROCEDURE

1. The authority citation for part 502 is revised to read as follows.

Authority: 5 U.S.C. 504, 551, 552, 553, 556(c), 559, 561–569, 571–596; 12 U.S.C. 1114j(a); 18 U.S.C. 207; 26 U.S.C. 501(c)(3); 28 U.S.C. 2112(a); 31 U.S.C. 9701; 46 U.S.C. app. 817, 820, 821, 826, 841a, 1114(b), 1705, 1707–1711, 1713–1716; E.O. 11222 of May 8, 1965 (30 FR 6469); 21 U.S.C. 862; and Pub. L 88–777 (46 U.S.C. app 817d, 817e).

§ 502.27 [Amended]

2. In § 502.27(a)(2) the reference to ''21 U.S.C. 853a'' is amended to read ''21 U.S.C. 862''.

PART 510—LICENSING OF OCEAN FREIGHT FORWARDERS

1. The authority citation for part 510 is revised to read as follows.

Authority: 5 U.S.C. 553; 31 U.S.C. 9701; 46 U.S.C. app. 1702, 1707, 1709, 1710, 1712, 1714, 1716, and 1718; 21 U.S.C. 862.

§ 510.12 [Amended]

2. In § 510.12(a)(2) is the reference to ''21 U.S.C. 853a'' is amended to read ''21 U.S.C. 862''.

By the Commission.

Joseph C. Polking,

Secretary.

[FR Doc. 97–3251 Filed 2–10–97; 8:45 am]

BILLING CODE 6730–01–M

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 679

[Docket No. 961126333–6333–01; I.D. 020597A]

Fisheries of the Exclusive Economic Zone Off Alaska; Pollock in Statistical Area 620

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

ACTION: Closure.

SUMMARY: NMFS is prohibiting directed fishing for pollock in Statistical Area 620 in the Gulf of Alaska (GOA). This action is necessary to prevent exceeding the interim specification for pollock in this area.

EFFECTIVE DATE: 1200 hrs, Alaska local time (A.l.t.), February 7, 1997, until superseded by the Final 1997 Harvest Specifications for Groundfish.

FOR FURTHER INFORMATION CONTACT: Thomas Pearson, 907–486-6919.

SUPPLEMENTARY INFORMATION: The groundfish fishery in the GOA exclusive economic zone is managed by NMFS according to the Fishery Management Plan for Groundfish of the Gulf of Alaska (FMP) prepared by the North Pacific Fishery Management Council under authority of the Magnuson-Stevens Fishery Conservation and Management Act. Fishing by U.S. vessels is governed by regulations implementing the FMP at subpart H of 50 CFR part 600 and 50 CFR part 679.

The interim specification of pollock total allowable catch in Statistical Area 620 was established by the Interim 1997 Harvest Specifications (61 FR 64299, December 4, 1996) as 4,575 metric tons (mt), determined in accordance with § 679.20(c)(2)(i).

In accordance with § 679.20(d)(1)(i), the Administrator, Alaska Region, NMFS (Regional Administrator), has determined that the 1997 interim specification of pollock in Statistical Area 620 soon will be reached. Therefore, the Regional Administrator is establishing a directed fishing allowance of 4,375 mt, and is setting aside the remaining 200 mt as bycatch to support other anticipated groundfish fisheries. In accordance with § 679.20(d)(1)(iii), the Regional Administrator finds that this directed fishing allowance will soon be reached. Consequently, NMFS is prohibiting directed fishing for pollock in Statistical Area 620 until superseded by the Final 1997 Harvest Specifications of Groundfish.

Maximum retainable bycatch amounts for applicable gear types may be found in the regulations at § 679.20(e).

Classification

This action is required by 50 CFR 679.20 and is exempt from review under E.O. 12866.

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

Dated: February 5, 1997.

Bruce Morehead,

Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 97–3258 Filed 2–5–97; 4:42 pm]

BILLING CODE 3510–22–F

Proposed Rules

Federal Register
Vol. 62, No. 28
Tuesday, February 11, 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

Fresh Plum Crop Insurance Provisions; and Common Crop Insurance Regulations; Plum 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 plums. 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 Plum Crop Insurance Endorsement with the Common Crop Insurance Policy for ease of use and consistency of terms, and to restrict the effects of the current Fresh Plum Endorsement to the 1997 and prior crop years.

DATES: Written comments on this proposed rule will be accepted until close of business April 14, 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 April 11, 1997.

ADDRESSES: Interested persons are invited to submit written comments to the Director, Product Development Division, 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, SW., Washington, DC, 8:15 a.m. to 4:45 p.m., est, Monday through Friday, except holidays.

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

SUPPLEMENTARY INFORMATION:

Executive Order No. 12866

The amendments set forth in this proposed rule contain information collection that requires clearance by the Office of Management and Budget (OMB) under provisions of 44 U.S.C. chapter 35.

Paperwork Reduction Act of 1995

The information collection requirements contained in these regulations were previously approved by OMB pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. chapter 35) under OMB control number 0563–0003 through September 30, 1998.

Section 7 of the 1998 Plum Crop Provisions adds interplanting as an insurable farming practice as long as it is interplanted with another perennial crop and does not adversely affect the insured crop. This practice was not insurable under the previous fresh plum endorsement and the General Crop Insurance Policy 88–G (REV 3–91) to which it attached. Consequently, interplanting information will need to be collected using the FCI–12–P Pre-Acceptance Perennial Crop Inspection Report form for approximately two percent of the insureds who interplant their plum crop. Standard interplanting language has been added to most perennial crops to make insurance available for more perennial crop producers and reduce the acreage that will need to be placed into the noninsured crop disaster assistance program (NAP).

The other amendments set forth in this proposed rule to not contain additional information collections that require clearance by OMB under the provisions of 44 U.S.C. chapter 35.

The title of this information collection is ''Catastrophic Risk Protection Plan and Related Requirements including, Common Crop Insurance Regulations; Plum Crop Insurance Provision.'' 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 plums 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 the information collection is 2,669,932 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, DC 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, the rule is not subject to the requirements of section 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. The producer must also annually certify to the previous years production, if adequate records are available to support the certification, or receive a transitional yield. The producer must maintain the production records to support the certified information for at least three years. 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 part 11 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 457.157, Plum 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 plums found at 7 CFR 401.146 (Fresh Plum Endorsement). FCIC also proposes to amend § 401.146 to limit its effect to the 1997 and prior crop years. FCIC will later publish a regulation to remove and reserve § 401.146.

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

1. Remove the word ''fresh'' from the title of the policy since plums marketed for uses other than fresh packed are covered.

2. Section 1—Add definitions for the terms ''days,'' ''direct marketing,'' ''good farming practice,'' ''interplanted,'' ''irrigated practice,'' ''non-contiguous,'' ''pitburn and sunburn,'' ''production guarantee (per acre),'' ''scion,'' ''varietal group,'' and ''written agreement'' for clarification purposes.

3. Section 2(e)(3)(ii)—Add optional units by varietal group to be consistent with other policies that offer insurance by crop variety.

4. Section 3(a)—Specify that the insured may select only one price election for all the plums in the county insured under this policy, unless the Special Provisions provide different price elections by varietal group, in which case the insured may select one price election for each varietal group. The price election the insured selects must have the same percentage relationship to the maximum price offered. This helps to protect against adverse selection and simplifies administration of the program.

5. Section 3(b)—Specify that an insured must report damage, removal of trees, and any change in practice that may reduce yields. For the first year of insurance for acreage interplanted with another perennial crop and anytime the planting pattern of such acreage is changed, the insured must report the age and varietal group, if applicable, of any interplanted perennial crop, its planting pattern, and any other information needed to establish the approved yield. If the insured fails to notify the insurer of factors that may reduce yields from previous levels, the insurer will reduce the production guarantee at any time the insurer becomes aware of damage, removal of trees, or changes in practices. This allows the insurance provider to limit liability, if necessary, before insurance attaches.

6. Section 6—Remove the provision that restricts crop insurance coverage if plums are harvested directly by the public. Section 10(b) of the proposed rule requires the insured to notify the insurance provider at least 15 days before any production from any unit will be sold by direct marketing in order to accurately determine production to count.

7. Section 6(d)—Specify that at least 200 lugs per acre must have been produced in at least one of the three most recent actual production history crop years. Previous regulations required a minimum of 200 lugs per acre of fresh market production in the previous crop year unless the acreage is inspected by us and approved for coverage. Basing the required minimum production on only the previous crop year is too restrictive considering that one year of adverse growing conditions would exclude eligibility for crop insurance.

8. Section 6(f)—Allow insurance for plums produced on scions that have not reached the fifth growing season after being grafted to established rootstock. If

all other requirements for insurability have been met, the crop should make the approved yield.

9. Section 7—Allow insurance for plums interplanted with another perennial crop in order to make insurance available on more acreage and reduce the reliance on the noninsured crop disaster assistance program (NAP) for protection against crop losses.

10. Section 8(a)(1)—Specify that the insurance period begins on February 1 of each crop year, except for the year of application, if the application is received after January 22 but prior to February 1, insurance will attach on the 10th day after the application is received in the insurance provider's local office unless the acreage is inspected during the 10 day period and does not meet insurability requirements. This provision is consistent with other perennial crops to prevent producers from obtaining insurance only when they know a loss is likely.

11. Section 8(b)—Add provisions to clarify the procedures when an insurable share is acquired or relinquished on or before the acreage reporting date.

12. Section 9(a)(2)—Add pitburn and sunburn as insured causes of loss since they are common causes of loss.

13. Section 9(c)(1)—Clarify that disease and insect infestation are excluded causes of loss unless adverse weather prevents the proper application of control measures, causes control measures to be ineffective when properly applied, or causes disease or insect infestation for which no effective control mechanism is available.

14. Section 10(a)—Specify the notice requirements if the orchard has suffered a loss, and the crop will not be harvested, in order to permit timely appraisal of any loss.

15. Section 10(b)—Require the producer to give notice at least 15 days prior to harvest so a preharvest inspection can be made if the insured intends to engage in direct marketing to consumers. This is necessary to permit an accurate appraisal of production to count because it is difficult to verify production that is directly marketed to consumers.

16. Section 10(c)—Require the producer to give at least 15 days notice prior to the beginning of harvest or immediately if damage is discovered during harvest to permit the insurance provider to make a timely inspection.

17. Section 10(d)—Prohibit the insured from selling or otherwise disposing of any damaged production until consent is given by the insurance provider.

18. Section 11(c)(2)(i)—Change the quality specifications for determining production to count from U.S. Number 1 standards to the California Marketing Order grade requirements in effect for the crop year, since such grade order requirements better correspond with the quality specifications used by the plum industry.

19. Sections 11(c)(2)(ii)—Specify the adjustment of the production to count for harvested production that is packed and sold as fresh fruit but does not meet California Marketing Order grade requirements.

20. Sections 11(c)(2)(iii)—Specify the adjustment of the production to count for harvested production that is or could be marketed for any use other than fresh packed plums.

21. Section 12—Add provisions for providing insurance covered by written agreement. FCC has a long standing policy of permitting certain modifications of the insurance contracts by written agreement for some policies. This amendment allows FCC to tailor the policy to a specific insured in certain instances. The new section will cover the application for and duration of written agreements.

List of Subjects in 7 CFR Parts 401 and 457

Crop insurance, Fresh plums endorsement, Plums.

Proposed Rule

Accordingly, 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. The introductory text of § 401.146 is revised to read as follows:

§ 401.146 Fresh plum endorsement.

The provisions of the Fresh Plum Crop Insurance Endorsement for the 1990 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 § 457.157 to read as follows:

§ 457.157 Plum Crop Insurance Provisions.

The Plum Crop Insurance Provisions for the 1998 and succeeding crop years are as follows:

FCIC policies:

Department of Agriculture

Federal Crop Insurance Corporation

Reinsured policies:

(Appropriate title for insurance provider)

Both FCIC and reinsured policies:

Plum 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.

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.

Good farming practices—The cultural practices generally in use in the county for the crop to make normal progress toward maturity and produce at least the yield used to determine the production guarantee, 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 mature plums from the trees either by hand or machine.

Interplanted—Acreage on which two or more crops are planted in any form of alternating or mixed pattern.

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 to produce at least the yield used to establish the irrigated production guarantee on the irrigated acreage planted to the insured crop.

Lug—Twenty-eight (28) pounds of the insured crop.

Non-contiguous—Any two or more tracts of land whose boundaries do not touch at any point, except that land separated only by a public or private right-of-way, waterway, or an irrigation canal will be considered as contiguous.

Pitburn and sunburn—Damage to fresh fruit as a result of excessive heat.

Production guarantee (per acre)—The number of lugs of plums determined by multiplying the approved APH yield per acre by the coverage level percentage you elect.

Scion—Twig or portion of a twig of one plant that is grafted on to a stock of another.

Varietal group—Different varieties of plums that are grouped according to the normal maturity dates as specified in the Special Provisions.

Written agreement—A written document that alters designated terms of this policy in accordance with section 12.

2. Unit Division.

(a) Unless limited by the Special Provisions, a unit as defined in section 1 (Definitions) of the Basic Provisions (§ 457.8) (basic unit), may be divided into optional units if, for each optional unit, you meet all the conditions of this section or if a written agreement to such division exists.

(b) Basic units may not be divided into optional units on any basis other than as described in this section.

(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 additional premium paid for the optional units that have been combined will be refunded to you for the units combined.

(d) All optional units you selected for the 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 acreage and production for each optional unit for at least the last crop year used to determine your production guarantee;

(2) 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

(3) Each optional unit must meet one or more of the following criteria, as applicable:

(i) *Optional Units on Acreage Located on Non-Contiguous Land:* Optional units may be established if each optional unit is located on non-contiguous land.

(ii) *Optional Units on Acreage by Varietal Group:* In addition to, or instead of, establishing optional units on non-contiguous land, optional units may be established by varietal group when provided for in the Special Provisions.

3. Insurance Guarantees, Coverage Levels, and Prices for Determining Indemnities.

In addition to the requirements of section 3 (Insurance Guarantees, Coverage Levels, and Prices for Determining Indemnities) of the Basic Provisions (§ 457.8):

(a) You may select only one price election for all the plums in the county insured under this policy unless the Special Provisions provide different price elections by varietal group, in which case you may select one price election for each plum varietal group designated in the Special Provisions. The price elections you choose for each varietal group must have the same percentage relationship to the maximum price offered by us for each varietal group. For example, if you choose 100 percent of the maximum price election for one varietal group, you must also choose 100 percent of the maximum price election for all other varietal groups.

(b) You must report, by the production reporting date designated in section 3 (Insurance Guarantees, Coverage Levels, and Prices for Determining Indemnities) of the Basic Provisions (§ 457.8), by varietal group if applicable:

(1) Any damage, removal of trees, change in practices, or any other circumstance that may reduce the expected yield below the yield upon which the insurance guarantee is based, and the number of affected acres;

(2) The number of bearing trees on insurable and uninsurable acreage;

(3) The age of the trees and the planting pattern; and

(4) For the first year of insurance for acreage interplanted with another perennial crop, and anytime the planting pattern of such acreage is changed:

(i) The age of the interplanted crop and varietal group if applicable;

(ii) The planting pattern; and

(iii) Any other information that we request in order to establish your approved yield.

We will reduce the yield used to establish your production guarantee as necessary, based on our estimate of the effect of interplanting a perennial crop, removal of trees, damage, change in practice, and any other circumstance that may effect the yield potential of the insured crop. If you fail to notify us of any circumstance that may reduce your yields from previous levels, we will reduce your production guarantee as necessary at any time we become aware of the circumstance.

4. Contract Changes.

In accordance with section 4 (Contract Changes) of the Basic Provisions (§ 457.8), the contract change date is October 31 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 January 31.

6. Insured Crop.

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

(a) In which you have a share;

(b) That are grown on tree varieties that:

(1) Were commercially available when the trees were set out;

(2) Are adapted to the area;

(3) Are grown on rootstock that is adapted to the area; and

(4) Are regulated by the California Advisory Board Standards, a related crop advisory board, or the state;

(c) That are irrigated;

(d) That have produced an average of at least 200 lugs per acre in at least one of the three most recent actual production history crop years, unless we inspect such acreage and give our approval in writing;

(e) That are grown in an orchard that, if inspected, is considered acceptable by us; and

(f) That have reached at least the fifth (5th) growing season after set out. Plums produced on scions that have not reached the fifth growing season may be insured if the provisions in section 6 (a), (b), (c), and (e) are met. Such trees must have produced at least 200 lugs per acre in at least one year after being grafted.

7. Insurable Acreage.

In lieu of the provisions in section 9 (Insurable Acreage) of the Basic Provisions (§ 457.8) that prohibit insurance attaching to a crop planted with another crop, plums interplanted with another perennial crop are insurable unless we inspect the acreage and determine that it does not meet the requirements contained in your policy.

8. Insurance Period.

(a) In accordance with the provisions of section 11 (Insurance Period) of the Basic Provisions (§ 457.8):

(1) Coverage begins on February 1 of each crop year, except that for the year of application, if your application is received after January 22 but prior to February 1, insurance will attach on the 10th day after your properly completed application is received in our local office unless we inspect the acreage during the 10 day period and determine that it does not meet insurability requirements. You must provide any information that we require for the crop or to determine the condition of the orchard.

(2) The calendar date for the end of the insurance period for each crop year is September 30.

(b) In addition to the provisions of section 11 (Insurance Period) of the Basic Provisions (§ 457.8):

(1) If you acquire an insurable share in any insurable acreage after coverage begins but on or before the acreage reporting date for the crop year, and after an inspection we consider the acreage acceptable, insurance will be considered to have attached to such acreage on the calendar date for the beginning of the insurance period.

(2) If you relinquish your insurable share on any insurable acreage of plums on or before the acreage reporting date for the crop year, insurance will not be considered to have attached to, and no premium or indemnity will be due for such acreage for that crop year unless:

(i) A transfer of coverage and right to an indemnity, or a similar form approved by us, is completed by all affected parties;

(ii) We are notified by you or the transferee in writing of such transfer on or before the acreage reporting date; and

(iii) The transferee is eligible for crop insurance.

9. 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) Adverse weather conditions;

(2) Pitburn and sunburn;

(3) Fire, unless weeds and other forms of undergrowth have not been controlled or

pruning debris has not been removed from the orchard;

(4) Wildlife;

(5) Earthquake;

(6) Volcanic eruption;

(7) An insufficient number of chilling hours to effectively break dormancy; or

(8) Failure of the irrigation water supply, if caused by an insured peril 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 damage or loss of production due to:

(1) Disease or insect infestation, unless adverse weather:

(i) Prevents the proper application of control measures or causes properly applied control measures to be ineffective; or

(ii) Causes disease or insect infestation for which no effective control mechanism is available;

(2) Rejection of the crop by the packing house due to being undersized, immature, overripe, or mechanically damaged; or

(3) Inability to market the plums for any reason other than actual physical damage from an insurable cause specified in this section. For example, we will not pay you an indemnity if you are unable to market due to quarantine, boycott, or refusal of any person to accept production.

10. Duties In The Event of Damage or Loss.

In addition to the requirements of section 14 (Duties in the Event of Damage or Loss) of the Basic Provisions (§ 457.8), the following will apply:

(a) You must notify us within 3 days of the date harvest should have started if the crop will not be harvested.

(b) You must notify us at least 15 days before any production from any unit will be sold by direct marketing. We will conduct an appraisal that will be used to determine your production to count for production that is sold by direct marketing. If damage occurs after this appraisal, we will conduct an additional appraisal. These appraisals, and any acceptable records provided by you, will be used to determine your production to count. Failure to give timely notice that production will be sold by direct marketing will result in an appraised amount of production to count of not less than the production guarantee per acre if such failure results in our inability to make the required appraisal.

(c) If you intend to claim an indemnity on any unit, you must notify us at least 15 days prior to the beginning of harvest or immediately if damage is discovered during harvest, so that we may inspect the damaged production.

(d) You must not sell or dispose of the damaged crop until after we have given you written consent to do so. If you fail to notify us and such failure results in our inability to inspect the damaged production, we may consider all such production to be undamaged and include it as production to count.

11. 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 units, we will combine all optional units for which acceptable production records were not provided; or

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

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

(1) Multiplying the insured acreage for each varietal group, if applicable, by its respective production guarantee;

(2) Multiplying the results in section 11(b)(1) by the respective price election for each varietal group, if applicable;

(3) Totaling the results in section 11(b)(2);

(4) Multiplying the total production to be counted of each varietal group, if applicable, (see section 11(c)) by the respective price election;

(5) Totaling the results in section 11(b)(4);

(6) Subtracting the results in section 11(b)(5) from the results in section 11 (b)(3); and

(7) Multiplying the result in section 11(b)(6) by your share.

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

(1) All appraised production as follows:

(i) Not less than the production guarantee per acre for acreage:

(A) That is abandoned;

(B) That is sold by direct marketing directly if you fail to meet the requirement contained in section 10;

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

(D) For which you fail to provide production records that are acceptable to us.

(ii) Production lost due to uninsured causes;

(iii) Unharvested production; and

(iv) Potential production on insured acreage that you intend to abandon or no longer care for, if you and we agree on the appraised amount of production. Upon such agreement, the insurance period for that acreage will end. If you do not agree with our appraisal, we may defer the claim only if you agree to continue to care for the crop. We will then make another appraisal when you notify us of further damage or that harvest is general in the area unless you harvested the crop, in which case we will use the harvested production. If you do not continue to care for the crop, our appraisal made prior to deferring the claim will be used to determine the production to count; and

(2) All harvested production from the insurable acreage:

(i) That is packed and sold as fresh fruit and meets the California Marketing Order grade requirements, as amended, in effect for the applicable crop year;

(ii) That is packed and sold as fresh fruit but does not meet the grade requirements specified in section 11(c)(2)(i) due to insurable causes. Such production will be adjusted by:

(A) Dividing the value per lug of this production by the highest price election available for the applicable varietal group; and

(B) Multiplying the resulting factor, if less than 1.0, by the number of lugs of such plums.

(iii) That is damaged and is, or could be, marketed for any use other than fresh packed plums. Such production will be adjusted by:

(A) Multiplying the number of tons of such production by the value per ton of the damaged plums or $50.00, whichever is greater; and

(B) Dividing that result by the highest price election available for the applicable varietal group.

12. Written agreement.

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 12(e);

(b) The application for a written agreement must contain all 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 variety, the guarantee, premium rate, and price election;

(d) Each 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 written agreement submitted after the sales closing date may be approved if, after 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.

Signed in Washington, DC, on February 6, 1997.

Kenneth D. Ackerman,

Manager, Federal Crop Insurance Corporation.

[FR Doc. 97–3330 Filed 2–10–97; 8:45 am]

BILLING CODE 3410–FA–P

Agricultural Marketing Service

7 CFR Part 980

[Docket No. FV96–980–1 PR]

Vegetables; Import Regulations; Reopening of Comment Period for Filing Written Comments on Removal of Banana and Fingerling Types of Potatoes and Exemption of Potatoes for Potato Salad From the Potato Import Regulation

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Proposed rule; reopening comment period.

SUMMARY: Notice is hereby given that the comment period on the proposed removal of banana and fingerling types of potatoes and exemption of potatoes for potato salad from the potato import

regulation is reopened until March 13, 1997.

DATES: Comments must be received by March 13, 1997.

ADDRESSES: Interested persons are invited to submit written comments concerning this proposal. Comments must be sent in triplicate to the Docket Clerk, Fruit and Vegetable Division, AMS, USDA, room 2525–S, P.O. Box 96456, Washington, DC 20090–6456, Fax Number (202) 720–5698. All comments should reference the docket number and the date and page number of this issue of the Federal Register and will be available for public inspection in the Office of the Docket Clerk during regular business hours.

FOR FURTHER INFORMATION CONTACT: Tom Tichenor, Marketing Order Administration Branch, F&V, AMS, USDA, room 2525–S, P.O. Box 96456, Washington, DC 20090–6456: telephone: (202) 720–6862. Small businesses may request information on compliance with this proposed regulation by contacting: Jay Guerber, Marketing Order Information Branch, Fruit and Vegetable Division, AMS, USDA, P.O. Box 96456, room 2525–S, Washington, DC 20090–6456; telephone: (202) 720–2491; Fax number: (202) 720–5698.

SUPPLEMENTARY INFORMATION: A proposed rule was issued on December 23, 1996, and published in the Federal Register (61 FR 67499). The proposed rule would: (1) Remove banana/fingerling potatoes from provisions of the potato import regulation (import regulation) and; (2) reclassify potatoes used to make fresh potato salad as potatoes for processing. The comment period ended January 22, 1997.

The National Potato Council (Council) requested that additional time be provided for interested persons to analyze the proposed rule. The Council stated that members of the industry need additional time to review all available information before making final comments on the proposed rule. Reopening the comment period to March 13, 1997, would allow the Council and other interested persons more time to review the proposed rule, perform a more complete analysis, and submit any written comments.

This delay should not substantially add to the time required to complete this rulemaking action. Accordingly, the period in which to file written comments is reopened until March 13, 1997. This notice is issued pursuant to the Agricultural Marketing Agreement Act of 1937.

Authority: 7 U.S.C. 601–674.

Dated: February 5, 1997.

Robert C. Keeney,

Director, Fruit and Vegetable Division.

[FR Doc. 97–3285 Filed 2–10–97; 8:45 am]

BILLING CODE 3410–02–P

FEDERAL DEPOSIT INSURANCE CORPORATION

12 CFR Part 312

RIN 3064–AC01

Prevention of Deposit Shifting

AGENCY: Federal Deposit Insurance Corporation (FDIC).

ACTION: Proposed rule.

SUMMARY: The proposed rule would implement a new statute to prevent the shifting of deposits insured under the Savings Association Insurance Fund (SAIF) to deposits insured under the Bank Insurance Fund (BIF) for the purpose of evading the assessment rates applicable to SAIF deposits.

DATES: Written comments must be received by the FDIC on or before April 14, 1997.

ADDRESSES: Written comments are to be addressed to the Office of the Executive Secretary, Federal Deposit Insurance Corporation, 550 17th Street, NW., Washington, DC 20429. Comments may be hand-delivered to Room F–402, 1776 F Street, NW., Washington, DC 20429, on business days between 8:30 a.m. and 5 p.m. (FAX number: (202) 898–3838; Internet address: comments@FDIC.gov). Comments will be available for inspection in the FDIC Public Information Center, room 100, 801 17th Street, NW., Washington, DC, between 9:00 a.m. and 5:00 p.m. on business days.

FOR FURTHER INFORMATION CONTACT: Joseph A. DiNuzzo, Counsel, (202) 898–7349; Richard J. Osterman, Senior Counsel, (202) 898–3523, Legal Division; or George Hanc, Associate Director, Division of Research and Statistics, (202) 898-8719, Federal Deposit Insurance Corporation, Washington, DC 20429.

SUPPLEMENTARY INFORMATION:

I. The Proposed Rule

A. The Funds Act and the Deposit Shifting Statute

The Deposit Insurance Funds Act of 1996 (Funds Act) was enacted as part of the Economic Growth and Regulatory Paperwork Reduction Act of 1996, Public Law 104–208, 110 Stat. 3009 *et seq.*, sections 2701–2711, and became effective September 30, 1996. The Funds Act provides for the capitalization of the SAIF through a special assessment on all depository institutions that hold SAIF-assessable deposits. Pursuant to this requirement, the FDIC recently issued a final rule imposing a special assessment on institutions holding SAIF-assessable deposits in an amount sufficient to increase the SAIF reserve ratio (SAIF reserve ratio) to the designated reserve ratio (DRR) of 1.25 percent as of October 1, 1996. 61 *FR* 53834 (Oct. 16, 1996), to be codified at 12 CFR 327.41.

Another provision of the Funds Act, entitled ''Prohibition on Deposit Shifting'' (deposit shifting statute), requires the Comptroller of the Currency, the Board of Directors of the FDIC, the Board of Governors of the Federal Reserve System, and the Director of the Office of Thrift Supervision (federal banking agencies) to take ''appropriate actions'' to prevent insured depository institutions and holding companies from ''facilitating or encouraging'' the shifting of deposits from SAIF-assessable deposits to BIF-assessable deposits for the purpose of evading the assessments applicable to SAIF-assessable deposits.[1] Funds Act, section 2703(d). The ''appropriate actions'' suggested in the deposit shifting statute are: denial of applications, enforcement actions and the imposition of entrance and exit fees.

The statute also specifies that its provisions shall not be construed to prohibit conduct or activity by any insured depository institution that is undertaken in the ''ordinary course of business'' and is not directed towards depositors of an insured depository institution affiliate of the insured institution.

The statute authorizes the FDIC to issue regulations, including regulations defining terms used in the statute, to prevent the shifting of deposits. The deposit shifting statute terminates on the earlier of December 31, 1999, or the date on which the last savings association ceases to exist.

B. Need for a Regulation on Deposit Shifting

The issuance of a regulation would provide guidance to the industry on the meaning and impact of the deposit shifting statute. This is particularly important in light of the relationship of the deposit shifting statute to section

[1] Although currently the range of risk-based assessments for BIF-assessable and SAIF-assessable deposits is the same, a higher assessment payable to the Financing Corporation must be paid on SAIF-assessable deposits. Thus, the overall assessment is higher for SAIF-assessable deposits than for BIF-assessable deposits.

5(d)(2) of the FDI Act (12 U.S.C. 1815(d))(section 5(d)(2)).

Section 5(d)(2) applies to conversions of depository institutions from one deposit insurance fund to the other. In relevant part, it provides that: (1) Institutions may not engage in a ''conversion transaction'' without the FDIC's prior approval; and (2) institutions that engage in an insurance-fund conversion must pay prescribed entrance and exit fees. Until recently, with certain specified exceptions, depository institutions were prohibited by section 5(d)(2) from engaging in conversion transactions. 12 U.S.C. 1815(d)(2)(A)(ii). The statute specified, however, that the ''conversion moratorium'' would expire when SAIF reached or exceeded its DRR. Because SAIF recently reached its DRR, the conversion moratorium no longer applies; therefore, an institution may convert from one fund to another as long as the FDIC approves the conversion and the institution pays the prescribed entrance and exit fees.

The requirement in section 5(d)(2) that converting institutions pay entrance and exit fees underscores the need to impose entrance and exit fees under the deposit migration statute: If insured depository institutions were permitted to shift deposits from a SAIF-insured institution to a BIF-insured institution outside the scope of section 5(d)(2), then—but for the existence of the deposit shifting statute—they would be able to evade the entrance and exit fees imposed by section 5(d)(2) for such fund conversions. The FDIC interprets the deposit shifting statute, therefore, in part, to be intended to preserve the integrity of the fee-payment requirements in section 5(d)(2). Indeed, as indicated above, the deposit shifting statue specifies that one of the ''appropriate actions'' the agencies may take to prevent deposit shifting is the ''imposition of entrance and exit fees as if such transaction qualified as a conversion transaction pursuant to section 5(d).''

C. Explanation of the Proposed Rule

The proposed rule is intended to interpret and implement the deposit shifting statute. The proposed rule consists of two basic provisions. The first would reiterate the requirement in the deposit shifting statute that the federal banking agencies deny applications and object to notices filed with them by depository institutions or depository institution holding companies if the agency determines that the transaction for which the application or notice is filed is for the purpose of evading assessments imposed on insured depository institutions with respect to SAIF-assessable deposits. The second provision of the proposed rule would establish a presumption under which entrance and exit fees would be imposed upon depository institutions for deposits that are shifted from SAIF-assessable deposits to BIF-assessable deposits within the contemplation of the deposit shifting statute.

1. Applications

As noted, the proposed rule reiterates the statutory requirement that the federal banking agencies deny applications or object to notices if the transaction for which the application or notice is filed is for the purpose of evading SAIF assessments. The proposed regulation is drafted to encompass any type of application or notice that might involve deposit shifting. It is anticipated that the respective agency would determine the purpose of the application or notice from the materials submitted by the depository institution or holding company. For example, certain types of applications require the filing of a business plan which describes the corporate strategy for and objective of the proposed transaction. If the agency's review of the business plan indicates that the purpose of a proposed transaction is to shift deposits in order to evade SAIF assessments, then the agency would deny the application. If a business plan is not required to be filed with an application that might raise a concern about deposit shifting, then the reviewing agency would otherwise determine, based on a review of the materials provided with the application and other available information, whether the underlying purpose of the application is to shift deposits within the contemplation of the deposit shifting statute. All such application determinations would be made on a case-by-case basis within the agency's discretion. It is also likely that the agencies would condition application approvals on compliance with the requirements of the deposit shifting statute.

2. Entrance and Exit Fees for Deposit Shifting

The proposed rule would establish a presumption under which entrance and exit fees would be imposed upon depository institutions that engage in deposit shifting for the purpose of evading SAIF assessments. The amounts of the entrance and exit fees would be those prescribed in part 312 of the FDIC's regulations (12 CFR part 312). Under the proposed rule the FDIC would use a rebuttable-presumption approach to determine whether depository institutions have engaged in deposit shifting and, therefore, must pay entrance and exit fees. To implement this approach the FDIC would identify all bank holding companies and savings and loan holding companies with both BIF- and SAIF-member subsidiaries and determine each holding company's aggregate average percentage of BIF and SAIF deposits for a period of time prior to the enactment of the deposit shifting statute on September 30, 1996. The FDIC would then compare that average to the percentage of each such holding company's BIF and SAIF deposits for each quarter subsequent to the enactment of the deposit shifting statute. The FDIC would determine whether any increase in the holding company's percentage of BIF deposits and decrease in its percentage of SAIF deposits exceeded a normal range relative to the holding company's historical average and industry averages.

If the FDIC determines, on a holding-company-by-holding-company basis, that a BIF-insured institution's increase in BIF-assessable deposits and decrease in SAIF-assessable deposits is above the normal range and is not attributable to factors other than deposit shifting, then, after consulting with each institution's primary federal regulator (where the FDIC is not the institution's primary federal regulator) the FDIC would apply the rebuttable presumption that the increase in BIF-assessable deposits resulted from deposit shifting encouraged or facilitated by the applicable depository institutions or their holding company for the purpose of evading SAIF assessments.[2]

[2] To determine whether a holding company should be subject to further scrutiny under the proposed rule, the FDIC would compute an average ratio of BIF-insured deposits to total deposits for all non-Oakar affiliates of the holding company as of the fourth quarter of 1994. This value would be computed as the average ratio of BIF-insured deposits for the period from the third quarter of 1989 to the fourth quarter of 1994, or the average ratio of BIF-insured deposits from the last quarter that the holding company acquired or sold a non-Oakar affiliate through the fourth quarter of 1994. The average ratio would then be subtracted from the ratio of BIF-insured deposits to total deposits in each quarter of 1995 and subsequent years to yield an adjusted BIF-insured deposit ratio. The adjusted ratio for each holding company would be divided by the standard deviation of adjusted ratios of BIF-insured deposits for all holding companies for the entire period beginning with the first quarter of 1995. The resulting value is compared with the value 1.65. If it exceeds 1.65, and assuming that the adjusted ratio is a normal random variable, there would be less than a 5 percent chance that the change in the BIF-insured deposit ratio is a random event. Holding companies for which the adjusted ratio of BIF-insured deposits divided by the standard deviation of adjusted ratios for all holding companies after 1994 exceeded 1.65 would be subject to further scrutiny under the proposed rule.

The FDIC would have 90 days after the report date (currently the end of a calendar quarter) as of which the applicable quarterly Consolidated Report of Condition and Income or Thrift Financial Report (financial reports) of affiliated BIF-member and SAIF-member depository institutions must be filed in which to notify the institutions of the FDIC's determination and the intended imposition of the entrance and exit fees. The depository institutions would then have 30 days from the date of the FDIC's notification to provide to the FDIC information and materials to demonstrate that the increase in BIF-assessable deposits was attributable to factors other than deposit shifting encouraged or facilitated by the depository institutions or their holding company. Mergers, acquisitions and changes in market conditions would be among the types of factors that may be sufficient to rebut the presumption of intentional deposit shifting.

The FDIC would review the materials and information submitted, consult with the institutions' primary federal regulator(s) (if other than the FDIC), determine whether the entrance and exit fees should be imposed and, within 60 days of receiving the institutions' materials and information, notify the institutions of the FDIC's determination. If the determination is that fees must be paid, then the institutions would be required to remit payment to the FDIC within 15 days of the notice. The institutions then would have 30 days after such payment is made to appeal the determination to the FDIC.

The details of the procedures for submitting materials and information to attempt to rebut the presumption of deposit shifting would be provided in writing to depository institutions when they are informed of the FDIC's intention to impose such fees.

D. Effective Date

The FDIC's review of financial reports for purposes of the possible imposition of entrance and exit fees under the proposed rule would begin with the reports filed as of the end of the first full quarter following the effective date of the final rule on deposit shifting. Concurrent with this rulemaking effort, the FDIC is considering what, if any, action it should take to impose the deposit shifting statute for the period between the enactment date of the deposit shifting statute (*i.e.*, September 30, 1996) and the effective date of the final rule on deposit shifting. Any such action would be on a case-by-case basis in consultation with the institutions' primary federal regulator(s), if other than the FDIC.

E. Rationale for the Proposed Rule

The FDIC believes, preliminarily, that the proposed rule is the most effective means of enforcing the requirements of the deposit shifting statute without imposing an undue burden on depository institutions. A regulation attempting to restrict and control depository institutions' conduct and activities, including advertising, would be difficult to design, implement and enforce. Moreover, such restrictions and controls might impose a significant regulatory burden on the industry. In addition, FDIC efforts to control and restrict advertising by depository institutions might raise First Amendment commercial free speech issues.

The FDIC believes, preliminarily, that the approach used in the proposed rule strikes the proper balance of enforcing the law and limiting the regulatory burden on depository institutions.

II. Request for Public Comment

The FDIC is hereby requesting comment during a 60-day comment period on all aspects of this proposed rule. Specifically, comments are requested on alternate means of implementing and enforcing the deposit shifting statute. For example, could and should the statute be applied on a case-by-case basis without an implementing regulation? And, if applied on a case-by-case basis, what factors should be considered in determining whether prohibited deposit shifting has occurred? More specifically, what depository institution conduct and activities should the FDIC interpret as encouraging or facilitating deposit shifting?

Comments also are specifically requested on the meaning of the rule of construction provided in the deposit shifting statute that the statute shall not be construed as prohibiting conduct or activity ''undertaken in the ordinary course of business * * * and * * * not directed towards the depositors of an insured depository institution affiliate * * *.'' The FDIC would have to interpret that rule of construction in considering whether to impose entrance and exit fees upon depository institutions.

III. Paperwork Reduction Act

No collections of information pursuant to section 3504(h) of the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 *et seq.*) are contained in this proposed rule. Consequently, no information has been submitted to the Office of Management and Budget for review.

IV. Regulatory Flexibility Act

The FDIC estimates that, currently, there are 135 bank holding companies and savings and loan holding companies that own both BIF-member and SAIF-member affiliates. Those holding companies, in turn, own approximately 870 banks and thrifts, of which about 250 have assets of $100 million or less. Based on the FDIC's calculations and projections, an insubstantial number of those 250 institutions would be subject to the rebuttable presumption and other provisions of this proposed rule. Thus, the Board hereby certifies that the proposed rule would not have a significant economic impact on a substantial number of small entities [3] within the meaning of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). Therefore, the provisions of that Act regarding an initial and final regulatory flexibility analysis (*Id.* at 603 & 604) do not apply here.

List of Subjects in 12 CFR Part 312

Bank deposit insurance, Savings associations.

The Board of Directors of the Federal Deposit Insurance Corporation hereby proposes to amend part 312 of title 12 of the Code of Federal Regulations as follows:

PART 312—ASSESSMENT OF FEES UPON ENTRANCE TO OR EXIT FROM THE BANK INSURANCE FUND OR THE SAVINGS ASSOCIATION INSURANCE FUND AND TREATMENT OF APPLICATIONS AND NOTICES AND THE IMPOSITION OF ENTRANCE AND EXIT FEES IN CONNECTION WITH DEPOSIT SHIFTING

1. The part heading of Part 312 is revised to read as set forth above.

2. The authority citation for Part 312 is revised to read as follows:

Authority: 12 U.S.C. 1815(d), 1819.

3. Section 312.11 is added to read as follows:

§ 312.11 Deposit shifting.

(a) *Purpose and scope.* The purpose of this section is to implement section 2703(d) of Public Law 104–208 which became effective on September 30, 1996 (110 Stat. 3009 et seq.). This section applies to all insured depository

[3] The definition of ''small business entity'' derives from the definition of a ''small business concern.'' Part 121 of the Small Business Administration's rules and regulations (13 CFR part 121) provides that any national bank or commercial bank, savings association, or credit union with assets of $100 million or less qualifies as a small business concern.

institutions and depository institution holding companies.

(b) *Applications and notices.* Applications and notices filed by an insured depository institution, a proposed or newly organized insured depository institution or a depository institution holding company shall be denied or objected to, respectively, by the appropriate federal banking agency if the agency determines, in its discretion, that the proposed transaction for which the application or notice is filed is for the purpose of evading assessments imposed on the applicable insured depository institutions with respect to SAIF-assessable deposits under section 7(b) of the Act and section 21(f)(2) of the Federal Home Loan Bank Act (12 U.S.C. 1441(f)(2)).

(c) *Imposition of entrance and exit fees.* (1) A depository institution that encourages or facilitates the shifting of deposits from SAIF-assessable deposits to BIF-assessable deposits (as defined in section 21(k) of the Federal Home Loan Bank Act (12 U.S.C. 1441(k)) for the purpose of evading SAIF assessments shall pay entrance and exit fees, as provided for in §§ 312.1 through 312.10, as if such deposit shifting constituted a ''conversion transaction'' under section 5(d) of the Act (12 U.S.C. 1815(d)).

(2) Subject to the FDIC's determination based on the methodology indicated in paragraph (c)(3) of this section, an abnormal increase in a depository institution's BIF-assessable deposits and a commensurate decrease in SAIF-assessable deposits of an affiliate of that depository institution within the same calendar quarter shall be presumed to be the result of deposit shifting for the purpose of evading SAIF assessments. The entrance and exit fees to be imposed under paragraph (c)(1) of this section shall apply to the dollar amount of the deposits shifted unless, pursuant to paragraph (c)(5) of this section, the affiliated depository institutions rebut the presumption that the increase in BIF-assessable deposits and the commensurate decrease in SAIF-assessable deposits resulted from deposit shifting between the affiliated institutions.

(3) For purposes of this section, the FDIC shall obtain deposit data from quarterly Consolidated Reports of Condition and Income filed by insured depository institutions with the FDIC and from Thrift Financial Reports filed by insured savings associations with the Office of Thrift Supervision, starting with the reports filed for the period ending [on the last day of the first full calendar quarter after the effective date of the final rule on deposit shifting].

(4) The FDIC, in its discretion, will determine whether to presume that the increase in an institution's BIF-assessable deposits and the commensurate decrease in the affiliated institution's SAIF-assessable deposits resulted from deposit shifting intended to evade SAIF assessments by using statistical averages and trends for the applicable affiliated depository institutions and industry averages and trends, and other information available to the FDIC. In determining whether to apply the rebuttable presumption, the FDIC will consult with the appropriate federal banking agency(ies) in cases where the FDIC is not the appropriate federal banking agency.

(5) A depository institution will be deemed to have rebutted the presumption of deposit shifting if it provides to the FDIC information and materials that the FDIC, in its discretion, determines demonstrate that the increase in BIF-assessable deposits and the commensurate decrease in SAIF-assessable deposits resulted from factors other than efforts by the depository institutions or their holding company to encourage or facilitate the shifting of deposits for the purpose of evading SAIF assessments.

(6) The FDIC shall notify, in writing, the applicable depository institutions of the intended imposition of entrance and exit fees within 90 days after the report date of the Consolidated Reports of Condition and Thrift Financial Reports from which the FDIC determines to apply the rebuttable presumption under paragraph (c)(4) of this section. The depository institutions shall have 30 days from the date of issuance of such notification to provide materials and information to the FDIC to rebut the aforementioned presumption. The FDIC shall within 60 days of the receipt of the materials and information consult with the appropriate federal banking agency(ies), if the FDIC is not the appropriate federal banking agency, and determine and notify the depository institutions whether they must pay entrance and exit fees for deposit shifting. If the FDIC indicates in such notice that the depository institutions must pay entrance and exit fees, those fees shall be paid within 15 days of the receipt of such notice. Within 30 days of the payment of the fees to the FDIC, the depository institution(s) may request a review of the determination by the FDIC. The details of the procedures for submitting materials and information to attempt to rebut the presumption of deposit shifting will be provided in writing to the depository institutions as part of the initial notice of the intended imposition of entrance and exit fees.

(d) *Termination date.* The provisions of this section shall terminate on the earlier of December 31, 1999 or the date as of which the last savings association ceases to exist.

By the order of the Board of Directors.

Dated at Washington, D.C., this 4th day of February, 1997.

Federal Deposit Insurance Corporation.

Jerry L. Langley,

Executive Secretary.

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12 CFR Part 328

RIN 3064–AB99

Advertisement of Membership

AGENCY: Federal Deposit Insurance Corporation.

ACTION: Notice of proposed rulemaking; request for comment.

SUMMARY: The Federal Deposit Insurance Corporation (FDIC) is proposing to amend its regulation entitled ''Advertisement of Membership''. The proposed rule would: Consolidate the provisions that require insured institutions to display official signs; extend the official advertising statement that is currently required for insured banks to all insured depository institutions; streamline the exceptions to the required use of the official advertising statement; prohibit the use of the official advertising statement in advertisements concerning nondeposit investment products or similar nondeposit products; and specifically delegate authority to approve the translation of the official advertising statement to certain FDIC officials. The FDIC is inviting comment on all aspects of its proposal as well as certain alternatives to its proposal as discussed herein. In addition, the FDIC is soliciting comment with respect to issues raised regarding the applicability of this regulation to insured depository institutions that are transmitting information to, or conducting business with, existing or potential customers, over a computer network, such as the Internet.

DATES: Written comments must be received by the FDIC on or before April 14, 1997.

ADDRESSES: Written comments shall be addressed to Office of the Executive Secretary, Federal Deposit Insurance Corporation, 550 17th Street, N.W., Washington, D.C. 20429. Comments may be hand delivered to Room F–402, 1776 F Street, N.W., Washington, D.C., 20429, on business days between 8:30

a.m. and 5:00 p.m. [Fax number: (202) 898–3838; Internet address: comments@fdic.gov]. Comments will be available for inspection at the FDIC's Reading Room, Room 7118, 550 17th Street, N.W., Washington, D.C. between 9:00 a.m. and 4:30 p.m. on business days.

FOR FURTHER INFORMATION CONTACT: Marc J. Goldstrom, Counsel, Legal Division, Federal Deposit Insurance Corporation, Washington, D. C. 20429, telephone (202) 898–8807; Robert W. Walsh, Manager, Policy and Program Development, Division of Supervision, Federal Deposit Insurance Corporation, Washington, D.C. 20429, telephone (202) 898–6911.

SUPPLEMENTARY INFORMATION:

A. Need for the Proposed Rule

The FDIC is issuing this proposed rule in response to two initiatives. Section 303 of the Riegle Community Development and Regulatory Improvement Act of 1994 (CDRIA), Pub. L. 103–325, 108 Stat. 2160 (Sept. 23, 1994), requires that each federal banking agency, consistent with the principles of safety and soundness, statutory law and policy, and the public interest, conduct a review of the regulations and written policies of that agency to, among other things: streamline and modify those regulations and policies, and remove inconsistencies and outmoded and duplicative requirements. In addition, the FDIC has voluntarily committed itself to review its regulations on a 5-year cycle. *See* Development and Review of FDIC Rules and Regulations, 2 FED. DEPOSIT INS. CORP., LAW, REGULATIONS, RELATED ACTS 5057 (1984).

As a result of its review of part 328, and as described herein, the FDIC has determined that certain aspects of the regulation may be streamlined, another aspect of the regulation treats banks and savings associations differently and accordingly should be modified to achieve consistent treatment, another aspect of the regulation should be modified to prohibit the use of the official advertising statement with respect to the advertisement of nondeposit investment products and similar nondeposit products, and a final aspect of the regulation should clarify which FDIC officials are authorized to approve the translation of the official advertising statement. In accordance with section 303 of CDRIA, the FDIC believes that this proposal is consistent with the principles of safety and soundness, statutory law and policy, and the public interest.

B. The Current Rule and the Proposal

1. Signs

Part 328 contains requirements for the design and display of the official bank sign of the FDIC. Only insured banks may use the official bank sign. 12 U.S.C. 1828(a). 12 CFR 328.2(a).

Part 328 also contains requirements for the design and display of the official savings association sign. Insured savings associations must use the official savings association sign, and may not use the official bank sign. *Id.* § 328.4(a) and (e). Insured banks may use either sign at their option. *Id.* § 328.2(a).

The two sets of requirements are virtually identical. The FDIC proposes to combine them into one.

Part 328 speaks of ''automatic service facilities'' in some places, and of ''remote service facilities'' in other places. The two phrases have the same meaning within part 328, however. The FDIC proposes to use the phrase ''remote service facility'' in each place.

Part 328 contains an outdated reference to a date in 1989. The FDIC proposes to delete it.

2. Advertising

(a) Proposal To Extend Official Advertising Statement Requirement to Savings Associations

Part 328 requires insured banks to include the official advertising statement in all their advertisements (with certain exceptions). *Id.* § 328.3(a). The basic form of the statement is ''Member of the Federal Deposit Insurance Corporation'', which may be shortened to ''Member FDIC''. *Id.* § 328.3(b). There is no equivalent requirement for insured savings associations.

In light of the inconsistent treatment of banks and savings associations, the FDIC proposes to require savings associations to use the official statement in advertisements. The effect of this proposal is that all insured depository institutions would be required to include the statement in their advertisements.

The FDIC insures both banks and savings associations to the same extent. *See* 12 U.S.C. 1811, 1813(c). There is no compelling justification for applying the rule to banks and not savings associations. Inconsistent treatment of banks and savings associations on this matter only tends to confuse consumers as to whether the institution's deposits are insured by the FDIC. We are of the view that a consistent and uniform rule applicable to both banks and savings associations will best serve the interests of the public and the protection of the insurance funds.

The proposed rule is premised on the belief that if all insured institutions are required to use the official advertising statement, consumers are more likely to recognize the absence of federal deposit insurance in advertisements by non-FDIC insured entities and can better distinguish insured depository institutions from non-insured entities. In today's environment with many non-banks providing banking type services it is more important than ever that consumers have a method of recognizing insured depository institutions. Recognition of FDIC insurance is particularly needed in electronic media such as the Internet where advertisements may originate from outside the United States or from nonbank entities.

Alternatively, the FDIC could achieve consistent treatment of banks and savings associations by eliminating the requirement that insured banks use the official statement in advertisements. The effect of such a proposal would be that all insured depository institutions would be permitted (but not required) to include such a statement if they see fit.

In support of such a proposal, one could argue that, as a general matter, it is no longer necessary to require banks to use the official statement in their advertising. Statutory and regulatory provisions requiring banks to use the statement were enacted in 1935 [1], a time when the FDIC was new and unfamiliar. Moreover, having endured the worst financial crisis in the nation's history, it was necessary to restore public confidence in the banking system. Over the years, as a result of the use of the official statement and other measures, banks and FDIC insurance have become intertwined in consumers' minds. Indeed, thrift customers arguably are aware of federal deposit insurance, even though there is no requirement that thrifts use the official statement in their advertisements.

Depository institutions and federal deposit insurance may be so interconnected that, as discussed below, many consumers erroneously assume that all bank products or services are FDIC insured. Accordingly, a rule requiring all institutions to use the official advertising statement may not

[1] The statutory provision was originally enacted in the Banking Act of 1935. Sec. 101 (v)(2), Banking Act of 1935, ch. 614, 49 Stat. 684, 701 (1935). Three months later, the FDIC promulgated a regulation which, among other things, required banks to use the official statement in advertisements. *See* Regulation III, section 3, FDIC Annual Report 92 (1935). The statutory requirement for the official statement in advertising was repealed in 1989. See Financial Institutions Reform, Recovery and Enforcement Act of 1989 (''FIRREA''), Pub. L. 101–73, sec. 221, 103 Stat. 183, 266 (Aug. 9, 1989).

alleviate such confusion and possibly could increase confusion among consumers.

The issue of advertising by depository institutions is of great importance to the FDIC. We are concerned that individuals understand when they are entrusting their money to an FDIC insured institution and when they are not. We are also extremely concerned that individuals understand when their funds are insured and when they are not. The FDIC invites comment on whether the proposed rule or the alternative discussed herein (or some other alternative) would better achieve these objectives. In addition we invite comment on the related issue of the increased burden to savings associations that the proposed rule would entail versus the potential benefits to be achieved.

(b) Proposals To Consolidate and Streamline Exceptions to the Required Use of the Official Advertising Statement and To Prohibit Insured Depository Institutions From Using the Official Advertising Statement in Advertisements Concerning Nondeposit Investment Products

Part 328 contains 20 exceptions to the required use of the official advertising statement. 12 CFR 328.3(c). The FDIC proposes to consolidate and streamline this paragraph into 11 exceptions. The two separate exceptions for radio and television advertisements not exceeding thirty seconds in time, 12 CFR 328.3(8) and (9), would be combined into one exception without any change in substance.

The nine exceptions for advertisements relating to various types of products or services which do not relate to deposits, 12 CFR 328.3(12) through (20), would be combined into a single exception for advertisements which do not relate to deposit products or services. The current rule only has exceptions for advertisements relating to certain types of nondeposit products or services. The proposed rule would create an exception for any advertisement which does not relate to a deposit product or service. This would have the effect of broadening the exceptions to the required use of the official advertising statement. The FDIC believes that there is no need to require the use of the official advertising statement in any advertisement which does not relate to deposit products or services. This proposal is consistent with the purpose of the regulation and the mandates of section 303 of the CDRIA.

Paragraph (d) of the proposed rule would prohibit an insured depository institution from including the official advertising statement or any similar statement in advertisements relating to nondeposit investment products or similar nondeposit products. In advertisements containing information about both insured deposits and nondeposit investment products (or similar nondeposit products), the information concerning insured deposits shall be clearly segregated from the information about nondeposit investment products (or similar nondeposit products) and shall contain either the official statement, or any similar statement, including, but not limited to, statements to the effect that the depository institution's deposits or depositors are insured by the Federal Deposit Insurance Corporation to the maximum of $100,000 for each depositor, or that specific deposit products are insured by the Federal Deposit Insurance Corporation.

As indicated above, many consumers erroneously believe that *all* bank or thrift products or services are FDIC insured. A recent independent survey found that 30% of investors are not aware that the FDIC does not insure bank mutual funds.[2] The FDIC is making this proposal because it is extremely concerned that depository institution customers understand what is and is not covered by FDIC insurance. The FDIC believes that a prohibition on the use of the official advertising statement in advertisements relating to nondeposit investment products or similar nondeposit products and a requirement that advertisements containing information about both insured deposits and nondeposit investment products (or similar nondeposit products) clearly segregate the information about the different products will help to minimize customer confusion on this matter.

This proposal is premised on the belief that it would minimize customer confusion with respect to the non-insured status of nondeposit investment products, such as mutual funds, and other similar nondeposit products. Conversely, there are other alternatives which may be more effective at alleviating customer confusion. For example, it could be argued that the proposal to require the use of the official statement (or similar statement) in advertisements concerning both types of products will further confuse consumers as to the insured and non-insured status of the products involved. Accordingly, not requiring, or prohibiting, the use of the official statement (or similar statement) in advertisements containing information on both types of products may be more effective at minimizing customer confusion. The FDIC invites comment on the rule as proposed in paragraph (d), the alternatives discussed herein, or any other possible approach. In addition we invite comment on the related issue of the increased burden to insured depository institutions that the proposed rule or the alternatives would entail, versus the potential benefits to be achieved.

Another alternative to minimize customer confusion as to the insured or non-insured status of the various products offered by insured depository institutions is to require insured depository institutions to make certain disclosures when they advertise nondeposit investment products, such as mutual funds. Specifically, insured depository institutions would be required to disclose that such products are: not insured by the FDIC; not deposits or other obligations of, or guaranteed by, the depository institution; and subject to investment risk, including possible loss of the principal amount invested.

These disclosure requirements would not impose a new obligation on insured depository institutions. In fact, these provisions are contained in the Federal banking agencies' ''Interagency Statement on Retail Sales of Nondeposit Investment Products''. Financial Institution Letter FIL 9–94 dated February 17, 1994 (the ''Interagency Statement''). Among other things the Interagency Statement provides that insured depository institutions should make the aforementioned disclosures in all of their advertising and promotional materials with respect to the retail sale of nondeposit investment products.

It may be desirable to include these provisions in part 328 in light of the recent FDIC study which showed more than a fourth of the institutions surveyed are still failing to make basic disclosures required under the Interagency Statement.[3] By including the advertising disclosure provisions in part 328, such provisions would be of greater weight and enforceability.

The FDIC invites comment as to whether codifying these disclosure provisions in part 328 will more effectively minimize customer confusion with respect to the insured or non-insured status of the various

[2] Scott Smith, ''Survey Says 70% of Investors Know U.S. Doesn't Insure Mutual Funds'', *American Banker*, May 15, 1996, at 3 (discussing results of a survey of Investor Protection Trust conducted by Princeton Survey Research Associates).

[3] ''Survey of Nondeposit Investment Sales at FDIC-Insured Institutions'', prepared for the FDIC by Market Trends, Inc., dated May 5, 1996.

products offered by insured depository institutions. In addition, we invite comment on the related issue of any possible increased burden to insured depository institutions that such provisions would entail versus the potential benefits to be achieved.

(c) Proposals Enhance Safety and Soundness of Insured Depository Institutions and Consumer Protection

In testimony before the U.S. House of Representatives' Subcommittee on Financial Institutions and Consumer Credit[4] the Chairman of the Board of Directors of the FDIC indicated that in conducting its review of regulations pursuant to section 303 of CDRIA, the FDIC would consider, among other things, whether the regulations are necessary to ensure a safe and sound banking system and whether the regulations can be justified on strong public policy grounds related to consumer protection. The FDIC believes that the proposed rule meets these criteria. It is intended to promote stability and confidence in the banking system and to minimize the possibility of customer confusion with respect to whether they are dealing with an FDIC insured institution and whether the advertised product is insured by the FDIC.

(d) Statutory Authority

The FDIC has the statutory authority to, by regulation, require all insured depository institutions to use the official statement in advertising and to prohibit its use in the advertisement of nondeposit investment products. Section 9 of the FDIA authorizes the FDIC to prescribe ''such rules and regulations as it may deem necessary to carry out the provisions of [the FDIA] or of any other law which it has the responsibility of administering or enforcing''. 12 U.S.C. 1819(a) Tenth. The Supreme Court has stated that ''[w]here the empowering provision of a statute states simply that the agency may 'make * * * such rules and regulations as may be necessary to carry out the provisions of this Act,' * * * the validity of the regulation will be sustained so long as it is 'reasonably related to the purposes of the enabling legislation' ''. *Mourning* v. *Family Publications Service, Inc.*, 411 U.S. 356, 369 (1973) (quoting *Thorp* v. *Housing Authority of the City of Durham*, 393 U.S. 268, 280–281 (1969)). Congress, in creating the FDIC, sought to instill public confidence in the banking system, promote safe and sound banking practices, eliminate runs on banks by depositors, and safeguard deposits. *See FDIC* v. *Allen*, 584 F. Supp. 386, 397 (E.D. Tenn. 1984); *Doherty* v. *United States*, 94 F.2d 495, 497 (8th Cir. 1938); *Weir* v. *United States*, 92 F.2d 634, 636 (7th Cir. 1937). The proposed rule seeks to promote stability and confidence in the banking system and avoid runs on banks by depositors. It is therefore reasonably related to the enabling legislation. Similarly, in promoting the aforementioned goals, the use or non-use of the official statement is related to the safety and soundness of insured depository institutions and is therefore subject to regulation under section 8(a) of the FDIA, 12 U.S.C. 1818(a), and section 9(a) of the FDIA, 12 U.S.C. 1819(a) Tenth. *See also FDIC* v. *Sumner Fin. Corp.*, 451 F.2d 898, 903 (''the FDIC has the power to make such rules as are reasonable and necessary to effectuate the purposes of the act'').

(e) Clarification of Delegated Authority

Part 328 provides that the non-English equivalent of the official advertising statement may be used in any advertisement, provided, that the translation has had the prior written approval of the Corporation. 12 CFR 328.3(e). The proposed rule clarifies that the Director, Division of Compliance and Consumer Affairs; the Deputy Director, Division of Compliance and Consumer Affairs; and any Regional Director, Division of Compliance and Consumer Affairs, may provide such approval on behalf of the FDIC.

C. Request for Comment—Electronic Banking Issues

In recent years, new and innovative media by which insured depository institutions may market their products and transact business have developed. Such media include computer networks such as the Internet. Many financial institutions have established ''world wide web sites''[5] by which customers may obtain information about an institution and, in certain cases, transact business with the institution. This recent proliferation of world wide web sites gives rise to certain issues concerning whether and under what circumstances part 328 should apply with respect to the Internet or other computer networks. The FDIC is not currently proposing any changes to the rule to address explicit questions arising out of this new technology. However, these issues are discussed below and the FDIC is also soliciting comment for the purpose of gathering information from the public on such issues.

Neither the proposed or existing rule define the term ''advertisement''. The staff is of the view that such term as used in the proposed and existing rule is not limited to television, radio, or print advertisements. Rather, such term would include, but not be limited to, advertisements transmitted via computer networks such as the Internet. Consumers using the Internet may typically view any one of an institution's web pages[6] directly, or may enter the institution's top level or ''home page''. The staff is of the view that every institution's home page is to some extent an advertisement and accordingly should contain the official statement to the extent required by the rule.[7] Whether subsidiary web pages contain advertisements will vary depending upon the content of the information within the particular web page. The staff is of the view that each such subsidiary web page that contains an advertisement should include the official statement, unless such advertisement is subject to one of the exceptions in § 328.3(c).

The FDIC also seeks comment on whether and under what circumstances it should require insured depository institutions to utilize the electronic equivalent of the official bank or savings association sign in their world wide web sites. Should such determination be different with respect to world wide web sites at which business may be transacted as opposed to sites where only information is conveyed?

D. Paperwork Reduction Act

The proposed rule would not constitute a ''collection of information'' within the meaning of section 3502(3) of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). Accordingly, the procedural and analytical requirements prescribed by that Act do not apply to the proposed rule.

E. Regulatory Flexibility Act

Compliance with the proposed rule takes only nominal advertising space or time and does not add significantly to the cost of advertisement. Insured banks have complied with the identical requirement for over sixty years without significant expense. Accordingly, the

[4] Also reported in 60 FR 62345 (December 6, 1995).

[5] The FDIC is aware of over 200 insured depository institutions that have a presence on the Internet.

[6] Web pages vary in length and may in certain cases encompass several computer screens of information.

[7] The staff's view is with respect to part 328 only. We do not express an opinion as to whether institutions' home pages are advertisements for other purposes. Furthermore, staff's views on this matter would not preclude an institution from demonstrating that its home page does not contain an advertisement for purposes of part 328.

Board hereby certifies that the proposed rule would not 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.*). The provisions of the Regulatory Flexibility Act relating to an initial and final regulatory flexibility analysis (5 U.S.C. 603 and 604) are not applicable.

List of Subjects in 12 CFR Part 328

Advertising, Bank deposit insurance, Savings associations, Signs and symbols.

For the reasons stated in the preamble, the Board of Directors of the FDIC proposes to amend 12 CFR part 328 as follows:

PART 328—ADVERTISEMENT OF MEMBERSHIP

1. The authority citation for part 328 is revised to read as follows:

Authority: 12 U.S.C. 1818(a), 1819, 1828(a).

2. Section 328.0 is revised to read as follows:

§ 328.0 Scope.

This part 328 describes the official bank sign and the official savings association sign, and prescribes their use by insured depository institutions. It also prescribes the official advertising statement insured depository institutions must include in certain advertisements. Finally, it prohibits the use of the official advertising statement and similar statements in advertisements concerning nondeposit investment products. For purposes of this part 328, the term ''insured depository institution'' includes insured branches of a foreign bank. Insured depository institutions which maintain offices that are not insured in foreign countries are not required to include the advertising statement in advertisements published in foreign countries.

3. Section 328.2 is revised to read as follows:

§ 328.2 Procurement and display of official signs.

(a) *Display*—(1) *Official sign.* Each insured depository institution shall continuously display its official sign at the locations specified in paragraph (a)(2)(i) of this section, as follows:

(i) *Insured banks.* At the option of the insured bank, its official sign is either the official bank sign or the official savings association sign.

(ii) *Insured savings associations.* Insured savings associations shall display the official savings association sign as provided herein. An insured savings association shall not display the official bank sign at its principal place of business or at any of its branches.

(2) *Locations*—(i) *Required locations.* Except as provided in paragraph (a)(2)(ii) of this section, an insured depository institution shall display its official sign at each station or window where insured deposits are usually and normally received in the depository institution's principal place of business and in all its branches.

(ii) *Other locations*—(A) *Within the institution.* An insured depository institution may display its official sign in other locations within the insured depository institution in other sizes, colors, or materials.

(B) *Other facilities.* An insured depository institution is permitted, but is not required, to display its official sign on remote service facilities including automated teller machines, cash dispensing machines, point-of-sale terminals, and other electronic facilities where deposits are received. If an insured depository institution displays its official sign at a remote service facility, and if there are any noninsured institutions that share in the remote service facility, any insured depository institution that displays its official sign must clearly show that the sign refers only to a designated insured depository institution(s).

(3) *Newly insured institutions*—(i) *Initial grace period.* A depository institution becoming an insured depository institution shall not be required to display its official sign until twenty-one (21) days after its first day of operation as an insured depository institution.

(ii) *Early display permitted.* An insured depository institution may display its official sign prior to the date display is required.

(b) *Obtaining signs*—(1) *Procurement from the FDIC*—(i) *Cost; design.* An insured depository institution may procure the appropriate official signs from the Corporation for official use at no charge.

(ii) *Order blanks.* The Corporation shall, upon request, furnish an order blank to an insured depository institution for use in procuring official signs.

(iii) *Safe harbor rule.* Any insured depository institution which promptly, after the receipt of an order blank, fills it in, executes it, and properly directs and forwards it to the Federal Deposit Insurance Corporation, Washington, D.C. 20429, shall not be deemed to have violated this section on account of not displaying an official sign, or signs, unless the insured depository institution shall omit to display such official sign or signs after receipt thereof.

(2) *Procurement from other sources.* Insured depository institutions may procure official signs or signs reflecting variations in size, colors, or materials from commercial suppliers.

(c) *Receipt of deposits at same teller's station or window as noninsured institution.* An insured depository institution may not receive deposits at any teller's station or window where any noninsured institution receives deposits or similar liabilities, except a remote service facility as defined in § 303.0(b)(18) of this chapter.

(d) *Required changes in signs.* The Corporation may require any insured depository institution, upon at least 30 days' written notice, to change the wording of its official signs in a manner deemed necessary for the protection of depositors or others.

4. Section 328.3 is revised to read as follows:

§ 328.3 Official advertising statement and manner of use by insured depository institutions.

(a) *Mandatory use.* Each insured depository institution shall include the official advertising statement, prescribed in paragraph (b) of this section, in all of its advertisements except as provided in paragraphs (c) and (d) of this section.

(1) An insured depository institution is not required to include the official advertising statement in its advertisements until thirty (30) days after its first day of operation as an insured depository institution.

(2) In cases where the Board of Directors of the Federal Deposit Insurance Corporation shall find the application to be meritorious, that there has been no neglect or willful violation in the observance of this section and that undue hardship will result by reason of its requirements, the Board of Directors may grant a temporary exemption from its provision to a particular depository institution upon its written application setting forth the facts. For the procedure to be followed in making such application see § 303.8 of this chapter.

(3) In cases where advertising copy not including the official advertising statement is on hand on the date the requirements of this section become operative, the insured depository institution may cause the official advertising statement to be included by use of a rubber stamp or otherwise.

(4) When a foreign depository institution has both insured and noninsured U.S. branches, the depository institution must identify

which branches are insured and which branches are not insured in all of its advertisements requiring the use of the official advertising statement.

(b) *Official advertising statement.* The official advertising statement shall be in substance as follows: ''Member of the Federal Deposit Insurance Corporation''. The word ''the'' or the words ''of the'' may be omitted. The words ''This bank is a'', ''This savings association is a'', ''This savings and loan is a'', or the words ''This institution is a'' or the name of the insured depository institution followed by the words ''is a'' may be added before the word ''member.'' The short title ''Member of FDIC'' or ''Member FDIC'' or a reproduction of the ''symbol'' may be used by insured depository institutions at their option as the official advertising statement. The official advertising statement shall be of such size and print to be clearly legible. Where it is desired to use the ''symbol'' of the Corporation as the official advertising statement, and the ''symbol'' must be reduced to such proportions that the small lines of type and the Corporation seal therein are indistinct and illegible, the Corporation seal in the letter C and the two lines of small type may be blocked out or dropped.

(c) *Types of advertisements which do not require the official advertising statement.* The following types of advertisements need not include the official advertising statement:

(1) Statements of condition and reports of condition of an insured depository institution which are required to be published by state or federal law;

(2) Stationery (except when used for circular letters), envelopes, deposit slips, checks, drafts, signature cards, deposit passbooks, certificates of deposit, and other similar items;

(3) Signs or plates in the banking office or attached to the building or buildings in which the banking offices are located;

(4) Listings in directories;

(5) Advertisements not setting forth the name of the insured depository institution;

(6) Display advertisements in depository institution directory, provided the name of the depository institution is listed on any page in the directory with a symbol or other descriptive matter indicating it is a member of the Federal Deposit Insurance Corporation;

(7) Joint or group advertisements of banking services where the names of insured depository institutions and noninsured institutions are listed and form a part of such advertisements;

(8) Advertisements by radio or television, other than display advertisements, which do not exceed thirty (30) seconds in time;

(9) Advertisements which are of the type or character making it impractical to include thereon the official advertising statement including, but not limited to, promotional items such as calendars, matchbooks, pens, pencils, and key chains;

(10) Advertisements which contain a statement to the effect that the depository institution is a member of the Federal Deposit Insurance Corporation, or that the depository institution is insured by the Federal Deposit Insurance Corporation, or that its deposits or depositors are insured by the Federal Deposit Insurance Corporation to the maximum of $100,000 for each depositor;

(11) Advertisements which do not relate to insured deposit products or services.

(d) *Prohibited use.* (1) Except as provided in paragraph (d)(2) of this section, an insured depository institution may not include the official advertising statement or refer to either federal deposit insurance or the Federal Deposit Insurance Corporation in any advertisement relating to nondeposit investment products or similar nondeposit products.

(2) In advertisements containing information about both insured deposits and nondeposit investment products or similar nondeposit products, the information concerning insured deposits shall be clearly segregated from the information about nondeposit investment products (or similar nondeposit products) and shall contain either the official statement, or any similar statement, including, but not limited to, statements to the effect that the depository institution's deposits or depositors are insured by the Federal Deposit Insurance Corporation to the maximum of $100,000 for each depositor, or that specific deposit products are insured by the Federal Deposit Insurance Corporation.

(e) *Billboard advertisements.* Where an insured depository institution has billboard advertisements in use as of [*the effective date of the final rule*] which are required to include the official advertising statement and the insured depository institution has direct control of such advertisements either by possession or under the terms of a contract, the institution shall, as soon as it can consistent with its contractual obligations, cause the official advertising statement to be included therein.

(f) *Official advertising statement in non-English language.* The non-English equivalent of the official advertising statement may be used in any advertisement: *Provided,* That the translation has had the prior written approval of the Corporation. Authority to provide such approval on behalf of the Corporation is hereby delegated to the Director, Division of Compliance and Consumer Affairs; the Deputy Director, Division of Compliance and Consumer Affairs; and each Regional Director, Division of Compliance and Consumer Affairs.

§ 328.4 [Removed]

5. Section 328.4 is removed.

By order of the Board of Directors.

Dated at Washington, D.C., this 21st day of January, 1997.

Federal Deposit Insurance Corporation.

Jerry L. Langley,

Executive Secretary.

[FR Doc. 97–3319 Filed 2–10–97; 8:45 am]

BILLING CODE 6714–01–P

SMALL BUSINESS ADMINISTRATION

13 CFR Part 107

Small Business Investment Companies

AGENCY: Small Business Administration.

ACTION: Proposed rule.

SUMMARY: In response to concerns expressed by a number of small business investment companies (SBICs), SBA is proposing to modify the examination fees charged to SBICs. SBA believes that the current fee schedule places a disproportionate burden on certain classes of licensees (particularly those with the largest amount of total assets) and, in some cases, results in fee assessments that exceed reasonable charges based on the level of effort and time associated with the examination process.

DATES: Comments must be submitted on or before March 13, 1997.

ADDRESSES: Written comments should be addressed to Don A. Christensen, Associate Administrator for Investment, U.S. Small Business Administration, 409 3rd Street, SW., Suite 6300, Washington, DC 20416.

FOR FURTHER INFORMATION CONTACT: Leonard W. Fagan, Investment Division, at (202) 205–7583.

SUPPLEMENTARY INFORMATION: On January 31, 1996 the Small Business Administration (SBA) published final regulations which, among other things, increased the examination fees charged to SBICs. See 61 FR 3177. Fees

continued to be assessed based on total assets of the licensee, but at higher rates. The new fee schedule was designed to produce total revenue sufficient to cover the current direct costs to SBA of conducting examinations.

Since the effective date and implementation of this regulation (March 1, 1996), SBA has received a number of comments regarding the impact of the new fee schedule on licensees in certain asset size groups. In particular, bank-owned SBICs argue that they are required to bear an unfair portion of the overall fees. In this regard, they note that they generally have no federal funds at risk. However, because fees are based on total assets and they generally have the largest amount of total assets, they are required to pay fees at levels which far exceed the level of effort and risk associated with the examination process. Similarly, larger SBICs which are not bank-owned and do rely on federal funds to supplement private capital argue that the fees greatly exceed the amount they pay for financial audits and are not representative of the level of effort and time attributable to the process.

Because of these comments, the SBA has re-assessed its examination fee schedule and its impact on the various classes of licensees. Based on its reassessment, the SBA has concluded that the current fee schedule places a disproportionate burden on certain classes of licensees and, in some cases, results in fee assessments that exceed reasonable charges based on the level of effort and time associated with the examination process.

To remedy this situation, the SBA is proposing revisions to § 107.692 to establish fees that are more reasonable in relation to the level of effort and resources expended by the Agency. The proposed fee schedule would establish ''base fees'' for examinations. The base fee increases as a licensee's total assets increase, but is capped at $14,000. The base fee would be adjusted upward in circumstances where the Agency incurs additional cost or burdens in the process because of circumstances solely related to the licensee to be examined. Similarly, the base fee would be adjusted downward where circumstances solely related to the licensee to be examined are such that the Agency's level of effort and time are minimized. In SBA's view, these adjustments are incentives for the licensees to adhere to program regulations and will serve to further enhance the safety and soundness of the SBIC program. The new fee schedule would apply to examinations beginning after the effective date of a final rule.

Compliance With Executive Orders, 12612, 12778, and 12866, the Regulatory Flexibility Act (5 U.S.C. 601, et seq.), and the Paperwork Reduction Act (44 U.S.C. Ch. 35)

SBA certifies that this proposed rule would not be a significant regulatory action for purposes of Executive Order 12866 because it would not have an annual effect on the economy of more than $100 million, and that it would not 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. The purpose of the proposed rule is to modify the existing regulatory guidance related to SBIC examination fees. The proposed regulations would provide for more reasonable and equitable examination fees. The proposed fee structure would more properly reflect the level of effort and Agency resources expended to conduct an examination, would encourage continued compliance with program regulations, and would continue to allow for efficient and effective program administration.

The proposed regulations would have some economic effect. The base fee for examinations would continue to be based on total assets of a licensee and, for the most part, at the rates prescribed in current regulations. However, no licensee would have a base fee greater than $14,000. The proposed regulations would provide for discounts of the base examination fee for (1) licensees that had no outstanding regulatory violations at the time of the examination and there were no violations noted as a result of the most recent prior examination; and (2) licensees that are cooperative with SBA examination personnel by being fully responsive to the letter of notification of examination. Similarly, the proposed regulations would provide increases to the base examination fee for a licensee that (1) is organized as a partnership or limited liability company; (2) is authorized to issue Participating Securities; and/or (3) maintains its records/files in multiple locations.

The largest licensees, those with total assets exceeding $60 million, would realize substantial fee decreases. The examination base fee of all licensees potentially could be increased or decreased. Therefore, all licensees with total assets below $60 million may experience a 5% to 25% increase or a 10% to 25% decrease in the cost of an annual examination. The economic impact in either case is inconsequential given the total number of licensees and the base fees applicable to the majority of the licensees. Further, even assuming the maximum increases provided for in the proposed regulations, most licensees with total assets greater than $60 million would realize significant examination fee reductions.

For purposes of the Paperwork Reduction Act, 44 U.S.C. Ch. 35, SBA certifies that this proposed rule, if adopted in final form, would contain no new reporting or recordkeeping requirements that have not already been approved by the Office of Management and Budget.

For purposes of Executive Order 12612, SBA certifies that this rule would not have any federalism implications warranting the preparation of a Federalism Assessment.

For purposes of Executive Order 12778, SBA certifies that this rule is drafted, to the extent practicable, in accordance with the standards set forth in Section 2 of that Order.

List of Subjects in 13 CFR Part 107

Investment companies, Loan programs-business, Reporting and recordkeeping requirements, Small businesses.

For the reasons set forth above, SBA hereby proposes to amend Part 107 of Title 13 of the Code of Federal Regulations as follows:

PART 107—SMALL BUSINESS INVESTMENT COMPANIES

1. The authority citation for part 107 is revised to read as follows:

Authority: 15 U.S.C. 681 *et seq.*, 683, 687(c), 687b, 687d, 687g and 687m, Pub. L. 104–208.

2. Section 107.692 is revised to read as follows:

§ 107.692 Examination fees.

(a) General. SBA will assess fees for examinations in accordance with this § 107.692. Unless SBA determines otherwise on a case by case basis, SBA will not assess fees for special examinations to obtain specific information.

(b) Base fee. A base fee will be assessed based on your total assets (at cost) as of the date of your latest certified financial statement or a more recent interim statement requested by and submitted to SBA in connection with the examination. The base fee table is as follows:

Total assets of licensee	Base fee	Plus, percent of assets
$0 to $1,500,000	$3,500	+0%.
$1,500,001 to $5,000,000	3,700	+.065% of the amount over $1,500,000.
$5,000,001 to $10,000,000	6,000	+.02% of the amount over $5,000,000.
$10,000,001 to $15,000,000	7,000	+.01% of the amount over $10,000,000.
$15,000,001 to $25,000,000	7,700	+.015% of the amount over $15,000,000.
$25,000,001 to $50,000,000	9,200	+.015% of the amount over $25,000,000.
$50,000,001 to $60,000,000	13,000	+.01% of the amount over $50,000,000.
$60,000,001 and above	14,000	+0%.

(c) Adjustments to base fee. Your base fee, as determined by the table in paragraph (b) of this section, will be adjusted (increased or decreased) based on the following criteria:

(1) If you have no outstanding regulatory violations at the time of the commencement of the examination and SBA did not identify any violations as a result of the most recent prior examination, you will receive a 15% discount on your base fee;

(2) If you were fully responsive to the letter of notification of examination (that is, you provided all requested documents and information within the time period stipulated in the notification letter in a complete and accurate manner, and you prepared and had available all information requested by the examiner for on-site review), you will receive a 10% discount on your base fee;

(3) If you are organized as a partnership or limited liability company, you will pay an additional charge equal to 5% of your base fee;

(4) If you are a Licensee authorized to issue Participating Securities, you will pay an additional charge equal to 10% of your base fee; and

(5) If you maintain your records/files in multiple locations (as permitted under § 107.600(b)), you will pay an additional charge equal to 10% of your base fee.

(d) Fee discounts and additions table. The following table summarizes the discounts and additions noted in paragraph (c) of this section:

Examination fee discounts	Amount of discount—% of base examination fee	Examination fee additions	Amount of addition—% of base examination fee
No prior violations	15	Partnership or limited liability co	5
Responsiveness	10	Participating Security Licensee	10
		Financing Records at Multiple Locations	10

(e) Delay fee. If, in the judgment of SBA, the time required to complete your examination is delayed due to your lack of cooperation or the condition of your records, SBA may assess an additional fee of up to $500 per day.

Dated: February 4, 1997.

Philip Lader,

Administrator.

[FR Doc. 97–3280 Filed 2–10–97; 8:45 am]

BILLING CODE 8025–01–P

DEPARTMENT OF THE INTERIOR

Minerals Management Service

30 CFR Part 251

RIN 1010–AC10

Geological and Geophysical (G&G) Explorations of the Outer Continental Shelf

AGENCY: Minerals Management Service (MMS), Interior.

ACTION: Proposed rule.

SUMMARY: We propose to revise the regulations that specify how to conduct G&G exploration and research for oil, gas, and sulphur in the Outer Continental Shelf (OCS) under a permit and to expand the provisions governing research by requiring everyone conducting G&G scientific research in the OCS without a permit to file a notice with MMS. These revisions respond to changes in technology and practice.

DATES: MMS will consider all comments we receive by April 14, 1997. We will begin reviewing comments then and may not fully consider comments we receive after April 14, 1997.

ADDRESSES: Mail or hand-carry written comments to the Department of the Interior, Minerals Management Service, Mail Stop 4700, 381 Elden Street, Herndon, Virginia 20170–4817, Attention: John V. Mirabella, Chief, Engineering and Standards Branch.

FOR FURTHER INFORMATION CONTACT: David R. Zinzer, Geologic Assessment Branch, (703) 787–1515 or Kumkum Ray, Engineering and Standards Branch, (703) 787–1600.

SUPPLEMENTARY INFORMATION: The Outer Continental Shelf Lands Act (OCSLA) (43 U.S.C. 1331 *et seq.*) is the basis for MMS regulations to administer G&G exploration and scientific research activities in the OCS. Section 11(a) of the OCSLA provides authority for the Secretary of the Interior (Secretary) to permit G&G exploration activities as follows:

(a) Approved exploration plans.

(1) Any agency of the United States and any person authorized by the Secretary may conduct geological and geophysical explorations in the outer Continental Shelf, which do not interfere with or endanger actual operations under any lease maintained or granted pursuant to this Act, and which are not unduly harmful to aquatic life in such area.

The regulations at 30 CFR part 251 implement the Secretary's authority and prescribe:

(1) MMS requirements for a permit or the filing of a statement of intent (notice) to conduct G&G exploration or scientific research in the OCS,

(2) Operating procedures for conducting exploration or scientific research,

(3) Conditions for reimbursing permittee for certain costs,

(4) Other conditions for conducting exploration and research, and

(5) Procedures for drilling deep stratigraphic tests in the OCS.

This proposed rule is especially timely now. Advances in 3-D seismic

acquisition and processing, graphics imaging, modeling, and other technologies have significantly increased exploration, especially in deep water, subsalt plays, and in deeper horizons of the Gulf of Mexico OCS.

I. Background for Expanding the Notice Requirement

The revised requirement for a notice before conducting any G&G scientific research was developed to address instances in which academic institutions conducted research and:

- They or industry sponsors held the data and analyzed and processed information as proprietary.
- They also offered for sale at least some of the data and information.

MMS defines such activities as G&G explorations and does not consider them G&G scientific research. A permit is required for exploration. For these reasons, the expanded notice requirement is needed to keep MMS informed of any G&G scientific *research* conducted on the OCS related to oil, gas, and sulphur. After receiving the notice, MMS will inform those conducting research of all necessary environmental regulations and laws. In this way, the researcher will be better able to follow safe and environmentally sound practices.

II. Clarification of Meaning of Terms ''Transfer'' and ''Third Party'

The current rule at §§ 251.11 and 251.12 specifies what happens when G&G data and information are transferred from one person to another person. MMS lists in the proposed rule several different ways by which a ''transfer'' can take place, for example, by sale, sale of rights, license agreement, or trade. The proposed rule clarifies that if a permittee transfers data and information to a third party, no matter how that transfer is formulated or characterized by the participants, the obligation to provide access to MMS of the data and information is a condition of the transfer. Further, MMS clarifies that all third party recipients of the data and information will be subject to the penalty provisions of part 250, subpart N, if they fail to meet the obligation to provide access. The term ''third party'' continues to mean ''any person other than a representative of the United States or the permittee'' as stated in the current rule. The proposed rule clarifies that the third party includes ''all persons to whom the permittee sold, licensed, traded, or otherwise transferred data or information acquired under a permit.'' These clarifications are not new requirements. MMS routinely obtains G&G data and information from permittees and third parties to whom data and information were transferred by a permittee.

MMS is including these clarifications in the proposed rule to eliminate any confusion that may arise due to misinterpretation of the rule. As mentioned earlier in the preamble, MMS administers G&G exploration and certain scientific research on the public lands of the OCS under the authority of the OCSLA. Since G&G exploration occurs on public lands, the MMS, before issuing a permit, imposes the condition that access to any data or information acquired must be provided to MMS. The regulated community is aware before obtaining a permit and expending any resources, or collecting any data and information, that it must agree to provide MMS all the data and information MMS requests and that MMS will pay reasonable costs for reproducing the data and information.

III. Discussion of Proposed Rule

These revisions bring Part 251—Geological and Geophysical (G&G) Explorations of the Outer Continental Shelf up to date with recent changes in related regulations at 30 CFR part 250.

Section 251.1 of the proposed regulation updates the definition list by removing unnecessary words and adding, modifying, or expanding definitions.

Section 251.4(b)(2) explains that a notice will be required for all G&G scientific research related to oil, gas, and sulphur conducted in the OCS except for research requiring a permit.

Section 251.5(c)(7) clarifies that at the earliest possible time, the data and information acquired through scientific research will be made available to the public or the permittee or person filing a notice.

Section 251.5(d) provides current addresses of MMS regional offices as filing locations for permit applications and notices.

Section 251.6(c) adds requirements for consulting and coordinating all G&G activities with other users of the area.

Section 251.7(d) changes the bond amount for drilling of a deep stratigraphic test for a single test well, or for an area bond, to be consistent with the current bonding requirements in 30 CFR part 256, subpart I, for drilling under an Exploration Plan. MMS published a proposed rule revising surety bond requirements on December 8, 1995 (60 FR 63011). After MMS publishes the final rule on surety bond requirements, we will modify 30 CFR part 251 to reflect the changes.

Section 251.8(b) specifies that a permittee must request in writing to modify or extend operations and could proceed with the modifications only after the Regional Director approves them.

Section 251.8(c) directs a permittee to submit status reports on a schedule specified in the permit rather than monthly. This would allow variations in the reporting requirements among OCS Regions.

Section 251.8(c)(2)(ii) requires that the final report contain digital navigational data in a format the Regional Director specifies in addition to charts, maps, and plats.

Section 251.11 adds processed geological information to the types of data requested throughout this section. The revision of § 251.11(b)(2) clarifies that washed samples may no longer replace paleontological reports and, if maintained, should be made available for MMS inspection if requested by the Regional Director. Sections 251.11(c) and 251.12(d) clarify that any transfer of geological or geophysical data and information to a third party would transfer the obligations to provide access to MMS as well. When the third party accepts the transfer, it must also accept the obligation to provide access and is subject to the penalty provisions of 30 CFR part 250 subpart N, if it fails to do so.

IV. Procedural Matters

Executive Order (E.O.) 12866

This proposed rule is not significant under E.O. 12866.

Regulatory Flexibility Act

The Department of the Interior (DOI) has determined that this proposed rule will not have a significant economic effect on a substantial number of small entities. In many ways MMS offers customer service to a number of small companies that participate in G&G work. An example is the northern Gulf of Mexico Oil and Gas Atlas which MMS helped to develop. This atlas classifies reservoirs based upon geologic and engineering parameters. The atlas will assist smaller oil and gas companies to more efficiently discover and develop hydrocarbons in the offshore northern Gulf of Mexico. The revised requirements in this proposed rule contain simple and routine requirements that can be carried out at a negligible cost. The benefits of the revisions are many. MMS would inform those conducting G&G research of environmental laws and regulations and thus ensure environmentally safe and sound practices. The revisions would also help to minimize conflict with other users of the area. The rule is in

''plain English'' so small companies unfamiliar with MMS regulations will find it easier to follow.

Paperwork Reduction Act

This proposed rule contains a collection of information which has been submitted to the Office of Management and Budget (OMB) for review and approval under section 3507 (d) of the Paperwork Reduction Act of 1995. As part of our continuing effort to reduce paperwork and respondent burdens, MMS invites the public and other Federal agencies to comment on any aspect of the reporting burden. Submit your comments to the Office of Information and Regulatory Affairs; OMB; Attention: Desk Officer for the Department of the Interior (OMB control number 1010–0048); Washington, D.C. 20503. Send a copy of your comments to the Chief, Engineering and Standards Branch; Mail Stop 4700; Minerals Management Service; 381 Elden Street; Herndon, Virginia 20170–4817. You may obtain a copy of the supporting statement for the collection of information by contacting the Bureau's Information Collection Clearance Officer at (703) 787–1242.

OMB may make a decision to approve or disapprove this collection of information within 30 days after receipt of our request. Therefore, your comments are best assured of being considered by OMB if they are received within the time period. However, MMS will consider all comments received during the comment period for this notice of proposed rulemaking.

OMB previously approved the information collections in the current 30 CFR Part 251 under OMB control numbers 1010–0031, 1010–0034, 1010–0036, and 1010–0048. For the proposed new rule, all of the requirements will be included under OMB control number 1010–0048. The title of this collection of information is ''30 CFR Part 251, Geological and Geophysical (G&G) Explorations of the OCS.''

The collection of information in the proposed rule consists of:

(a) A permit application for conducting geological and geophysical (G&G) exploration offshore or filing a notice for monitoring scientific research activities (30 CFR 251.5). The notification requirement for scientific research is new;

(b) Reporting the detection of hydrocarbon occurrences, environmental hazards, or adverse effects (30 CFR 251.6(b);

(c) Informing others in the OCS area of your G&G activities (30 CFR 251.6(c));

(d) Information required for test drilling activities (30 CFR 251.7);

(e) Requesting reimbursement of expenses incurred when MMS inspects your exploration activity (30 CFR 251.8(a));

(f) Requesting modifications to and reporting progress of activities conducted under a permit (30 CFR 251.8(c));

(g) Notifying MMS to relinquish a permit (30 CFR 251.9(c)(2));

(h) Accurate and complete information on G&G data and information and subsequent analyses and interpretations (30 CFR 251.11 and 251.12); and

(i) Requesting reimbursement for costs of:

(1) Reproducing the data and information MMS selects; and

(2) Processing, or reprocessing certain geophysical information (30 CFR 251.13).

MMS needs and uses the information to ensure there is no environmental degradation, personal harm, damage to historical or archaeological sites, or interference with other uses; to analyze and evaluate preliminary or planned drilling activities; to monitor progress and activities in the OCS; to acquire geological and geophysical data and information collected under a Federal permit offshore; and to determine eligibility for reimbursement from the government for certain costs.

Respondents represent the oil, gas, and sulphur industry or academic institutions conducting G&G exploration or scientific research on the Federal OCS. The frequency of response is on occasion, with the exception of the status reports. The frequency of those will be specified in the G&G permit.

The estimated annual reporting burden is 10,604 hours—an average of 7.7 hours per response. Based on $35 per hour, the burden hour cost to respondents is estimated to be $371,140. The estimate of other annual costs to respondents is unknown.

MMS will summarize written responses to this notice and address them in the final rule. All comments will become a matter of public record.

1. MMS specifically solicits comments on the following questions:

(a) Is the proposed collection of information necessary for the proper performance of MMS's functions, and will it be useful?

(b) Are the estimates of the burden hours of the proposed collection reasonable?

(c) Do you have any suggestions that would enhance the quality, clarity, or usefulness of the information to be collected?

(d) Is there a way to minimize the information collection burden on those who are to respond, including through the use of appropriate automated electronic, mechanical, or other forms of information technology?

2. In addition, the Paperwork Reduction Act of 1995 requires agencies to estimate the total annual cost burden to respondents or recordkeepers resulting from the collection of information. MMS needs your comments on this item. Your response should split the cost estimate into two components:

(a) Total capital and startup cost component and

(b) Annual operation, maintenance, and purchase of services component.

Your estimates should consider the costs to generate, maintain, and disclose or provide the information. You should describe the methods you use to estimate major cost factors, including system and technology acquisition, expected useful life of capital equipment, discount rate(s), and the period over which you incur costs. Capital and startup costs include, among other items, computers and software you purchase to prepare for collecting information; monitoring, sampling, drilling, and testing equipment; and record storage facilities. Generally, your estimates should not include equipment or services purchased: before October 1, 1995; to comply with requirements not associated with the information collection; for reasons other than to provide information or keep records for the Government; or as part of customary and usual business or private practices.

The Paperwork Reduction Act of 1995 provides that an agency may not conduct or sponsor, and you are not required to respond to, a collection of information unless it displays a currently valid OMB control number.

Takings Implication Assessment

The proposed rule does not represent a Government action capable of interference with constitutionally protected property rights. A new requirement in the rule is a notice for scientific research in the OCS. Since MMS is not requiring the researcher to submit data and information or analyses resulting from the research activity, there is no direct or indirect taking.

The proposed rule also clarifies the terms ''transfer'' and ''third party.'' When a permittee transfers data and information to a third party, there is a transfer of the obligation to provide access to MMS as well. Further, the recipient of the data and information is subject to the same penalty provisions as the original permittee—if a third party fails to provide access. These

clarifications better define existing requirements and add no new requirements.

Other changes are not substantive or were made to put the regulation into plain English. Thus, a Takings Implication Assessment need not be prepared pursuant to E.O. 12630, ''Governmental Actions and Interference with Constitutionally Protected Property Rights.''

Unfunded Mandates Reform Act of 1995

The DOI has determined and certifies according to the Unfunded Mandates Reform Act, 2 U.S.C. 1502 *et seq.*, that this rule will not impose a cost of $100 million or more in any given year on local, tribal, and State governments, or the private sector.

E.O. 12988

The DOI has certified to OMB that the rule meets the applicable reform standards provided in sections 3 (a) and 3 (b)(2) of E.O. 12988, ''Civil Justice Reform.''

National Environmental Policy Act

The DOI has also determined that this action does not constitute a major Federal action affecting the quality of the human environment; therefore, an Environmental Impact Statement is not required.

List of Subjects in 30 CFR Part 251

Continental shelf, Freedom of information, Oil and gas exploration, Public lands-mineral resources, Reporting and recordkeeping requirements, Research.

Dated: January 23, 1997.

Bob Armstrong,

Assistant Secretary, Land and Minerals Management.

For the reasons stated in the preamble, 30 CFR Part 251 is proposed to be revised to read as follows:

PART 251—GEOLOGICAL AND GEOPHYSICAL (G&G) EXPLORATIONS OF THE OUTER CONTINENTAL SHELF (OCS)

Sec.

Authority: 43 U.S.C. 1331 *et seq.*

§ 251.1 Definitions.

Terms used in this part have the following meaning:

Act means the OCS Lands Act, as amended (43 U.S.C. 1331 *et seq.*).

Analyzed geological information means data collected under a permit or a lease that have been analyzed. Analysis may include but is not limited to identification of lithologic and fossil content, core analyses, laboratory analyses of physical and chemical properties, well logs or charts, results from formation fluid tests, and descriptions of hydrocarbon occurrences or hazardous conditions.

Archaeological resources means any material remains of human life or activities that are at least 50 years of age and of archaeological interest.

Coastal environment means the physical, atmospheric, and biological components, conditions, and factors that interactively determine the productivity, state, condition, and quality of the terrestrial ecosystem from the shoreline inward to the boundaries of the coastal zone.

Coastal Zone means the coastal waters (including the lands therein and thereunder) and the adjacent shorelands (including the waters therein and thereunder), strongly influenced by each other and in proximity to the shorelines of the several coastal States and extends seaward to the outer limit of the U.S. territorial sea. Section 305(b)(1) of the Coastal Zone Management Act identifies the inward boundaries of several coastal States.

Coastal Zone Management Act means the Coastal Zone Management Act of 1972, as amended (16 U.S.C. 1451 *et seq.*).

Data means facts, statistics, measurements, or samples that have not been analyzed, processed, or interpreted.

Deep stratigraphic test means drilling that involves the penetration into the sea bottom of more than 500 feet (152 meters).

Director means the Director of the Minerals Management Service, U.S. Department of the Interior, or a subordinate authorized to act on the Director's behalf.

Exploration means the commercial search for oil, gas, and sulphur. Activities classified as exploration include but are not limited to:

(1) Geological and geophysical surveys where magnetic, gravity, seismic reflection, seismic refraction, gas sniffers, coring, or other systems are used to detect or imply the presence of oil, gas, or sulphur; and

(2) Any drilling, whether on or off a geological structure.

Geological exploration means exploration that utilizes geological and geochemical techniques (e.g., coring and test drilling, well logging, and bottom sampling) to produce data and information on oil, gas, and sulphur resources in support of possible exploration and development activities. The term does not include geological scientific research.

Geological and geophysical scientific research means any oil, gas, or sulphur related investigation conducted in the OCS for scientific and/or research purposes. Geological, geophysical, and geochemical data and information gathered and analyzed are made available to the public for inspection and reproduction at the earliest possible time. The term does not include commercial geological or geophysical exploration.

Geophysical exploration means exploration that utilizes geophysical techniques (e.g., gravity, magnetic, or seismic) to produce data and information on oil, gas, and sulphur resources in support of possible exploration and development activities. The term does not include geophysical scientific research.

Governor means the Governor of a State or the person or entity lawfully designated to exercise the powers granted to a Governor pursuant to the Act.

Human environment means the physical, social, and economic components, conditions, and factors. These factors interactively determine the quality of life of those affected, directly or indirectly, by OCS activities.

Hydrocarbon occurrence means the direct or indirect detection during drilling operations of any liquid or gaseous hydrocarbons by examination of well cuttings, cores, gas detector readings, formation fluid tests, wireline logs, or by any other means. The term does not include background gas, minor accumulations of gas, or heavy oil residues on cuttings and cores.

Information means geological and geophysical data that have been analyzed, processed, or interpreted.

Interpreted geological information means knowledge, often in the form of schematic cross sections, 3-dimensional representations, and maps, developed by determining the geological significance of geological data and analyzed geologic information.

Interpreted geophysical information means knowledge, often in the form of seismic cross sections, 3-dimensional representations, and maps, developed by determining the geological significance of geophysical data and processed geophysical information.

Lease means:

(1) Any form of authorization which is issued under section 8 or maintained under section 6 of the Act and which authorizes exploration for, and/or development and production of, minerals; or

(2) The area covered by such authorization, whichever is required by the context.

Lessee has the same meaning as provided in 30 CFR 250.2.

Marine environment means the physical, atmospheric, and biological components, conditions, and factors that interactively determine the quality of the marine ecosystem in the coastal zone and in the OCS.

Minerals means oil, gas, sulphur, geopressured-geothermal and associated resources, and all other minerals which are authorized by an Act of Congress to be produced from ''public lands'' as defined in section 103 of the Federal Land Policy and Management Act of 1976 (43 U.S.C. 1702).

Notice means a written statement of intent to conduct geological or geophysical scientific research related to oil, gas, and sulphur in the OCS other than under a permit.

Oil, gas, and sulphur means oil, gas, sulphur, geopressured-geothermal, and associated resources.

Outer Continental Shelf (OCS) means all submerged lands lying seaward and outside the area of lands beneath navigable waters as defined in section 2 of the Submerged Lands Act (43 U.S.C. 1301), and of which the subsoil and seabed appertain to the United States and are subject to its jurisdiction and control.

Permit means the contract or agreement, other than a lease, issued pursuant to this part, under which a person acquires the right to conduct in the OCS:

(1) Geological exploration for mineral resources;

(2) Geophysical exploration for mineral resources;

(3) Geological scientific research; or

(4) Geophysical scientific research in accordance with appropriate statutes, regulations, and stipulations.

Permittee means the person authorized by a permit issued pursuant to this part to conduct activities in the OCS.

Person means a citizen or national of the United States; an alien lawfully admitted for permanent residence in the United States as defined in section 8 U.S.C. 1101(a)(20); a private, public, or municipal corporation organized under the laws of the United States or of any State or territory thereof; and associations of such citizens, nationals, resident aliens, or private, public, or municipal corporations, States, or political subdivisions of States or anyone operating in a manner provided for by treaty or other applicable international agreements. The term does not include Federal agencies.

Processed geological or geophysical information means data collected under a permit and later processed or reprocessed. Processing involves changing the form of data so as to facilitate interpretation. Processing operations may include, but are not limited to, applying corrections for known perturbing causes, rearranging or filtering data, and combining or transforming data elements. Reprocessing is the additional processing other than ordinary processing used in the general course of evaluation. Reprocessing operations may include varying identified parameters for the detailed study of a specific problem area.

Secretary means the Secretary of the Interior or a subordinate authorized to act on the Secretary's behalf.

Shallow test drilling means drilling into the sea bottom to depths less than those specified in the definition of a deep stratigraphic test.

Third Party means any person other than a representative of the United States or the permittee, including all persons to whom the permittee sold, licensed, traded, or otherwise transferred data or information acquired under a permit.

Violation means a failure to comply with any provision of the Act, or a provision of a regulation or order issued under the Act, or any provision of a lease, license, or permit issued under the Act.

You means a person who inquires about or obtains a permit or files a notice to conduct geological or geophysical exploration or scientific research related to oil, gas, and sulphur in the OCS.

§ 251.2 Purpose of this part.

(a) To allow you to conduct G&G activities in the OCS related to oil, gas, and sulphur on unleased lands or on lands under lease to a third party.

(b) To ensure that you carry out G&G activities in a safe and environmentally sound manner so as to prevent harm or damage to, or waste of, any natural resources (including any mineral deposit in areas leased or not leased), any life (including fish and other aquatic life), property, or the marine, coastal, or human environment.

(c) To inform you of your legal and contractual obligations.

§ 251.3 Authority and applicability of this part.

MMS authorizes you to conduct exploration or scientific research activities under this part in accordance with the Act, the regulations in this part, orders of the Director/Regional Director, and other applicable statutes, regulations, and amendments.

(a) This part does not apply to G&G exploration conducted by or on behalf of the lessee on a lease in the OCS. Refer to 30 CFR part 250 if you plan to conduct G&G activities related to oil, gas, or sulphur under terms of a lease.

(b) Federal agencies are exempt from the regulations in this part.

(c) G&G exploration or G&G scientific research related to minerals other than oil, gas, and sulphur is covered by regulations at 30 CFR part 280.

§ 251.4 Types of G&G activities that require permits or notices.

(a) *Exploration.* You must have an MMS-approved permit to conduct G&G exploration, including deep stratigraphic tests, for oil, gas, or sulphur resources. If you conduct both geological and geophysical exploration, you must have a separate permit for each.

(b) *Scientific research.* You may only conduct G&G scientific research related to oil, gas, and sulphur in the OCS after you obtain an MMS-approved permit or file a notice.

(1) *Permit.* You must obtain a permit if the research activities you propose to conduct involve:

(i) Using solid or liquid explosives; or

(ii) Drilling a deep stratigraphic test.

(2) *Notice.* Any other G&G scientific research that you conduct related to oil, gas, and sulphur in the OCS requires you to file a notice with the Regional Director at least 30 days before you begin. If circumstances preclude a 30-day notice, you must provide oral notice and followup in writing. You must also notify MMS in writing when you conclude your work.

§ 251.5 Applying for permits or filing notices.

(a) *Permits.* You must submit the original and three copies of the MMS permit application form (Form MMS–327). The form includes names of persons, type, location, purpose, and dates of activity, and environmental and other information.

(b) *Disapproval of permit application.* If MMS disapproves your application for a permit, the Regional Director will state the reasons for the denial and will advise you of the changes needed to obtain approval.

(c) *Notices.* You must sign and date a notice and state:

(1) The name(s) of the person(s) who will conduct the proposed research;

(2) The name of any other person(s) participating in the proposed research, including the sponsor;

(3) The type of research and a brief description of how you will conduct it;

(4) The location in the OCS, indicated on a map, plat, or chart, where you will conduct research;

(5) The proposed dates you project for your research activity to start and end;

(6) The name, registry number, registered owner, and port of registry of vessels used in the operation;

(7) The earliest time you expect to make the data and information resulting from your research activity available to the public;

(8) Your plan of how you will make the data and information you collected available to the public;

(9) That you and others involved will not sell or withhold for exclusive use the data and information resulting from your research; and

(10) At your option, you may submit (as a substitute for the material required in paragraphs (c)(7), (c)(8), and (c)(9) of this section) the nonexclusive use agreement for scientific research attachment to Form 327.

(d) *Filing locations.* You must apply for a permit or file a notice at one of the following locations:

(1) For the OCS off the State of Alaska—the Regional Supervisor for Resource Evaluation, Minerals Management Service, Alaska OCS Region, 949 East 36th Avenue, Anchorage, Alaska 99508–4302.

(2) For the OCS off the Atlantic Coast and in the Gulf of Mexico—the Regional Supervisor for Resource Evaluation, Minerals Management Service, Gulf of Mexico OCS Region, 1201 Elmwood Park Boulevard, New Orleans, Louisiana 70123–2394.

(3) For the OCS off the coast of the States of California, Oregon, Washington, or Hawaii—the Regional Supervisor for Resource Evaluation, Minerals Management Service, Pacific OCS Region, 770 Paseo Camarillo, Camarillo, California 93010–6064.

§ 251.6 Obligations and rights under a permit or a notice.

While conducting G&G exploration or scientific research activities under an MMS permit or notice:

(a) You must not:

(1) Interfere with or endanger operations under any lease, or right-of-way, or permit issued or maintained under the Act;

(2) Cause harm or damage to life (including fish and other aquatic life) or to the marine, coastal, or human environment;

(3) Cause harm or damage to property or to any mineral (in areas leased or not leased);

(4) Cause pollution;

(5) Disturb archaeological resources;

(6) Create hazardous or unsafe conditions; or

(7) Interfere with or cause harm to other uses of the area.

(b) You must immediately report to the Regional Director if you:

(1) Detect hydrocarbon occurrences;

(2) Detect environmental hazards which imminently threaten life and property; or

(3) Adversely affect the environment, aquatic life, archaeological resources, or other uses of the area where you are conducting exploration or scientific research activities.

(c) You must also consult and coordinate your G&G activities with other users of the area, such as the fishing, marine transportation, oil and gas, and geophysical survey industries, U.S. Navy, Coast Guard, etc.

(d) You must use the best available and safest technologies that the Regional Director determines to be economically feasible.

(e) You may not claim any oil, gas, sulphur, or other minerals you discover while conducting operations under a permit or notice.

§ 251.7 Test drilling activities under a permit.

(a) *Shallow test drilling.* Before you begin shallow test drilling under a permit, the Regional Director may require you to:

(1) Gather and submit seismic, bathymetric, sidescan sonar, magnetometer, or other geophysical data and information to determine shallow structural detail across and in the vicinity of the proposed test.

(2) Submit information for coastal zone consistency certification according to paragraphs (b)(3) and (b)(4) of this section and for protecting archaeological resources according to paragraph (b)(5) of this section.

(3) Allow all interested parties the opportunity to participate in the shallow test according to paragraph (c) of this section and meet bonding requirements according to paragraph (d) of this section.

(b) *Deep stratigraphic tests.* You must submit to the Regional Director at the address given in § 251.5, a drilling plan, an environmental report, and an application for permit to drill as follows:

(1) *Drilling plan.* The drilling plan must include:

(i) The proposed type, sequence, and timetable of drilling activities;

(ii) A description of your drilling rig, indicating the important features with special attention to safety, pollution prevention, oil-spill containment and cleanup plans, and onshore disposal procedures;

(iii) The location of each deep stratigraphic test you will conduct, including the location of the surface and projected bottomhole of the borehole;

(iv) The types of geophysical survey instruments you will use before and during drilling;

(v) Seismic, bathymetric, sidescan sonar, magnetometer, or other geophysical data and information sufficient to evaluate seafloor characteristics, shallow geologic hazards, and structural detail across and in the vicinity of the proposed test to the total depth of the proposed test well; and

(vi) Other relevant data and information that the Regional Director requires.

(2) *Environmental report.* The environmental report must include all of the following material:

(i) A summary with data and information available at the time you submitted the related drilling plan. MMS will consider site-specific data and information developed since the most recent environmental impact statement or other environmental impact analysis in the immediate area. The summary must meet the following requirements:

(A) You must concentrate on the issues specific to the site(s) of drilling activity. However, you only need to summarize data and information discussed in any environmental reports, analyses, or impact statements prepared for the geographic area of the drilling activity.

(B) You must list referenced material. Include brief descriptions and a statement of where the material is available for inspection.

(C) You must refer only to data that are available to MMS.

(ii) Details about your project such as:

(A) A list and description of new or unusual technologies;

(B) The location of travel routes for supplies and personnel;

(C) The kinds and approximate levels of energy sources;

(D) The environmental monitoring systems; and

(E) Suitable maps and diagrams showing details of the proposed project layout.

(iii) A description of the existing environment. For this section, you must include the following information on the area:

(A) Geology;

(B) Physical oceanography;

(C) Other uses of the area;

(D) Flora and fauna;

(E) Existing environmental monitoring systems; and

(F) Other unusual or unique characteristics that may affect or be affected by the drilling activities.

(iv) A description of the probable impacts of the proposed action on the environment and the measures you propose for mitigating these impacts.

(v) A description of any unavoidable or irreversible adverse effects on the environment that could occur.

(vi) Other relevant data that the Regional Director requires.

(3) *Copies for coastal States.* You must submit copies of the drilling plan and environmental report to the Regional Director for transmittal to the Governor of each affected coastal State and the coastal zone management agency of each affected coastal State that has an approved program under the Coastal Zone Management Act. (The Regional Director will make the drilling plan and environmental report available to appropriate Federal agencies and the public according to DOI policies and procedures.)

(4) *State concurrence.* When required under an approved coastal zone management program of an affected State, your proposed activities must receive State concurrence before the Regional Director can approve the activities.

(5) *Protecting archaeological resources.* The Regional Director may require you to conduct and submit studies that determine whether any archaeological resources exist in the area that the drilling may affect.

(i) You must include a description of any archaeological resources you detect.

(ii) You must not take any action that could disturb the archaeological resources.

(iii) If you discover any archaeological resource after you submit the study results (i.e., during site preparation or drilling), you must immediately halt operations within the area of discovery, and you must report the discovery to the Regional Director.

(iv) If investigations determine that the resource is significant, the Regional Director will inform you how to protect it. You must make every reasonable effort to protect the archaeological resource from damage until the Regional Director has given you further directions for preserving it.

(6) *Application for permit to drill (APD).* Before commencing deep stratigraphic test drilling activities under an approved drilling plan, you must submit an APD and receive approval. You must comply with all regulations relating to drilling operations in 30 CFR part 250.

(7) *Revising an approved drilling plan.* Before you revise an approved drilling plan, you must obtain the Regional Director's approval.

(8) *After drilling.* When you complete the test activities, you must permanently plug and abandon the borehole of all deep stratigraphic tests in compliance with 30 CFR part 250. If the tract on which you conducted a deep stratigraphic test is leased to another party for exploration and development, and if the lessee has not disturbed the borehole, MMS will hold you and not the lessee responsible for problems associated with the test hole.

(9) *Deadline for completing a deep stratigraphic test.* If your deep stratigraphic test well is within 50 geographic miles of a tract that MMS has identified for a future lease sale, as listed on the currently approved OCS leasing schedule, you must complete all drilling activities and submit the data and information to the Regional Director at least 60 days before the first day of the month in which MMS schedules the lease sale. However, the Regional Director may extend your permit duration to allow you to complete drilling activities and submit data and information if the extension is in the national interest.

(c) *Group participation in test drilling.* MMS encourages group participation for deep stratigraphic tests.

(1) *Purpose of group participation.* The purpose is to minimize duplicative G&G activities involving drilling into the seabed of the OCS.

(2) *Providing opportunity for participation in a deep stratigraphic test.* When you propose to drill a deep stratigraphic test, you must give all interested persons an opportunity to participate in the test drilling through a signed agreement on a cost-sharing basis. You may include a penalty for late participation of not more than 100 percent of the cost to each original participant in addition to the original share cost.

(i) The participants must assess and distribute penalties in accordance with the terms of the agreement.

(ii) For a significant hydrocarbon occurrence that the Regional Director announces to the public, the penalty for subsequent late participants may be raised to not more than 300 percent of the cost of each original participant in addition to the original share cost.

(3) *Providing opportunity for participation in a shallow test drilling project.* When you apply to conduct shallow test drilling activities, you must, if ordered by the Regional Director or required by the permit, give all interested persons an opportunity to participate in the test activity on a cost-sharing basis. You may include a penalty provision for late participation of not more than 50 percent of the cost to each original participant in addition to the original share cost.

(4) *Procedures for group participation in drilling activities.* You must:

(i) Publish a summary statement that describes the approved activity in a relevant trade publication;

(ii) Forward a copy of the published statement to the Regional Director;

(iii) Allow at least 30 days from the summary statement publication date for other persons to join as original participants;

(iv) Compute the estimated cost by dividing the estimated total cost of the program by the number of original participants; and

(v) Furnish the Regional Director with a complete list of all participants before starting operations or at the end of the advertising period if you begin operations before the advertising period is over. Forward the names of all late participants to the Regional Director.

(5) *Changes to the original application for test drilling.* If you propose changes to the original application and the Regional Director determines that the changes are significant, the Regional Director will require you to publish the changes for an additional 30 days to give other persons a chance to join as original participants.

(d) *Bonding requirements.* You must submit a bond under this part before you may start a deep stratigraphic test. You must submit a bond for shallow drilling if the Regional Director so requires.

(1) Before MMS authorizes the drilling of a deep stratigraphic test, you must furnish to MMS:

(i) A corporate surety bond in the amount specified at 30 CFR 256.61(a)(1)

conditioned on compliance with the terms of the permit.

(ii) An areawide bond in the amount specified at 30 CFR 256.61(a)(2) conditioned on compliance with the terms of the permit issued to you.

(2) If the Regional Director requires a bond for shallow drilling, you must furnish the appropriate bond.

(3) Any bond you furnish or maintain under this section must be on a form that the Regional Director has approved or prescribed.

(4) The Regional Director may require additional security in the form of a supplemental bond or bonds or increase the coverage of an existing surety bond when the Regional Director deems that additional security is necessary.

§ 251.8 Inspection and reporting requirements for activities under a permit.

(a) *Inspection of permit activities.* You must allow MMS representatives to inspect your exploration or scientific research activities under a permit. They will determine whether operations are adversely affecting the environment, aquatic life, archaeological resources, or other uses of the area. MMS will reimburse you for food, quarters, and transportation that you provide for MMS representatives if you send in your reimbursement request within 90 days of the inspection.

(b) *Approval for modifications.* Before you begin modified operations, you must submit a written request describing the modifications and receive the Regional Director's oral or written approval.

(c) *Reports.* (1) You must submit status reports on a schedule specified in the permit and include a daily log of operations.

(2) You must submit a final report of exploration or scientific research activities under a permit within 30 days after the completion of activities. You may combine the final report with the last status report and must include:

(i) A description of the work performed.

(ii) Charts, maps, plats, and digital navigational data in a format specified by the Regional Director, showing the areas and blocks in which any exploration or permitted scientific research activities were conducted. Identify the lines of geophysical traverses and their locations including a reference sufficient to identify the data produced during each activity.

(iii) The dates on which you conducted the actual exploration or scientific research activities.

(iv) A summary of any:

(A) Hydrocarbon or sulphur occurrences encountered;

(B) Environmental hazards; and

(C) Adverse effects of the exploration or scientific research activities on the environment, aquatic life, archaeological resources, or other uses of the area in which the activities were conducted.

(v) Other descriptions of the activities conducted as specified by the Regional Director.

§ 251.9 Temporarily stopping, canceling, or relinquishing activities approved under a permit.

(a) MMS may temporarily stop exploration or scientific research activities under a permit when the Regional Director determines that:

(1) Activities pose a threat of serious, irreparable, or immediate harm. This includes damage to life (including fish and other aquatic life), property, any mineral deposit (in areas leased or not leased), to the marine, coastal, or human environment, or to an archaeological resource;

(2) You failed to comply with any applicable law, regulation, order, or provision of the permit. This would include MMS's required submission of reports and well records or logs within the time specified; or

(3) Stopping the activities is in the interest of national security or defense.

(b) *Procedures to temporarily stop activities.* (1) The Regional Director will notify you either orally or in writing. MMS will confirm an oral notification in writing and deliver all written notifications by courier or certified or registered mail. You must halt all activities under a permit as soon as you receive an oral or written notification.

(2) The Regional Director will notify you when you may start your permit activities again.

(c) *Procedure to cancel or relinquish a permit.* The Regional Director may cancel, or a permittee may relinquish, a permit at any time.

(1) If MMS cancels your permit, the Regional Director will notify you by certified or registered mail 30 days before the cancellation date and will state the reason.

(2) You may relinquish the permit by notifying the Regional Director by certified or registered mail 30 days in advance.

(3) After MMS cancels your permit or you relinquish it, you are still responsible for proper abandonment of any drill sites in accordance with the requirements of § 251.7 (b)(8). You must also comply with all other obligations specified in this part or in the permit.

§ 251.10 Penalties and appeals.

(a) *Penalties for noncompliance under a permit issued by MMS.* You are subject to the penalty provisions of:

(1) Section 24 of the Act (43 U.S.C. 1350); and

(2) The procedures contained in 30 CFR part 250, subpart N, for noncompliance with:

(i) Any provision of the Act;

(ii) Any provision of the permit; or

(iii) Any regulation or order issued under the Act.

(b) *Penalties under other laws and regulations.* The penalties prescribed in this section are in addition to any other penalty imposed by any other law or regulation.

(c) *Procedures to appeal orders or decisions MMS issues.* You may appeal any orders or decisions that MMS issues under the regulations in this part by referring to 30 CFR part 290. When you file an appeal with the Director, you must continue to follow all requirements for compliance with an order or decision other than payment of a civil penalty.

§ 251.11 Inspection, selection, and submission of geological data and information collected under a permit.

(a) *Availability of geological data and information collected under a permit.* (1) You must notify the Regional Director immediately, in writing, after you acquire, analyze, process, or interpret geological data and information.

(2) Within 30 days of the Regional Director's request, you must inform MMS in writing of subsequent analysis, processing, or interpretation of geological data and information.

(3) The Regional Director may, at some time, request that you submit the analyzed, processed, and interpreted geologic data and information for inspection and/or permanent retention by MMS.

(b) *Submission of geological data and information collected under a permit.* Unless the Regional Director specifies otherwise, geological data and information must include:

(1) An accurate and complete record of all geological (including geochemical) data and information describing each operation of analysis, processing, and interpretation;

(2) Paleontological reports identifying microscopic fossils by depth, including the reference datum to which paleontological sample depths are related; and, if the Regional Director requests, washed samples that you maintain for paleontological determinations;

(3) Copies of well logs or charts in a digital format, if available;

(4) Results and data obtained from formation fluid tests;

(5) Analyses of core or bottom samples and/or a representative cut or split of the core or bottom sample;

(6) Detailed descriptions of any hydrocarbons or hazardous conditions encountered during operations, including near losses of well control, abnormal geopressures, and losses of circulation; and

(7) Other geological data and information that the Regional Director may specify.

(c) *Permit obligations when transferring geological data and information to a third party.* If you transfer geological data and information, in any manner, such as by sale, sale of rights, license agreement, or trade to a third party; or if a third party transfers data and information to another third party, the recipient of the data and information assumes the obligations of a permittee under this section and is subject to the penalty provisions of subpart N of part 250.

(1) The party transferring the data and information must notify the recipient, in writing, that accepting these obligations is a condition of the transfer. The recipient must accept those obligations before the transfer of data and information can occur.

(2) The party transferring the data and information must notify the Regional Director of the transfer of the data and information within 30 days of transfer.

§ 251.12 Inspection, selection, and submission of geophysical data and information collected under a permit.

(a) *Availability of geophysical data and information collected under a permit.* (1) You must notify the Regional Director immediately, in writing, after you initially acquire, process, and interpret any geophysical data and information you collect under a permit.

(2) Within 30 days of a request from the Regional Director, you must inform MMS in writing of the availability of any geophysical data and information that you further processed or interpreted.

(b) *Review and selection of geophysical data and information collected under a permit.* The Regional Director is authorized to inspect geophysical data and information before making a final selection for retention. MMS representatives may inspect and select the data and information on your premises, or the Regional Director can request that you deliver data and information to the appropriate MMS regional office for review.

(1) You must submit the geophysical data and information within 30 days of receiving the request, unless the Regional Director extends the delivery time.

(2) At any time before final selection, the Regional Director may return any or all geophysical data and information following review. You will be notified in writing of all or portions of those data the Regional Director decides to retain.

(c) *Submission of geophysical data and information collected under a permit.* Unless the Regional Director specifies otherwise, you must include:

(1) An accurate and complete record of each geophysical survey conducted under the permit, including digital navigational data and final location maps;

(2) All seismic data developed under a permit presented in a format and of a quality suitable for processing;

(3) Processed geophysical information derived from seismic data with extraneous signals and interference removed, presented in a quality format suitable for interpretive evaluation, reflecting state-of-the-art processing techniques; and

(4) Other geophysical data, processed geophysical information, and interpreted geophysical information including, but not limited to, shallow and deep subbottom profiles, bathymetry, sidescan sonar, gravity and magnetic surveys, and special studies such as refraction and velocity surveys.

(d) *Permit obligations when transferring geophysical data and information to a third party.* If you transfer geophysical data, processed geophysical information, or interpreted geophysical information in any manner, such as by sale of rights, license agreement, or trade to a third party; or if a third party transfers the data and information to another third party, the recipient of the data and information assumes the obligations of a permittee under this section and is subject to the penalty provisions of part 250, subpart N.

(1) The party that transfers the data and information must notify the recipient of the data, in writing, that accepting these obligations is a condition of the transfer. The recipient must accept those obligations before the transfer of data and information can occur.

(2) The party that transfers the data and information must notify the Director of the transfer of the data and information within 30 days of transfer, unless the transfer is by means of a license agreement.

(3) If the transfer is by means of a license agreement, you or the next transferor must notify the Regional Director of any transfers of data and information within 30 days of a request by the Regional Director.

§ 251.13 Reimbursement for the costs of reproducing data and information and certain processing cost.

(a) MMS will reimburse you or a third party for reasonable costs of reproducing data and information that the Regional Director requests if:

(1) You deliver G&G data and information to MMS for the Regional Director to review, or select and retain (according to §§ 251.11 or 251.12);

(2) MMS receives your request for reimbursement and the Regional Director determines that the requested reimbursement is proper; and

(3) The cost is at your lowest rate (or a third party's) or at the lowest commercial rate established in the area, whichever is less.

(b) MMS will reimburse you or the third party for the reasonable costs of processing geophysical information (which does not include cost of data acquisition):

(1) If at the request of the Regional Director, you processed the geophysical data or information in a form or manner other than that used in the normal conduct of business; or

(2) If you collected the information under a permit that MMS issued to you before October 1, 1985, and the Regional Director requests and retains the information.

(c) When you request reimbursement, you must identify reproduction and processing costs separately from acquisition costs.

(d) MMS will not reimburse you or a third party for data acquisition costs or for the costs of analyzing or processing geological information or interpreting geological or geophysical information.

§ 251.14 Protecting and disclosing data and information submitted to MMS under a permit.

(a) *Disclosure of data and information to the public by MMS.* (1) In making data and information available to the public, the Regional Director will follow the applicable requirements of:

(i) The Freedom of Information Act (5 U.S.C. 552);

(ii) The implementing regulations at 43 CFR part 2;

(iii) The Act; and

(iv) The regulations at 30 CFR parts 250 and 252 of this chapter.

(2) Except as specified in this section or in 30 CFR parts 250 and 252, if the Director determines any data or information is exempt from public disclosure under paragraph (a) of this section, MMS will not provide the data and information to any State or to the

executive of any local government or to the public, unless you and all third parties agree to the disclosure. (Third party includes all persons to whom you sold, licensed, traded, or otherwise transferred the data or information.)

(3) When you detect any significant hydrocarbon occurrences or environmental hazards on unleased lands during drilling operations, the Regional Director will immediately issue a public announcement. The announcement must further the national interest but without unduly damaging your competitive position.

(b) *Timetable for release of G&G data and information that MMS acquires.* MMS will release data and information that you or a third party submits and MMS retains in accordance with paragraphs (b)(1) and (b)(2) of this section.

(1) If the data and information are not related to a deep stratigraphic test, MMS will release them to the public in accordance with the following table:

If you or a third party submits and MMS retains	The Regional Director will disclose them to the public
Geological data and information.	10 years after issuing the permit.
Geophysical data	50 years after you submit the data.
Geophysical information.	25 years after you submit the information.

(2) If the data and information are related to a deep stratigraphic test, MMS will release them to the public at the earlier of the following times:

(i) Twenty-five years after you complete the test; or

(ii) If a lease sale is held after you complete a test well, 60 calendar days after MMS issues the first lease, a portion of which is located within 50 geographic miles (92.7 kilometers) of the test.

(c) *Procedure that MMS follows to disclose acquired data and information to a contractor for reproduction, processing, and interpretation.* (1) When practicable, the Regional Director will notify you of the intent to disclose the data or information to an independent contractor or agent.

(2) The notice will give you at least 5 working days to comment on the action.

(3) When the Regional Director notifies you, all other owners of such data or information will be considered to have been so notified.

(4) Before disclosure, the contractor or agent must sign a written commitment not to transfer or disclose data or information to anyone without the Regional Director's consent.

(d) *Sharing data and information with coastal States.* (1) When MMS solicits nominations for leasing lands located within 3 geographic miles (5.6 kilometers) of the seaward boundary of any coastal State, the Regional Director in accordance with 30 CFR 252.7 (a)(4) and (b) and subsections 8(g) and 26(e) of the Act (43 U.S.C. 1337(g) and 1352(e)) will provide the Governor with:

(i) All information on the geographical, geological, and ecological characteristics of the areas and regions MMS proposes to offer for lease;

(ii) An estimate of the oil and gas reserves in the areas proposed for leasing; and

(iii) An identification of any field, geological structure, or trap on the OCS within 3 geographic miles (5.6 kilometers) of the seaward boundary of the State.

(2) After receiving nominations for leasing an area of the OCS within 3 geographic miles of the seaward boundary of any coastal State, MMS will carry out a tentative area identification according to 30 CFR part 256, subparts D and E. At that time, the Regional Director will consult with the Governor to determine whether any tracts further considered for leasing may contain any oil or gas reservoirs that underlie both the OCS and lands subject to the jurisdiction of the State.

(3) Before a sale, if a Governor requests, the Regional Director, in accordance with 30 CFR 252.7(a)(4) and (b) and sections 8(g) and 26(e) of the Act (43 U.S.C. 1337(g) and 1352(e)) will share with the Governor information that identifies potential and/or proven common hydrocarbon bearing areas within 3 geographic miles of the seaward boundary of that State.

(4) Knowledge received by the State official who receives information described in paragraph (d) of this section is subject to applicable confidentiality requirements of:

(i) The Act; and

(ii) The regulations at 30 CFR parts 250, 251, and 252 of this chapter.

§ 251.15 Authority for information collection.

(a) The Office of Management and Budget has approved the information collection requirements in part under 44 U.S.C. 3501 *et seq.* and assigned OMB control number 1010–0048. The title of this information collection is ''30 CFR Part 251, Geological and Geophysical (G&G) Explorations of the OCS.'' Paragraph (d) of this section lists the sections in this part requiring the information collection, summarizes how MMS will use the information, and indicates the reason for the response.

(b) An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

(c) Send comments regarding any aspect of the collection of information under this part, including suggestions for reducing the burden, to the Information Collection Clearance Officer, Minerals Management Service, Mail Stop 2053, 381 Elden Street, Herndon, Virginia 20170–4817; and to the Office of Information and Regulatory Affairs, Office of Management and Budget, Attention: Desk Officer for the Department of the Interior (1010–0048), 725 17th Street, NW, Washington, DC 20503.

(d) MMS is collecting this information for the reasons given in the following table:

Regulation cite	Information used	Response
30 CFR 251.5	To evaluate permit applications and to monitor scientific research activities for environmental and safety reasons.	The response is required to obtain a benefit.
30 CFR 251.6(b)	To determine that explorations do not harm resources, result in pollution or create hazardous or unsafe conditions.	The response is mandatory.
30 CFR 251.6(c)	To coordinate activities in the OCS and not harm or interfere with other users in the area.	The response is required to obtain a benefit.
30 CFR 251.7: The burden for this section is included with 30 CFR 250.31 and 250.33 (OMB Control No. 1010–0049).	To analyze and evaluate preliminary or planned drilling activities of permittees in the OCS.	The response is mandatory.
30 CFR 251.8(a)	To approve reimbursement of certain expenses	The response is required to obtain a benefit.
30 CFR 251.8 (b) and (c)	To monitor the progress of activities carried out under an OCS G&G permit.	The response is mandatory.

Regulation cite	Information used	Response
30 CFR 251.9(c)(2)	To monitor the activities carried out under an OCS G&G permit	The response is mandatory.
30 CFR 251.11 and 251.12	To inspect and select G&G data and information collected under an OCS G&G permit.	The response is mandatory.
30 CFR 251.13	To determine eligibility for reimbursement from the Government for certain costs.	The response is required to obtain a benefit.

[FR Doc. 97–3200 Filed 2–10–97; 8:45 am]
BILLING CODE 4310–MR–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[IL154–b–1; FRL–5685–8]

Approval and Promulgation of Implementation Plans; Illinois

AGENCY: Environmental Protection Agency (USEPA).
ACTION: Proposed rule.

SUMMARY: On October 11, 1996, Illinois submitted a negative declaration regarding the need for rules controlling air emissions from sources classified as part of the ''Shipbuilding and Ship Repair Industry'' (SSRI) or ''Marine Coatings'' category in the Standard Industrial Classification (SIC) Manual. This negative declaration indicates that the State of Illinois has determined that there are no major sources (sources with a potential to emit twenty-five or more tons per year of volatile organic material (VOM)) in the Chicago ozone nonattainment area or the Metro-East ozone nonattainment area. In this action, USEPA is proposing to approve the State's finding that no additional control measures are needed. In the final rules section of this Federal Register, the USEPA is approving these actions as a direct final rule without prior proposal because USEPA views this as a noncontroversial action and anticipates no adverse comments. A detailed rationale for the approval is set forth in the direct final rule. If no adverse comments are received in response to that direct final rule, no further activity is contemplated in relation to this proposed rule. If USEPA receives adverse comments, the direct final rule will be withdrawn and all public comments received will be addressed in a subsequent final rule based on the proposed rule. USEPA will not institute a second comment period on this action. Any parties interested in commenting on this notice should do so at this time.

DATES: Comments on this proposed rule must be received on or before March 13, 1997.

ADDRESSES: Written comments should be mailed to: J. Elmer Bortzer, Chief, Regulation Development Section, Air Programs Branch (AR18–J), U.S. Environmental Protection Agency, Region 5, 77 West Jackson Boulevard, Chicago, Illinois 60604.

Copies of the State submittal and USEPA's analysis of it are available for inspection at: Regulation Development Section, Air Programs Branch (AR18–J), U.S. Environmental Protection Agency, Region 5, 77 West Jackson Boulevard, Chicago, Illinois 60604.

FOR FURTHER INFORMATION CONTACT: Randolph O. Cano, Regulation Development Section, Air Programs Branch (AR–18J), U.S. Environmental Protection Agency, Region 5, 77 West Jackson Boulevard, Chicago, Illinois 60604, (312) 886–6036.

SUPPLEMENTARY INFORMATION: For additional information see the direct final rule published in the rules section of this Federal Register.

Dated: January 23, 1997.

Steve Rothblatt,

Acting Regional Administrator.

[FR Doc. 97–3255 Filed 2–10–97; 8:45 am]
BILLING CODE 6560–50–P

40 CFR Part 52

[IL153–b1; FRL–5684–9]

Approval and Promulgation of Implementation Plans; Illinois

AGENCY: U.S. Environmental Protection Agency (USEPA).
ACTION: Proposed rule.

SUMMARY: On October 11, 1996, Illinois submitted a negative declaration regarding the need for rules controlling air emissions from sources classified as part of the ''Aerospace Manufacturing and Rework Industry'' (AMRI)) or ''Aerospace Coatings'' category in the Standard Industrial Classification (SIC) Manual. This negative declaration indicates that the State of Illinois has determined that there are no major sources (sources with a potential to emit twenty-five or more tons per year of volatile organic material (VOM) in the Chicago ozone nonattainment area or the Metro-East ozone nonattainment area. In this action, USEPA is proposing to approve the State's finding that no additional control measures are needed. In the final rules section of this Federal Register, the USEPA is approving these actions as a direct final rule without prior proposal because USEPA views this as a noncontroversial action and anticipates no adverse comments. A detailed rationale for the approval is set forth in the direct final rule. If no adverse comments are received in response to that direct final rule, no further activity is contemplated in relation to this proposed rule. If USEPA receives adverse comments, the direct final rule will be withdrawn and all public comments received will be addressed in a subsequent final rule based on the proposed rule. USEPA will not institute a second comment period on this action. Any parties interested in commenting on this notice should do so at this time.

DATES: Comments on this proposed rule must be received on or before March 13, 1997.

ADDRESSES: Written comments should be mailed to: J. Elmer Bortzer, Chief, Regulation Development Section, Air Programs Branch (AR18–J), U.S. Environmental Protection Agency, Region 5, 77 West Jackson Boulevard, Chicago, Illinois 60604.

Copies of the State submittal and USEPA's analysis of it are available for inspection at: Regulation Development Section, Air Programs Branch (AR18–J), U.S. Environmental Protection Agency, Region 5, 77 West Jackson Boulevard, Chicago, Illinois 60604.

FOR FURTHER INFORMATION CONTACT: Randolph O. Cano, Regulation Development Section, Air Programs Branch (AR–18J), U.S. Environmental Protection Agency, Region 5, 77 West Jackson Boulevard, Chicago, Illinois 60604, (312) 886–6036.

SUPPLEMENTARY INFORMATION: For additional information see the direct final rule published in the rules section of this Federal Register.

Dated: January 23, 1997.

Steve Rothblatt,

Acting Regional Administrator.

[FR Doc. 97–3253 Filed 2–10–97; 8:45 am]
BILLING CODE 6560–50–P

40 CFR Part 52

[AK14–7102b; FRL–5686–3]

Approval and Promulgation of State Implementation Plans: Alaska

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The EPA proposes to approve the State Implementation Plan (SIP) revision submitted by the State of Alaska for the purpose of approving the 1990 base year carbon monoxide emission inventory portion of the Anchorage and Fairbanks, Alaska carbon monoxide (CO) State Implementation Plan (SIP) submitted on December 29, 1993, by the State of Alaska Department of Environmental Conservation (ADEC). The SIP revision was submitted by the State to satisfy certain Federal Clean Air Act requirements for the purpose of bringing about the attainment of the national ambient air quality standard (NAAQS) for CO. In the Final Rules Section of this Federal Register, the EPA is approving the State's SIP revision as a direct final rule without prior proposal because the Agency views this as a noncontroversial revision amendment and anticipates no adverse comments. A detailed rationale for the approval is set forth in the direct final rule. If no adverse comments are received in response to this proposed rule, no further activity is contemplated in relation to this rule. If the EPA receives adverse comments, the direct final rule will be withdrawn and all public comments received will be addressed in a subsequent final rule based on this proposed rule. The EPA will not institute a second comment period on this action.

DATES: Comments on this proposed rule must be received in writing by March 13, 1997.

ADDRESSES: Written comments should be addressed to Montel Livingston, Environmental Protection Specialist (OAQ–107), Office of Air Quality, at the EPA Regional Office listed below. Copies of the documents relevant to this proposed rule are available for public inspection during normal business hours at the following locations. The interested persons wanting to examine these documents should make an appointment with the appropriate office at least 24 hours before the visiting day.

Environmental Protection Agency, Region 10, Office of Air Quality, 1200 6th Avenue, Seattle, WA 98101.

Alaska Department of Environmental Conservation, 410 Willoughby, Suite 105, Juneau, Alaska 99801–1795.

FOR FURTHER INFORMATION CONTACT: John Pavitt, EPA Region 10, Alaska Operations Office (AOO/A), 222 W. 7th Avenue, Box #19, Anchorage, AK 99513–7588, (907) 271–5083.

SUPPLEMENTARY INFORMATION: See the information provided in the Direct Final action which is located in the Rules Section of this Federal Register.

Dated: January 28, 1997.

Chuck Clarke,

Regional Administrator.

[FR Doc. 97–3364 Filed 2–10–97; 8:45 am]

BILLING CODE 6560–50–P

40 CFR Part 721

[OPPTS–50581B; FRL–5580–8]

Proposed Revocation of Significant New Use Rules for Certain Chemical Substances

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is proposing to revoke two significant new use rules (SNUR) promulgated under section 5(a)(2) of the Toxic Substances Control Act (TSCA) for certain chemical substances based on new toxicity data. Based on the data the Agency determined that it could no longer support a finding that activities not described in the TSCA section 5(e) consent order may result in significant changes in human exposure.

DATES: Written comments must be received by March 13, 1997.

ADDRESSES: Each comment must bear the docket control number OPPTS–50581B. All comments should be sent in triplicate to: OPPT Document Control Officer (7407), Office of Pollution Prevention and Toxics, Environmental Protection Agency, 401 M Street, SW., Room G–099, East Tower, Washington, DC 20460.

All comments which are claimed confidential must be clearly marked as such. Three additional sanitized copies of any comments containing confidential business information (CBI) must also be submitted. Nonconfidential versions of comments on this rule will be placed in the rulemaking record and will be available for public inspection. Unit III of this preamble contains additional information on submitting comments containing 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 (OPPTS–50581B). No CBI should be submitted through e-mail. Electronic comment on this notice may be filed online at many Federal Depository Libraries. Additional information on electronic submissions can be found under Unit IV of this preamble.

FOR FURTHER INFORMATION CONTACT: Susan B. Hazen, Director, Environmental Assistance Division (7408), Office of Pollution Prevention and Toxics, Environmental Protection Agency, Rm. E–543A, 401 M St., SW., Washington, DC 20460; telephone: (202) 554–1404; TDD: (202) 554–0551; e-mail: TSCA-Hotline@epamail.epa.gov.

SUPPLEMENTARY INFORMATION: In the Federal Register of October 31, 1990 (55 FR 45994) EPA issued a SNUR establishing significant new uses for the substances listed in Unit I of this preamble. Because of additional data EPA has received for these substances, EPA is proposing to revoke the SNURs.

I. Proposed Revocation

EPA is proposing to revoke the significant new use and recordkeeping requirements for the following chemical substances under 40 CFR part 721, subpart E. In this unit, EPA provides a brief description for the substances, including its premanufacture notice (PMN) number, chemical name (generic name if the specific name is claimed as CBI), CAS number (if assigned), basis for the revocation of the section 5(e) consent order for the substance, and the CFR citation removed in the regulatory text section of this proposed rule. Further background information for the substances is contained in the rulemaking record referenced below in Unit IV of this preamble.

PMN Number P–89–697

Chemical name: (generic) Alkenoic acid, trisubstituted-benzyl-disubstituted-phenyl ester.

CAS number: Not available.

Basis for revocation of SNUR: Based on data for triethylene glycol diacrylate which was not carcinogenic in a long term dermal bioassay in mice and a 28-day study for P–89–694 which demonstrated no dermal absorption or toxic effects by the dermal route, EPA no longer supports the carcinogenicity concern for this substance. Based on that assessment EPA determined that it could no longer support an unreasonable risk finding under section 5(e) of TSCA and is revoking the consent order. EPA can no longer make

the finding that activities not described in the TSCA section 5(e) consent order may result in significant changes in human exposure.
CFR Number: 40 CFR 721.3020.

PMN Number P–89–694

Chemical name: (generic) Alkenoic acid, trisubstituted-phenylalkyl-disubstituted-phenyl ester.
CAS number: Not available.
Basis for revocation of SNUR: Based on data for triethylene glycol diacrylate which was not carcinogenic in a long term dermal bioassay in mice, and a 28-day study for this substance which demonstrated no dermal absorption or toxic effects by the dermal route, EPA no longer supports the carcinogenicity concern for this substance. Based on that assessment EPA determined that it could no longer support an unreasonable risk finding under section 5(e) of TSCA and is revoking the consent order. EPA can no longer make the finding that activities not described in the TSCA section 5(e) consent order may result in significant changes in human exposure.
CFR Number: 40 CFR 721.3040.

II. Background and Rationale for Revocation of the Rule

During review of the PMNs submitted for the chemical substances that are the subject of this revocation, EPA concluded that regulation was warranted based on the fact that activities not described in the section 5(e) consent order may result in significant changes in human exposure. Based on these findings, SNURs were promulgated.

EPA will revoke the section 5(e) consent order that is the basis for these SNURs and has determined that it can no longer support a finding that activities not described in the section 5(e) consent order may result in significant changes in human exposure. The proposed revocation of SNUR provisions for these substances designated herein is consistent with this finding.

In light of the above, EPA is proposing to revoke the SNUR provisions for these chemical substances. When this revocation becomes final, EPA will no longer require notice of any company's intent to manufacture, import, or process these substances. In addition, export notification under section 12(b) of TSCA will no longer be required.

III. Comments Containing Confidential Business Information

Any person who submits comments claimed as CBI must mark the comments as ''confidential,'' ''trade secret,'' 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 must prepare and submit a public version of the comments that EPA can place in the public file.

IV. Rulemaking Record

A record has been established for this rulemaking under docket number OPPTS 50581B (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 12 noon to 4 p.m., Monday through Friday, except legal holidays. The public record is located in the TSCA Nonconfidential Information Center Rm. NE–B607, 401 M St., SW., Washington, DC 20460.

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 rulemaking, as well as the public version, as described above will be kept in paper form. Accordingly, EPA will transfer all comments received electronically into printed, paper form as they are received and will place the paper copies in the official rulemaking record which will also include all comments submitted directly in writing. The official rulemaking record is the paper record maintained at the address in ''ADDRESSES'' at the beginning of this document.

V. Regulatory Assessment Requirements

EPA is revoking the requirements of this rule. Any costs or burdens associated with this rule will also be eliminated when the rule is revoked. Therefore, EPA finds that no costs or burdens must be assessed under Executive Order 12866, the Regulatory Flexibility Act (5 U.S.C. 605(b)), or the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*).

List of Subjects in 40 CFR Part 721

Environmental protection, Chemicals, Hazardous materials, Recordkeeping and reporting requirements.

Dated: February 3, 1997.

Charles M. Auer,
Director, Chemical Control Division, Office of Pollution Prevention and Toxics.

Therefore, it is proposed that 40 CFR part 721 be amended as follows:

PART 721—[AMENDED]

1. The authority citation for part 721 would continue to read as follows:

Authority: 15 U.S.C. 2604, 2607, and 2625(c).

§ 721.3020 [Removed]

2. By removing § 721.3020.

§ 721.3040 [Removed]

3. By removing § 721.3040.

[FR Doc. 97–3382 Filed 2–10–97; 8:45 am]
BILLING CODE 6560–50–F

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

49 CFR Part 395

FHWA Docket No. MC–96–28

RIN 2125–AD93

Public Meetings for Drivers and Other Interested Persons

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Notice of meetings.

SUMMARY: The FHWA is announcing seven public meeting listening sessions for commercial motor vehicle drivers and other interested persons to speak with FHWA officials about their problems with the FHWA's hours-of-service regulations. This action is necessary to inform the public about the dates, times, and locations of the listening sessions. The FHWA hopes to hear from the public, specifically drivers of trucks and buses, about how the hours-of-service regulations affect their professional, personal, and family life. All oral comments will be transcribed and placed in the rulemaking docket for the FHWA's consideration.

DATES: Session 1—Monday, March 10, 1997, Kansas City, Missouri.

Session 2—Wednesday, March 12, 1997, Billings, Montana.

Session 3—Friday, March 14, 1997, Ontario, California.

Session 4—Friday, March 14 through Saturday, March 15, 1997, Ontario, California.

Session 5—Tuesday, March 18, 1997, Doswell, Virginia.

Session 6—Wednesday, March 26, 1997, Birmingham, Alabama.

Session 7—Monday, March 31, 1997, Washington, District of Columbia.

The listening sessions will start at 8:30 a.m. and end at 5:00 p.m. local time, on each of these dates, except for Sessions 4 and 7. The ending time may be extended at any session to accommodate the attendees, except for Session 7 in Washington, D.C. The listening session for Session 4 will start at 10:00 p.m. March 14, 1997 and end at 4:00 a.m. March 15, 1997, local time. Session 7 in Washington, D.C. will end at 4:00 p.m. local time.

Written comments to the general ANPRM should be submitted to the public docket no later than March 31, 1997. Late comments will be considered to the extent practicable.

ADDRESSES:

Written Comments. Written comments should be sent to: Docket Clerk, Attn: FHWA Docket No. MC–96–28, Federal Highway Administration, Department of Transportation, Room 4232, 400 Seventh Street, SW., Washington, D.C. 20590. Persons who require acknowledgment of the receipt of their comments must enclose a stamped, self-addressed postcard. Comments may be reviewed at the above address from 8:30 a.m. through 3:30 p.m. Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT:

General Information. To request time to be heard at the Washington, D.C. listening session and for other general information about all listening sessions, contact Mr. Stan Hamilton, Office or Motor Carrier Planning and Customer Liaison, telephone (202) 366–0665.

Specific ANPRM Information. For information concerning the rulemaking, contact Mr. David Miller, Office of Motor Carrier Research and Standards, (202) 366–1790.

SUPPLEMENTARY INFORMATION:

Addresses for Listening Sessions

The listening sessions will be held at these locations:

Session 1—Monday, March 10, 1997, Kansas City, Missouri, Park Place Hotel, 1601 North Universal (on west side of Interstate 435), Kansas City, Missouri 64120, Hotel Telephone: (816) 483–9900. *Directions to Session 1: From Interstate 435,* exit number 57. Truck tractor-trailer combinations and motorcoaches may park at the Flying J Truck Stop (on the east side of Interstate 435, exit 57). A van shuttle service will be provided.

Session 2—Wednesday, March 12, 1997, Billings, Montana, Holiday Inn Plaza, 5500 Midland Road, Billings, Montana 59101, Hotel Telephone: (406) 248–7701. *Directions to Session 2:* From Interstate 90, use exit 446 (Midland Road). Hotel parking area capacity: 70 truck tractor-trailer combinations. Additional truck and motorcoach parking may be found at Sinclair West Parkway Truck Stop, 5400 Laurel Road (exit 446 toward City Center, one block north of Interstate 90 and hotel). A van shuttle service will be provided.

Session 3—Friday, March 14, 1997, Ontario, California, Ontario Airport Hilton Hotel, 700 North Haven Avenue, Ontario, California 91764–4902, Hotel Telephone: 909–980–0400. *Directions to Sessions 3 and 4:* From Interstate 10, truck tractor-trailer combinations and motorcoaches exit onto southbound Milliken Avenue. Park at the Ontario Union 76 Truck Stop. Truck stop parking capacity: 500 truck tractor-trailer combinations. A van shuttle service will be provided. Truck tractors with no trailers, ''bobtails,'' may park at the hotel by exiting Interstate 10 on to northbound Haven Avenue. Turn right at Inland Empire Boulevard. Only ''bobtails'' may park in the hotel parking lot.

Session 4—Friday night, March 14 through Saturday, before dawn, March 15, 1997, Ontario, California, Ontario Airport Hilton Hotel, 700 North Haven Avenue, Ontario, California 91764–4902, Hotel Telephone: 909–980–0400.

Session 5—March 18, 1997, Doswell, Virginia, Doswell All-American Travel Plaza, Interstate 95 at exit 98, Doswell, Virginia 23047, All-American Telephone: (804) 876–3712. *Directions to Session 5:* From Interstate 95, use exit 98 (same exit as King's Dominion Amusement Park). All trucks and motorcoaches may park at the travel/truck stop plaza.

Session 6—March 26, 1997, Birmingham, Alabama, Birmingham-Jefferson Civic Center, 1 Civic Center Plaza (950 22nd Street, North), Birmingham, Alabama 35203, Civic Center Telephone: (800) 972–8007. Listening sessions will be held in Medical Forum Rooms A and B.

Motorcoaches and truck tractor-trailer combinations may park at the Best Western Hotel across the street from the Civic Center. Best Western Hotel parking area capacity: 15 to 20 truck tractor-trailer combinations. Additional motorcoach and truck parking may be found at the Civic Center large vehicle parking lot at 18th Street and 11th Avenue North (approximately four blocks from Civic Center—Medical Forum). *Directions to Session 6:* Interstate 65 North: From Montgomery going North, exit onto Interstate 20 and 59 North toward Atlanta. Exit onto 22nd Street North exit number 125–B. Proceed north one block to 23rd Street. Turn left. Proceed west one block to Civic Center Boulevard. *Interstate 65 South:* From Huntsville/Nashville going south, exit onto Interstate 20 and 59 North toward Atlanta. Merge immediately to the right side of the freeway and exit onto 22nd Street North exit number 125–B. Proceed north one block to 23rd Street. Turn left. Proceed west one block to Civic Center Boulevard. *Interstate 20 and 59 North:* From Tuscaloosa and points Southwest, exit onto 22nd Street North exit number 125–B. Proceed north one block to 23rd Street. Turn left. Proceed west one block to Civic Center Boulevard. *Interstate 20 and 59 South:* From Atlanta, exit at Carraway Boulevard exit number 125–A. Follow signs to 11th Avenue North. Follow the Civic Center signs to Civic Center Boulevard. Turn right onto Civic Center Boulevard.

Session 7—March 31, 1997, Washington, D.C., DOT Building, 400 Seventh Street, S.W., Room 2230, Telephone (202) 366–1790. *Session 7 Directions:* From the left lane of Interstate 295, exit onto Westbound East Capitol Street, drive around Robert F. Kennedy (RFK) Memorial Stadium. Park in the south RFK Stadium lot, marked Lot 8. Walk to the Metrorail subway system (about five city blocks). It is on the opposite side of the D.C. Armory from the parking lot. When you walk to the front of the D.C. Armory, the Metrorail station will be on your right about two more blocks. It is located at the intersection of 19th Street and ''A'' Street, S.E.

Enter the station by going down the escalator. Obtain a farecard from the vending machine ($1.10 one-way). Place the farecard in an entrance gate marked with a green arrow. Be sure you take the farecard out of the machine when it comes out, you will need the farecard when you get to L'Enfant Plaza station. If you need help buying a farecard or passing through the entrance gate, please ask the station attendant for assistance. Board a train going toward Van Dorn or Vienna. Flashing lights near a track means a train is about to enter the station on that track. Trains run about every 15 minutes. The L'Enfant Plaza station is five (5) stations away from the Stadium/Armory station.

When exiting the subway trains, use the escalators to the left (rear of the train) to go up to the U.S. Department of Transportation. Place the farecard in an exit gate marked with a green arrow. If you purchased a farecard for $1.10, the exit gate will keep your farecard. If you bought a farecard for more than $1.10, be sure you take the farecard out

of the machine when it comes out, as you will need the farecard to re-enter the station for the return trip. If you need help passing through the exit gate, please ask the station attendant for assistance. After exiting the exit gate, ride the second set of escalators to the plaza. Enter the U.S. DOT building through the Southwest Entrance (farthest entrance to the right across the plaza as you get off the escalator). A map on a column at the top of the escalator will also indicate the Southwest corner of the DOT building.

When you are ready to return to the RFK Stadium parking lot, re-enter the L'Enfant Plaza metrorail station at the DOT building. Purchase an additional farecard, enter the station and go down to the platform on the lowest level. Board a blue or orange train headed toward New Carrollton or Addison Road. When you get off the escalator, the correct train track will be to your left. Take the train five (5) stops to the Stadium/Armory station and walk back to the RFK Stadium parking lots by going around the D.C. Armory.

The FHWA is providing this opportunity to listen particularly to drivers who must live with, and follow, these regulations on a daily basis. The FHWA is specifically interested in hearing about problems drivers have with any aspect of the hours-of-service issue.

The FHWA will not have developed any proposals for this rulemaking by the time these listening sessions are held. These sessions are being held to obtain additional information that may assist us in formulating proposals that would minimize crashes, minimize regulatory burdens, are cost-effective, and are easy to understand. The FHWA would like to develop new proposals based upon supportable scientific data or, if scientific data is not supportable, by the best available professional judgment. The FHWA does not intend to base new proposals upon anecdotal information or intuitive opinion.

Anecdotal information or intuitive opinions from drivers and other members of the public, however, may assist us in developing proposals that are easy to understand, comply with, and are enforceable.

At all listening sessions, except in Washington, D.C., FHWA officials will recognize and listen to all persons with an interest in the hours-of-service regulations. An individual will not be required to make a formal statement at these listening sessions. It is not necessary to request time to be heard at the sessions, except for the Washington, D.C. session. All persons will be given an opportunity to participate. All discussions and comments made at the listening sessions will be recorded and transcribed and will be placed in the rulemaking docket.

For Washington, D.C. Participants Only

All persons who would like to participate at the Washington, D.C. session must request notice of their desire to participate by telephoning Mr. Stan Hamilton at (202) 366–0665 by 4:00 p.m. eastern standard time on Friday, March 28, 1997.

All persons participating at the Washington, D.C. session will be subject to Federal and DOT workplace security measures. All persons will need identification with their picture on it and must display the identification to DOT Security officers. The DOT's Security office will search all non-Government personnel. Please leave knives, guns, and other weapons at home. These weapons may be confiscated by DOT Security officers or the Metropolitan Police Department.

All persons will be required to sign-in at the guard's desk, walk-through metal detection devices (and possibly be searched with a hand-held metal detection device). All handbags and packages will be X-rayed by detection equipment. All visitors to DOT will be required to wear a ''Visitor'' badge at all times while in the DOT building.

The DOT's Security office will limit and monitor the public's access and movement through the DOT building. All persons requesting to participate in the session, but failing to satisfy DOT Security requirements, will be denied entry into the building and will forfeit their opportunity to participate in the Washington, D.C. listening session. Such persons will be allowed to submit written comments to the docket, at the above address, by the close of business on March 31, 1997.

Authority: 23 U.S.C. 315 and 49 CFR 1.48.

Issued on: February 6, 1997.

George L. Reagle,

Associate Administrator for Motor Carriers.

[FR Doc. 97–3387 Filed 2–10–97; 8:45 am]

BILLING CODE 4910–22–P

Notices

Federal Register
Vol. 62, No. 28
Tuesday, February 11, 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.

EXECUTIVE OFFICE OF THE PRESIDENT

Office of National Drug Control Policy

Administration Response to Arizona Proposition 200 and California Proposition 215

AGENCY: Office of National Drug Control Policy, Executive Office of the President.

ACTION: Notice.

SUMMARY: This notice lists the Federal government response to the recent passage of propositions which make dangerous drugs more available in California and Arizona. These measures pose a threat to the National Drug Control Strategy goal of reducing drug abuse in the United States. At the direction of the President, the Office of National Drug Control Policy (ONDCP) developed a coordinated administration strategy to respond to the actions in Arizona and California with the other agencies of the Federal Government to minimize the tragedy of drug abuse in America.

FOR FURTHER INFORMATION CONTACT: Comments and questions regarding this notice should be directed to Mr. Dan Schecter, Office of Demand Reduction, ONDCP, Executive Office of the President, 750 17th Street N.W., Washington, D.C. 20503, (202) 395–6733.

SUPPLEMENTARY INFORMATION: A Federal interagency working group chaired by ONDCP met four times in November and December. In developing this strategy, the inter-agency group gave due consideration to two key principles: federal authority vis a vis that of the states, and the requirement to ensure American citizens are provided safe and effective medicine. The President has approved this strategy, and Federal drug control agencies will undertake the following coordinated courses of action:

A. Objective 1—Maintain Effective Enforcement Efforts Within the Framework Created by the Federal Controlled Substances Act and the Food, Drug, and Cosmetic Act

Department of Justice's (DOJ) position is that a practitioner's action of recommending or prescribing Schedule I controlled substances is not consistent with the ''public interest'' (as that phrase is used in the federal Controlled Substances Act) and will lead to administrative action by the Drug Enforcement Administration (DEA) to revoke the practitioner's registration.

DOJ and Department of Health and Human Services (HHS) will send a letter to national, state, and local practitioner associations and licensing boards which states unequivocally that DEA will seek to revoke the DEA registrations of physicians who recommend or prescribe Schedule I controlled substances. This letter will outline the authority of the Inspector General for HHS to exclude specified individuals or entities from participation in the Medicare and Medicaid programs.

DOJ will continue existing enforcement programs using the following criteria: (a) the absence of a bona fide doctor-patient relationship; (b) a high volume of prescriptions or recommendations of Schedule I controlled substances; (c) the accumulation of significant profits or assets from the prescription or recommendation of Schedule I controlled substances; (d) Schedule I controlled substances being provided to minors; and/or (e) special circumstances, such as when death or serious bodily injury results from drugged driving. The five U.S. Attorneys in California and Arizona will continue to review cases for prosecution using these criteria.

DEA will adopt seizures of Schedule I controlled substances made by state and local law enforcement officials following an arrest where state and local prosecutors must decline prosecution because of the Propositions. Once in DEA's possession the drugs can be summarily forfeited and destroyed by DEA. State and local law enforcement officials will be encouraged to continue to execute state law to the fullest extent by having officers continue to make arrests and seizures under state law, leaving defendants to raise the medical use provisions of the Propositions only as a defense to state prosecution.

Department of the Treasury (Treasury) and the Customs Service will continue to protect the nation's borders and take strong and appropriate enforcement action against imported or exported marijuana and other illegal drugs. The Customs Service will continue to: (a) seize unlawfully imported or exported marijuana and other illegal drugs; (b) assess civil penalties against persons violating federal drug laws; (c) seize conveyances facilitating the illegal import or export of marijuana and other illegal drugs; and (d) arrest persons committing Federal drug offenses and refer cases for prosecution to the appropriate Federal or state prosecutor.

Treasury and the Internal Revenue Service (IRS) will continue the enforcement of existing Federal tax laws which discourage illegal drug activities.

IRS will enforce existing Federal tax law as it relates to the requirement to report gross income from whatever source derived, including income from activities prohibited under Federal or state law.

Treasury will recommend that the IRS issue a revenue ruling, to the extent permissible under existing law, that would deny a medical expense deduction for amounts expended for illegal operations or treatments and for drugs, including Schedule I controlled substances, that are illegally procured under Federal or state law.

IRS will enforce existing Federal tax law as it relates to the disallowance of expenditures in connection with the illegal sale of drugs. To the extent that state laws result in efforts to conduct sales of controlled substances prohibited by Federal law, the IRS will disallow expenditures in connection with such sales to the fullest extent permissible under existing Federal tax law.

U.S. Postal Service will continue to pursue aggressively the detection and seizure of Schedule I controlled substances mailed through the US mails, particularly in California and Arizona, and the arrest of those using the mail to distribute Schedule I controlled substances.

DEA together with other Federal, state and local law enforcement agencies will work with private mail, parcel and freight services to ensure continuing compliance with internal company

policies dictating that these companies refuse to accept for shipment Schedule I controlled substances and that they notify law enforcement officials of such activities. Federal investigations and prosecutions will be instituted consistent with appropriate criteria.

B. Objective 2—Ensure the Integrity of the Medical-Scientific Process by Which Substances are Approved as Safe and Effective Medicines in Order to Protect Public Health

The Controlled Substances Act embodies the conclusion of the Congress, affirmed by DEA and HHS, that marijuana, as a Schedule I drug, has ''high potential for abuse'' *and* ''no currently accepted medical use in treatment in the United States.'' To protect the public health, all evaluations of the medical usefulness of any controlled substance should be conducted through the Congressionally established research and approval process managed by the National Institutes of Health (NIH) and the Food and Drug Administration (FDA). Currently there are a few patients who receive marijuana through FDA approved investigations.

HHS to ensure the continued protection of the public health will: (a) examine all medical and scientific evidence relevant to the perceived medical usefulness of marijuana; (b) identify gaps in knowledge and research regarding the health effects of marijuana; (c) determine whether further research or scientific evaluation could answer these questions; and (d) determine how that research could be designed and conducted to yield scientifically useful results.

HHS will undertake discussions with medical organizations throughout the nation: (a) to address the ''compassionate use'' message; and (b) to educate medical and public health professionals by underscoring the dangers of smoked marijuana and explaining the views of NIH that a variety of approved medications are clinically proven to be safe and effective in treating the illnesses for which marijuana is purported to provide relief, such as pain, nausea, wasting syndrome, multiple sclerosis, and glaucoma.

C. Objective 3—Preserve Federal Drug-Free Workplace and Safety Programs

Transportation Workers: Department of Transportation (DOT) has issued a formal advisory to the transportation industry that safety-sensitive transportation workers who test positive under the Federally-required drug testing program may not under any circumstance use state law as a legitimate medical explanation for the presence of prohibited drugs. DOT is encouraging private employers to follow its example.

General Contractors and Grantees: Under the Drug-Free Workplace Act, the recipients of Federal grants or contracts must have policies that prohibit the use of illegal drugs. Each Federal agency will issue a notice to its grantees and contractors to remind them: (a) of their responsibilities; (b) that any use of marijuana or other Schedule I controlled substances remains a prohibited activity; and (c) that the failure to comply with this prohibition will make the grantee or contractor subject to the loss of eligibility to receive Federal grants and contracts. Further, Federal agencies will increase their efforts to monitor compliance with the provisions of the Act, and to institute suspension or debarment actions against violators—with special priority given to states enacting drug medicalization measures.

Federal Civilian Employees: HHS will issue policy guidance to all 130 Federal Agency Drug-Free Workplace program coordinators, the 72 laboratories certified by HHS to conduct drug tests, and trade publications that reach medical review officers. This policy guidance states that the Propositions do not change the requirements of the Federal Drug-Free Workplace Program, which will continue to be fully enforced for federal civilian employees nationwide. Medical Review Officers will not accept physician recommendations for Schedule I substances as a legitimate explanation for a positive drug test.

Department of Defense (DOD) and the Military Services: DOD will instruct civilian employees and military personnel in the active, reserve and National Guard components, that DOD is a drug-free organization, a fact that is not changed by the Propositions. The requirement that all DOD contractors maintain drug-free workplaces will continue to be enforced.

Nuclear Industry Workers: The Nuclear Regulatory Commission will continue to demand drug-free employees in the nuclear power industry, and will develop a formal advisory to emphasize that its drug free workplace regulations continue to apply.

Public Housing: The Propositions will not affect the Department of Housing and Urban Development's (HUD) continued aggressive execution of the ''One Strike and You're Out'' policy to improve the safety and security of our nation's public housing developments. HUD's principal tool for implementing ''One Strike'' will be the systematic evaluation of public housing agencies screening and evictions efforts through the Public Housing Management Assessment Program. This program will give HUD a standard measurement of the progress of all public housing authorities in developing effective law enforcement, screening, and occupancy policies to reduce the level of drug use, crime, and drug distribution and sales in their communities.

Safe Work Places: Department of Labor (DOL) will continue to implement its Working Partners Initiative, providing information to small businesses about workplace substance abuse prevention programs, focusing specific attention on trade and business organizations located in California and Arizona. DOL will accelerate its effort to post its updated Substance Abuse Information Database (SAID) on the Internet. SAID will provide information to businesses about workplace substance abuse and how to establish workplace substance abuse prevention programs. DOL will give priority to its efforts in California and Arizona.

DOL's Occupational Safety and Health Administration (OSHA) will send letters to the California and Arizona Occupational Safety and Health Administrations reiterating the dangers of drugs in the workplace and providing information on programs to help employers address these problems.

DOL's Mine Safety and Health Administration will continue to strictly enforce the prohibition on the use of alcohol and illegal drugs notwithstanding these Propositions.

D. Objective 4—Protect Children from Increased Marijuana Availability and Use

HHS and the Department of Education will educate the public in both Arizona and California about the real and proven dangers of smoking marijuana. A message will be tailored for preteens, teens, parents, educators, and medical professionals. Research demonstrates that, marijuana: (a) harms the brain, heart, lungs, and immune system; and (b) limits learning, memory, perception, judgment, and the ability to drive a motor vehicle. In addition, research shows that marijuana smoke typically contains over 400 carcinogenic compounds and may be addictive. The message will remind the public there is no medical use for smoked marijuana and will educate the public about strategies to prevent marijuana use. The message will also remind the public that the production, sale, and distribution of marijuana for medical uses not approved by DEA violates the

Controlled Substances Act and the Federal Food, Drug, and Cosmetic Act.

HHS will analyze all available data on marijuana use, expand ongoing surveys to determine current levels of marijuana use in California and Arizona, and track changes in marijuana use in those states.

HHS will develop the survey capacity to assess trends in drug use in all states on a state-by-state basis.

The Department of Education (Education) will use provisions of the Safe and Drug Free Schools Act to reinforce the message to all local education agencies receiving Federal Safe and Drug Free School funds that any drug possession or use will not be tolerated in schools. This affects approximately 95% of school districts. Notwithstanding the passage of the two Propositions, local education agencies must continue to: (a) develop programs which prevent the use, possession, and distribution of tobacco, alcohol, and illegal drugs by students; (b) develop programs which prevent the illegal use, possession, and distribution of such substances by school employees; and (c) ensure that programs supported by and with Federal Safe and Drug Free Schools funds convey the message that the illegal use of alcohol and other drugs, including marijuana, is wrong and harmful.

Education will review with educators in Arizona and California the effect Propositions 200 and 215 will have on drug use by students. They will also communicate nationally with school superintendents, administrators, principals, boards of education, and PTAs about the Arizona and California Propositions and the implications for their states.

Education will develop a model policy to confront ''medical marijuana'' use in schools and outline actions educators can take to prevent illicit drugs from coming into schools.

Education will develop model drug prevention programs to discourage marijuana use. These models will be disseminated to the states at a Spring 1997 conference.

ONDCP and DOT will provide recommendations pursuant to the October 19, 1996 Presidential directive to deter teen drug use and drugged driving through pre-license drug testing, strengthened law enforcement and other means. The recommendations will underscore the point that the use of marijuana for *any* reason endangers the health and safety of the public.

Legislative Enactments: ONDCP, HHS and DOJ will work with Congress to consider changes to the Federal Food, Drug, and Cosmetic Act and the Controlled Substances Act, as appropriate, to limit the states'' ability to rely on these and similar medical use provisions. The Administration believes that working with Congress is the course of action that will affirm the national policy to control substances that have a high potential for abuse and no accepted medical use. The objective is to provide a uniform policy which preserves the integrity of the medical-scientific process by which substances are approved as safe and effective medicines. We will also consider additional steps, including conditioning Federal funds on compliance with the Controlled Substances Act and the National Drug Control Strategy.

Signed at Washington, D.C. this 15th day of January, 1997.

Barry R. McCaffrey,

Director.

[FR Doc. 97–3334 Filed 2–10–97; 8:45 am]

BILLING CODE 3180–02–P

Designation of New High Intensity Drug Trafficking Areas

AGENCY: Office of National Drug Contol Policy, Executive Office of the President.

ACTION: Notice.

SUMMARY: This notice lists the five new High Intensity Drug Trafficking Areas (HIDTAs) designated by the Director, Office of National Drug Control Policy. HIDTAs are regions identified as having the most critical drug trafficking problems that adversely affect the United States. These new HIDTAs are designated pursuant to 21 U.S.C. 1504(c), as amended, to promote more effective coordination of drug control efforts. The additional resources provided by Congress enable task forces of local, State, and Federal officials to assess regional drug threats, design strategies to combat the threats, develop initiatives to implement the strategies, and evaluate effectiveness of these coordinated efforts.

FOR FURTHER INFORMATION CONTACT: Comments and questions regarding this notice should be directed to Mr. Richard Y. Yamamoto, Director, HIDTA, Office of National Drug Control Policy, Executive Office of the President, 750 17th Street N.W., Washington, D.C. 20503, (202) 395–6755.

SUPPLEMENTARY INFORMATION: In 1990, the Director of ONDCP designated the first five HIDTAs. These original HIDTAs, areas through which most illegal drugs enter the United States, are Houston, Los Angeles, New York/New Jersey, South Florida, and the Southwest Border. In 1994, the Director designated the Washington/Baltimore HIDTA to address the extensive drug distribution networks serving hardcore drug users. Also in 1994, the Director designated Puerto Rico/U.S. Virgin Islands as a HIDTA based on the significant amount of drugs entering the United States through this region.

In 1995, the Director designated three more HIDTAs in Atlanta, Chicago, and Philadelphia/Camden to target drug abuse and drug trafficking in those areas, specifically augmenting Empowerment Zone programs.

The five new HIDTAs will build upon the effective efforts of previously established HIDTAs. In Fiscal Year 1997, the HIDTA program will receive $140 million in Federal resources. The program will support more than 150 co-located officer/agent task forces; strengthen mutually supporting local, State, and Federal drug trafficking and money laundering task forces; bolster information analysis and sharing networks; and, improve integration of law enforcement, drug treatment, and drug abuse prevention programs. The states and counties included in the five new HIDTAs are:

(1) Cascade HIDTA: State of Washington; King, Pierce, Skagit, Snohomish, Thurston, Whatcom, and Yakima counties;

(2) Gulf Coast HIDTA: State of Alabama; Baldwin, Jefferson, Mobile, and Montgomery counties; State of Louisiana; Caddo, East Baton Rouge, Jefferson, and Orleans parishes; and State of Mississippi; Hancock, Harrison, Hinds, and Jackson counties.

(3) Lake County HIDTA: State of Indiana; Lake County.

(4) Midwest HIDTA: State of Iowa; Muscatine, Polk, Pottawattamie, Scott, and Woodbury counties; State of Kansas; Cherokee, Crawford, Johnson, Labette, Leavenworth, Saline, Seward, and Wyandotte counties; State of Missouri; Cape Girardeau, Christian, Clay, Jackson, Lafayette, Lawrence, Ray, Scott, and St. Charles counties, and the city of St. Louis; State of Nebraska; Dakota, Dawson, Douglas, Hall, Lancaster, Sarpy, and Scott's Bluff counties; State of South Dakota; Clay, Codington, Custer, Fall River, Lawrence, Lincoln, Meade, Minnehaha, Pennington, Union, and Yankton counties.

(4) Rocky Mountain HIDTA: State of Colorado; Adams, Arapahoe, Denver, Douglas, Eagle, El Paso, Garfield, Jefferson, La Plata, and Mesa counties; State of Utah; Davis, Salt Lake, Summit, Utah, and Weber counties; and State of Wyoming; Laramie, Natrona, and Sweetwater counties.

Signed at Washington, D.C. this 15th day of January, 1997.

Barry R. McCaffrey,

Director.

[FR Doc. 97–3334 Filed 2–10–97; 8:45 am]

BILLING CODE 3180–02–P

DEPARTMENT OF AGRICULTURE

Forest Service

California Coast Province Advisory Committee (PAC)

AGENCY: Forest Service, USDA.

ACTION: Notice of meeting.

SUMMARY: The California Coast Province Advisory Committee (PAC) will meet from 1:00 p.m. to 5:00 p.m., on February 26, 1997, and from 8:30 a.m. to 3 p.m. February 27, 1997, at the Six Rivers National Forest Supervisor's Office Conference Room, 1330 Bayshore Way, Eureka, CA. Agenda items to be covered include: (1) Survey and Manage species information presentation; (2) Province impacts of fish species listed/potentially listed as Threatened or Endangered; (3) Report and recommendations from Public/Private Subcommittee (4) Report and recommendations from Monitoring Subcommittee; (5) Report and recommendations from Work on the Ground Subcommittee; (6) Agency updates; (7) North Coast Environmental Center presentation; (8) Agency reports on December/January flood and storm damage on federal lands in the Province; (9) Update on Headwaters Forest; (10) USFWS request for proposals for restoration projects; and (11) Open public forum. All California Coast Province Advisory Committee meetings are open to the public. Interested citizens are encouraged to attend.

FOR FURTHER INFORMATION CONTACT:

Direct questions regarding this meeting to Daniel Chisholm, USDA, Forest Supervisor, Mendocino National Forest, 825 N. Humboldt Avenue, Willows, CA, 95988, (916) 934–3316 or Phebe Brown, Province Coordinator, USDA, Mendocino National Forest, 825 N. Humboldt Avenue, Willows, CA 95988, (916) 934–3316.

Dated: February 2, 1997.

Daniel K. Chisholm,

Forest Supervisor.

[FR Doc. 97–3264 Filed 2–10–97; 8:45 am]

BILLING CODE 3410–FK–M

Grain Inspection, Packers and Stockyards Administration

Opportunity for Designation in the Jamestown (ND) Area

AGENCY: Grain Inspection, Packers and Stockyards Administration (GIPSA).

ACTION: Notice.

SUMMARY: The United States Grain Standards Act, as amended (Act), provides that official agency designations will end not later than triennially and may be renewed. The designation of Grain Inspection, Inc. (Jamestown), will end July 31, 1997, according to the Act. In the January 2, 1997 Federal Register (62 FR 91), GIPSA asked for applications from persons interested in providing official services in the Jamestown area. Applications were due on or before January 31, 1997; no applications were received. GIPSA is again asking for applications from persons interested in providing official services in the Jamestown area.

DATES: Applications must be postmarked or sent by telecopier (FAX) on or before March 13, 1997.

ADDRESSES: Applications must be submitted to USDA, GIPSA, Janet M. Hart, Chief, Review Branch, Compliance Division, STOP 3604, 1400 Independence Avenue, S.W., Washington, DC 20250–3604. Applications may be submitted by FAX on 202–690–2755. If an application is submitted by FAX, GIPSA reserves the right to request an original application. All applications will be made available for public inspection at this address located at 1400 Independence Avenue, S.W., during regular business hours.

FOR FURTHER INFORMATION CONTACT: Janet M. Hart, telephone 202–720–8525.

SUPPLEMENTARY INFORMATION:

This action has been reviewed and determined not to be a rule or regulation as defined in Executive Order 12866 and Departmental Regulation 1512–1; therefore, the Executive Order and Departmental Regulation do not apply to this action.

Section 7(f)(1) of the Act authorizes GIPSA' Administrator to designate a qualified applicant to provide official services in a specified area after determining that the applicant is better able than any other applicant to provide such official services. GIPSA designated Jamestown, main office located in Jamestown, North Dakota, to provide official inspection services under the Act on August 1, 1994.

Section 7(g)(1) of the Act provides that designations of official agencies shall end not later than triennially and may be renewed according to the criteria and procedures prescribed in Section 7(f) of the Act. The designation of Jamestown ends on July 31, 1997, according to the Act.

Pursuant to Section 7(f)(2) of the USGSA, the following geographic area, in the State of North Dakota, is assigned to Jamestown.

Bounded on the North by Interstate 94 east to U.S. Route 85; U.S. Route 85 north to State Route 200; State Route 200 east to U.S. Route 83; U.S. Route 83 southeast to State Route 41; State Route 41 north to State Route 200; State Route 200 east to State Route 3; State Route 3 north to U.S. Route 52; U.S. Route 52 southeast to State Route 15; State Route 15 east to U.S. Route 281; U.S. Route 281 south to Foster County; the northern Foster County line; the northern Griggs County line east to State Route 32;

Bounded on the East by State Route 32 south to State Route 45; State Route 45 south to State Route 200; State Route 200 west to State Route 1; State Route 1 south to the Soo Railroad line; the Soo Railroad line southeast to Interstate 94; Interstate 94 west to State Route 1; State Route 1 south to the Dickey County line;

Bounded on the South by the southern Dickey County line west to U.S. Route 281; U.S. Route 281 north to the Lamoure County line; the southern Lamoure County line; the southern Logan County line west to State Route l3; State Route l3 west to U.S. Route 83; U.S. Route 83 south to the Emmons County line; the southern Emmons County line; the southern Sioux County line west State Route 49; State Route 49 north to State Route 21; State Route 21 west to the Burlington-Northern (BN) line; the Burlington-Northern (BN) line northwest to State Route 22; State Route 22 south to U.S. Route 12; U.S. Route 12 west-northwest to the North Dakota State line; and

Bounded on the West by the western North Dakota State line north to Interstate 94.

The following grain elevators, located outside of the above contiguous geographic area, are part of this geographic area assignment: Farmers Coop Elevator, Fessenden, Farmers Union Elevator, and Manfred Grain, both in Manfred, all in Wells County (located inside Grand Forks Grain Inspection Department, Inc.'s, area); and Norway Spur, and Oakes Grain, both in Oakes, Dickey County (located inside North Dakota Grain Inspection Service, Inc.'s, area).

Jamestown's assigned geographic area does not include the following grain elevators inside Jamestown's area which have been and will continue to be

serviced by the following official agency: Minot Grain Inspection, Inc.: Benson Quinn Company, Underwood; and Missouri Valley Grain Company, Washburn, all in McLean County.

Interested persons, including Jamestown, are hereby given the opportunity to apply for designation to provide official services in the geographic areas specified above under the provisions of Section 7(f) of the Act and section 800.196(d) of the regulations issued thereunder. Designation in the Jamestown geographic area is for the period beginning August 1, 1997, and ending July 31, 2000. Persons wishing to apply for designation should contact the Compliance Division at the address listed above for forms and information.

Applications and other available information will be considered in determining which applicant will be designated.

AUTHORITY: Pub. L. 94–582, 90 Stat. 2867, as amended (7 U.S.C. 71 *et seq.*)

Dated: February 5, 1997

Neil E. Porter

Director, Compliance Division

[FR Doc. 97–3374 Filed 2–10–97; 8:45 am]

BILLING CODE 3410–EN–F

Deposting of Stockyards

Notice is hereby given, that the livestock markets named herein, originally posted on the dates specified below as being subject to the Packers and Stockyards Act, 1921, as amended (7 U.S.C. 181 *et seq.*), no longer come within the definition of a stockyard under the Act and are therefore, no longer subject to the provisions of the Act.

Facility No., name, and location of stockyard	Date of posting
AZ–100, Arizona Livestock Auction, Inc., Phoenix, Arizona	February 12, 1975.
IA–111, Audubon County Livestock Exchange, Audubon, Iowa	May 28, 1959.
IA–127, Coggon Livestock Sales Co., Coggon, Iowa	May 18, 1959.
IA–163, Independence Livestock Sales Company, Independence, Iowa	May 23, 1959.
IA–259, The Auction Farm, Sheldon, Iowa	July 21, 1987.
NB–177, Spalding Livestock Market, Spalding, Nebraska	January 27, 1950.
NY–157, Bast's Livestock Exchange, Watertown, New York	August 2, 1978.
NC–167, Foothills Livestock Auction, Inc., Spindale, North Carolina	July 11, 1994.
PA–115, Green Dragon Livestock Sales, Ephrata, Pennsylvania	December 10, 1959.

This notice is in the nature of a change relieving a restriction and, thus, may be made effective in less than 30 days after publication in the Federal Register without prior notice or other public procedure. This notice is given pursuant to section 302 of the Packers and Stockyards Act (7 U.S.C. 202) and is effective upon publication in the Federal Register.

Done at Washington, D.C. this 3rd day of February 1997.

Daniel L. Van Ackeren,

Director, Livestock Marketing Division, Packers and Stockyards Programs.

[FR Doc. 97–3375 Filed 2–10–97; 8:45 am]

BILLING CODE 3210–KD–P

DEPARTMENT OF COMMERCE

Economics and Statistics Administration

2000 Census Advisory Committee

AGENCY: Economics and Statistics Administration, Department of Commerce.

ACTION: Notice of public meeting.

SUMMARY: Pursuant to the Federal Advisory Committee Act (Pub. L. 92–463, as amended by Pub. L. 94–409, Pub. L. 96–523, and 97–375), we are giving notice of a meeting of the 2000 Census Advisory Committee. The meeting will convene on March 6–7, 1997, at the Bureau of the Census, Conference Center, Federal Building 3, Suitland, MD 20746.

The Advisory Committee is composed of a Chair, Vice Chair, and up to thirty-five member organizations, all appointed by the Secretary of Commerce. The Advisory Committee will consider the goals of Census 2000 and user needs for information provided by that census, and provide a perspective from the standpoint of the outside user community about how operational planning and implementation methods proposed for Census 2000 will realize those goals and satisfy those needs. The Advisory Committee shall consider all aspects of the conduct of the 2000 census of population and housing, and shall make recommendations for improving that census.

DATES: On Thursday, March 6, 1997, the meeting will begin at 9:00 a.m. and adjourn for the day at 4:30 p.m. On Friday, March 7, 1997, the meeting will begin at 9:00 a.m. and adjourn at 3:30 p.m.

ADDRESSES: The meeting will take place at the Bureau of the Census, Conference Center, Federal Building 3, Suitland, MD 20746.

FOR FURTHER INFORMATION CONTACT: Anyone wishing additional information about this meeting, or who wishes to submit written statements or questions, may contact Maxine Anderson-Brown, Committee Liaison Officer, Department of Commerce, Bureau of the Census, Room 3039, Federal Building 3, Washington, DC 20233, telephone: 301–457–2308.

SUPPLEMENTARY INFORMATION: A brief period will be set aside for public comment and questions. However, individuals with extensive questions or statements for the record must submit them in writing to the Commerce Department official named above at least three working days prior to the meeting.

The meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Kathy Maney; her telephone number is 301–457–2308.

Dated: February 6, 1997.

Everett M. Ehrlich,

Under Secretary for Economic Affairs, Economics and Statistics Administration.

[FR Doc. 97–3378 Filed 2–10–97; 8:45 am]

BILLING CODE 3510–EA–M

International Trade Administration

[A–588–609]

Color Picture Tubes From Japan; Preliminary Results of Antidumping Administrative Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

ACTION: Notice of preliminary results of antidumping duty administrative review of color picture tubes from Japan.

SUMMARY: In response to a request by the petitioners, the Department of Commerce (the Department) is conducting an administrative review of the antidumping duty order on color picture tubes (CPTs) from Japan. The period of review (POR) is January 1, 1995 through December 31, 1995. The review indicates the existence of dumping margins during this period.

We have preliminarily determined that subject merchandise has been sold at less than normal value (NV) during the POR. If these preliminary results are adopted in our final results of administrative review, we will instruct the U.S. Customs Service to assess antidumping duties on entries during the POR. Interested parties are invited to comment on these preliminary results.

EFFECTIVE DATE: February 11, 1997.

FOR FURTHER INFORMATION CONTACT: Charles Riggle or Kris Campbell, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, N.W., Washington D.C. 20230; telephone (202) 482–4733.

Applicable Statute

Unless otherwise indicated, all citations to the Tariff Act of 1930, as amended, (the Act) are references to the provisions effective January 1, 1995, the effective date of the amendments made to the Act by the Uruguay Round Agreements Act (URAA). In addition, 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).

Background

On January 26, 1996, the Department published in the Federal Register (61 FR 2488) a notice of ''Opportunity To Request an Administrative Review'' of the antidumping duty order on CPTs from Japan (52 FR 44171 (November 18, 1987)). In accordance with 19 C.F.R. 353.22(a), the petitioners, the International Association of Machinists and Aerospace Workers, International Union of Electronic, Electrical, Salaried, Machine & Furniture Workers, AFL–CIO, Industrial Union Department AFL–CIO, requested that we conduct an administrative review of sales of CPTs from Japan by Mitsubishi Electric Corporation (MELCO). We published a notice of initiation of this antidumping duty administrative review on February 20, 1996 (61 FR 6347), covering the period January 1, 1995 through December 31, 1995.

Because it was not practicable to complete this review within the normal time frame, on October 25, 1996, we published in the Federal Register our notice of extension of the time limit for these preliminary results to January 30, 1997 (61 FR 55271). The deadline for the final results will continue to be 120 days after publication of these preliminary results.

Scope of Review

Imports covered by this review are shipments of CPTs from Japan. CPTs are defined as cathode ray tubes suitable for use in the manufacture of color televisions or other color entertainment display devices intended for television viewing. This merchandise is classifiable under the *Harmonized Tariff Schedule* (HTS) item numbers 8540.11.00.10, 8540.11.00.20, 8540.11.00.30, 8540.11.00.40, 8540.11.00.50 and 8540.11.00.60. Although the HTS item numbers are provided for convenience and customs purposes, our written description of the scope of this proceeding is dispositive.

Verification

In accordance with section 782(i) of the Act, we verified information provided by MELCO by using standard verification procedures, including onsite inspection of the manufacturer's facilities, the examination of relevant sales and financial records, and selection of original documentation containing relevant information. We conducted the verification at the company's headquarters in Kyoto, Japan, from September 17 through September 20, 1996. Our verification results are outlined in the public version of the verification report. See Memorandum from Case Analyst to File, dated December 27, 1996.

Product Comparisons

We calculated NV on a monthly weighted-average basis. Where possible, we compared U.S. sales to sales of identical merchandise in Japan. For U.S. sales in which identical merchandise was not sold during the relevant contemporaneous period, we compared U.S. sales to the most similar foreign like product on the basis of characteristics listed in MELCO's April 1, 1996 response to section A of our questionnaire.

Constructed Export Price

We calculated a constructed export price (CEP) for MELCO's U.S. transactions, in accordance with section 772(b) of the Act, because sales to the first unrelated purchaser took place after importation into the United States.

We calculated CEP based on the packed, ex-warehouse price from the U.S. subsidiary to unrelated customers. We made deductions from CEP for U.S. packing in the United States, international freight, foreign inland freight, marine insurance, U.S. customs duties, U.S. inland freight insurance and U.S. inland freight. In accordance with section 772(d)(1) of the Act, we deducted from CEP the following selling expenses that related to economic activity in the United States: commissions, direct selling expenses, including advertising, warranties, credit expenses, discounts, rebates, and indirect selling expenses, including inventory carrying costs, and further manufacturing. We also made an adjustment for CEP profit in accordance with section 772 (d)(3) of the Act.

Normal Value

In order to determine whether there was a sufficient volume of sales in the home market to serve as a viable basis for calculating NV, we compared respondent's volume of home market sales of the foreign like product to the volume of U.S. sales of the subject merchandise, in accordance with section 773(a)(1)(C) of the Act. Since respondent's aggregate volume of home market sales of the foreign like product was greater than five percent of its aggregate volume of U.S. sales for the subject merchandise, we determined that the home market was viable. Therefore, we have based NV on home market sales. We based NV on the packed, delivered price to unrelated purchasers in the home market.

Where applicable, we made adjustments to home market prices for discounts, rebates, technical service expenses, pre-sale warehouse expenses, and royalties. To adjust for differences in circumstances of sale between the home market and the United States, we deducted post-sale inland freight and credit expense from NV in accordance with section 773(a)(6)(C) of the Act. In accordance with 19 C.F.R. 353.56(b), we made an adjustment to NV for indirect selling expenses in the home market to offset the sum of commissions in the United States.

In order to adjust for differences in packing between the two markets, we deducted home market packing costs from NV and added U.S. packing costs.

We compared U.S. sales of CPTs to NV based on constructed value (CV) when MELCO did not have contemporaneous home market sales of CPTs with which we could compare the U.S. sale. We calculated CV in accordance with section 773(e) of the Tariff Act. We included the cost of materials, labor, general expenses, profit and packing. Where appropriate, we

made adjustments to CV, in accordance with 19 C.F.R. 353.56, for differences in circumstances of sale.

The home market and CV databases that MELCO submitted did not contain matches for certain U.S. sales. *See Memorandum from Analyst to File: Preliminary Results for MELCO,* January 30, 1997. Therefore, in accordance with section 776 of the Act, we applied a rate based on the facts available to these sales. Given the nature and extent of the deficiency, we have selected the weighted-average rate that we calculated for all other sales in this review (1.92 percent) as facts available. *See* section 776(a) of the Act.

Level of Trade and CEP Offset

As set forth in section 773(a)(7) of the Act and in the Statement of Administrative Action (H.R. Doc. 316, Vol. 1, 103d Cong., 2d Sess. (1994)) (SAA) at 829–831, to the extent practicable, we will calculate NV based on sales at the same level of trade as the U.S. sale. In this review, we were unable to find comparison sales at the same level of trade as the U.S. sales. Accordingly, we compared the sales in the United States to sales at a different level of trade in the comparison market.

In accordance with section 773(a)(7)(A) of the Act, if we compare a U.S. sale with a home market sale made at a different level of trade, we will adjust the NV to account for this difference if two conditions are met. First, there must be differences between the actual selling functions performed by the seller at the level of trade of the U.S. sale and at the level of trade of the comparison market sale used to determine NV. Second, the differences must affect price comparability as evidenced by a pattern of consistent price differences between sales at the different levels of trade in the market in which NV is determined. For CEP sales, section 773(a)(7)(B) of the Act establishes the procedures for making a CEP ''offset'' when two conditions exist: (1) NV is established at a level of trade which constitutes a more advanced stage of distribution than the level of trade of the CEP; and (2) the data available do not provide an appropriate basis for a level-of-trade adjustment.

We based the level of trade of CEP sales on the price in the United States after making the CEP deductions under section 772(d) but before making the deductions under section 772(c). Where home market sales served as the basis for NV, we determined the NV level of trade based on starting prices in the home market. Where NV was based on CV, we determined the NV level of trade based on the level of trade of the sales from which we derived SG&A and profit for CV.

In order to determine whether sales in the comparison market are at a different level of trade than the CEP, we examined whether the comparison sales were at different stages in the marketing process than the CEP. We made this determination on the basis of a review of the distribution system in the comparison market, including selling functions, class of customer, and the level of selling expenses for each type of sale. Different stages of marketing necessarily involve differences in selling functions, but differences in selling functions, even substantial ones, are not alone sufficient to establish a difference in the level of trade. Similarly, while customer categories such as ''distributor'' and ''wholesaler'' may be useful in identifying different levels of trade, they are insufficient in themselves to establish that there is a difference in the level of trade. *See Certain Corrosion-Resistant Carbon Steel Flat Products and Certain Cut-to-Length Carbon Steel Plate from Canada: Preliminary Results of Antidumping Duty Administrative Review,* 61 FR 51896 (October 4, 1996).

MELCO requested that we make a level-of-trade adjustment, or a CEP offset if we could not quantify a level-of-trade adjustment, because sales in the home market involved a more advanced level of trade than the level of trade of the CEP. Our analysis of the reported selling expenses, selling functions, and customer classes of U.S. and home market sales demonstrates that the home market sales are distributed through a more advanced marketing stage than that involved at the level of trade of the CEP.

Because we compared CEP sales to home market sales at a different level of trade, we examined whether a level-of-trade adjustment was appropriate. In this case, we were unable to quantify price differences involving comparisons of sales made at different levels of trade because the same level of trade as that of the CEP did not exist in the home market. Therefore, we could not determine whether there was a pattern of consistent price differences between the levels of trade based on respondent's home market sales of merchandise under review.

Because we were unable to quantify a level-of-trade adjustment based on a pattern of consistent price differences, we granted a CEP offset where the comparison sales were at a more advanced level of trade than the sales to the United States, in accordance with section 773(a)(7)(B) of the Act.

To calculate the CEP offset, in accordance with section 772(d)(1)(D) of the Act, we considered the home market indirect selling expenses and deducted this amount from NV on home market sales which we compared to U.S. CEP sales. We limited the home market indirect selling expense deduction by the amount of the indirect selling expenses incurred in the United States.

Currency Conversion

We made currency conversions in accordance with section 773A of the Act. Currency conversions were made at the rates certified by the Federal Reserve Bank. Section 773A(a) directs the Department to use a daily exchange rate to convert foreign currencies into U.S. dollars unless the daily rate involves a ''fluctuation.'' It is our practice to find that a fluctuation exists when the daily exchange rate differs from a benchmark rate by 2.25 percent. *See Preliminary Results of Antidumping Duty Administrative Review: Certain Welded Carbon Steel Pipe and Tube from Turkey,* 61 FR 35188, 35192 (July 5, 1996). The benchmark rate is defined as the rolling average of the rates for the past 40 business days. Because we found no fluctuation in this case, we believe it is appropriate to use a daily exchange rate for currency conversion purposes.

Preliminary Results of the Review

As a result of our comparison of the CEP to NV, we preliminarily determine that the following dumping margin exists for the period January 1, 1995 through December 31, 1995:

Manufacturer/exporter	Margin (percent)
MELCO	1.92

Parties to the proceeding may request disclosure within five days of the date of publication of this notice. Any interested party may request a hearing within 10 days of publication. Any hearing, if requested, will be held approximately 44 days after the publication of this notice. Interested parties may submit written comments (case briefs) within 30 days of the date of publication of this notice. Rebuttal comments (rebuttal briefs), which must be limited to issues raised in the case briefs, may be filed not later than 37 days after the date of publication. The Department will publish a notice of final results of this administrative review, including the results of its analysis of issues raised in any such written comments, within 120 days of publication of these preliminary results.

The Department shall determine, and the Customs Service shall assess, antidumping duties on all appropriate entries. Because the inability to link sales with specific entries prevents calculation of duties on an entry-by-entry basis, we have calculated an importer-specific *ad valorem* duty assessment rate for the merchandise based on the ratio of the total amount of antidumping duties calculated for the examined sales made during the POR to the total customs value of the sales used to calculate those duties. This rate will be assessed uniformly on all entries of that particular importer made during the POR. (This is equivalent to dividing the total amount of antidumping duties, which are calculated by taking the difference between NV and CEP, by the total CEP value of the sales compared, and adjusting the result by the average difference between CEP and customs value for all merchandise examined during the POR.) The Department will issue appraisement instructions directly to the Customs Service.

Furthermore, the following cash deposit requirements will be effective upon publication of the final results of this administrative review for all shipments of the subject merchandise entered, or withdrawn from warehouse, for consumption on or after the publication date, as provided for by section 751(a)(1) of the Act: (1) For MELCO the cash deposit rate will be the rate established in the final results of this review; (2) if the exporter is not a firm covered in this review, a previous review, or the original less-than-fair value investigation (LTFV), but the manufacturer is, the cash deposit rate will be that which was established for the most recent period for the manufacturer of the merchandise; (3) for non-Japanese exporters of subject merchandise from Japan, the cash deposit rate will be the rate applicable to the Japanese supplier of that exporter; (4) if neither the exporter nor the manufacturer is a firm covered in this or any previous reviews, the cash deposit rate will be 27.93 percent, the ''all others'' rate established in the LTFV investigation, as explained below. These deposit requirements, when imposed, shall remain in effect until publication of the final results of the next administrative review.

On May 25, 1993, the Court of International Trade (CIT) in *Floral Trade Council* v *United States,* 822 F.Supp. 766 (CIT 1993), and *Federal-Mogul Corporation and The Torrington Company* v. *United States,* 822 F.Supp. 782 (CIT) 1993), decided that once an ''All Others'' rate is established for a company it can only be changed through an administrative review. We have determined that, in order to implement these decisions, it is appropriate to reinstate the ''All Others'' rate from the LTFV investigation (or that rate as amended for correction of clerical errors or as a result of litigation) in proceedings governed by antidumping duty orders. Therefore, we are reinstating the ''All Others'' rate made effective by the final determination of sales at LTFV *(see Color Pictures Tubes,* 52 FR 44171, November 18, 1987).

This notice also serves as a preliminary reminder to importers of their responsibility under 19 C.F.R. 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 administrative review and notice are in accordance with section 751(a)(1) of the Act (19 U.S.C. 1675(a)(1)) and 19 C.F.R. 353.22.

Dated: January 30, 1997.

Robert S. LaRussa,

Acting Assistant Secretary for Import Administration.

[FR Doc. 97–3361 Filed 2–10–97; 8:45 am]

BILLING CODE 3510–DS–P

[A–533–808]

Certain Stainless Steel Wire Rod From India; Preliminary Results of New Shipper Antidumping Duty Administrative Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

ACTION: Notice of preliminary results of new shipper antidumping duty administrative review; Certain stainless steel wire rod from India.

SUMMARY: The Department of Commerce (the Department) is conducting a new shipper administrative review of the antidumping duty order on certain stainless steel wire rods (SSWR) from India in response to a request by one manufacturer/exporter, Isibars Limited (Isibars). This review covers sales of this merchandise to the United States during the period January 1, 1996 through June 30, 1996.

We have preliminarily determined that sales have not been made below normal value (NV). If these preliminary results are adopted in our final results of administrative review, we will instruct the U.S. Customs Service to liquidate subject entries without regard to antidumping duties.

Interested parties are invited to comment on these preliminary results. Parties who submit argument are requested to submit with the argument (1) a statement of the issue and (2) a brief summary of the argument.

EFFECTIVE DATE: February, 11, 1997.

FOR FURTHER INFORMATION CONTACT: Donald Little or Maureen Flannery, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, N.W., Washington D.C. 20230; telephone (202) 482–4733.

Applicable Statute and Regulations

Unless otherwise indicated, 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 June 28, 1996, the Department received a request from Isibars for a new shipper review pursuant to section 751(a)(2)(B) of the Act and section 353.22(h) of the Department's interim regulations, which govern determinations of antidumping duties for new shippers. These provisions state that, if the Department receives a request for review from an exporter or producer of the subject merchandise stating that it did not export the merchandise to the United States during the period of investigation (POI) and that such exporter and producer is not affiliated with any exporter or producer who exported the subject merchandise during that period, the Department shall conduct a new shipper review to establish an individual weighted-average dumping margin for such exporter or producer, if the Department has not previously established such a margin for the exporter or producer. To establish these facts, the exporter or producer must include with its request, with appropriate certification: (i) the date on which the merchandise was first entered, or withdrawn from warehouse, for consumption, or, if it cannot certify as to the date of first entry, the date on which it first shipped the merchandise

for export to the United States; (ii) a list of the firms with which it is affiliated; and (iii) a statement from such exporter or producer, and from each affiliated firm, that it did not, under its current or a former name, export the merchandise during the POI.

Isibars' request was accompanied by information and certification establishing the names of Isibar's affiliated parties and statements that Isibars and its affiliated parties did not, under any name, export the subject merchandise during the POI. Isibars supplied the date of shipment in a letter dated July 29, 1996.

On August 6, 1996, we published in the Federal Register (60 FR 40819) a notice of initiation of this new shipper antidumping duty administrative review of Isibars. The Department is now conducting this review in accordance with section 751 of the Act and section 353.22 of its interim regulations.

Scope of Review

The products covered by the order are SSWR which are hot-rolled or hot-rolled annealed and/or pickled rounds, squares, octagons, hexagons or other shapes, in coils. SSWR are made of alloy steels containing, by weight, 1.2 percent or less of carbon and 10.5 percent or more of chromium, with or without other elements. These products are only manufactured by hot-rolling and are normally sold in coiled form, and are of solid cross section. The majority of SSWR sold in the United States are round in cross-section shape, annealed and pickled. The most common size is 5.5 millimeters in diameter.

The SSWR subject to this review are currently classifiable under subheadings 7221.00.0005, 7221.00.0015, 7221.00.0020, 7221.00.0030, 7221.00.0040, 7221.00.0045, 7221.00.0060, 7221.00.0075, and 7221.00.0080 of the *Harmonized Tariff Schedule of the United States* (HTSUS). Although the HTSUS subheading is provided for convenience and customs purposes, the written description of the scope of this order is dispositive.

This review covers one manufacturer/exporter, Isibars, and the period January 1, 1996 through June 30, 1996.

Verification

As provided in section 776(b) of the Act, we verified information provided by the respondent by using standard verification procedures, including on-site inspection of the respondent's facilities, the examination of relevant sale and financial records, and selection of original documentation containing relevant information. Our verification results are outlined in the public version of the verification report.

United States Price

In calculating United States Price (USP), we used export price (EP), in accordance with section 772(a) of the Act, because the subject merchandise was sold directly to the first unaffiliated purchaser in the United States prior to importation into the United States and constructed export price was not otherwise indicated.

We calculated EP based on the price from Isibars to an unaffiliated customer prior to importation into the United States. In accordance with section 772(c)(2) of the Act, we made deductions for terminal handling charges, foreign inland freight, ocean freight, and marine insurance. No other adjustments were claimed or allowed.

Normal Value

Because there were no sales of the subject merchandise in the home market during the period of review (POR), we based NV on third country sales in accordance with section 773(a)(1)(C)(i) of the Act. In accordance with section 773(a)(1)(B)(ii) of the Act, we based NV on sales of the foreign like product to the Philippines because the prices were representative, the aggregate quantity of sales to the Philippines exceeded five percent of the aggregate quantity of the subject merchandise sold for export to the United States, and we did not find that the particular market situation prevented a proper comparison with EP.

We based NV on the packed, C&F price to unaffiliated purchasers in the Philippines. We made deductions for terminal handling charges, foreign inland freight, and ocean freight. We adjusted for differences in packing costs between the two markets. We made circumstance-of-sale adjustments for differences in credit costs and bank charges between the two markets. We deducted third country commissions and added U.S. indirect selling expenses up to the amount of the third country commission. Because Isibars failed to report U.S. indirect selling expenses, as facts available we based U.S. indirect selling expenses on the amount of the third country commission.

Preliminary Results of the Review

As a result of our comparison of EP and NV, we preliminarily determine that the following weighted-average dumping margin exists:

Manufacturer/exporter	Period	Margin
Isibars	1/1/96–6/30/96	0.00

Parties to the proceeding may request disclosure within five days of the date of publication of this notice. Any interested party may request a hearing within 10 days of publication. Any hearing, if requested, will be held 34 days after the publication of this notice, or the first workday thereafter. Interested parties may submit case briefs within 20 days of the date of publication of this notice. Rebuttal briefs, which must be limited to issues raised in the case briefs, may be filed not later than 27 days after the date of publication of this notice. Parties who submit argument are requested to submit with the argument (1) a statement of the issue and (2) a brief summary of the argument. The Department will issue the final results of this new shipper administrative review, which will include the results of its analysis of issues raised in any such comments, within 90 days of issuance of these preliminary results.

Upon completion of this new shipper review, the Department will issue appraisement instructions directly to the Customs Service. The results of this review shall be the basis for the assessment of antidumping duties on entries of merchandise sold during the POR and covered by the determination and for future deposits of estimated duties.

Furthermore, upon completion of this review, the posting of a bond or security in lieu of a cash deposit, pursuant to section 751(a)(2)(B)(iii) of the Act and section 353.22(h)(4) of the Department's interim regulations, will no longer be permitted and, should the final results yield a margin of dumping, a cash deposit will be required for each entry of the merchandise.

The following deposit requirement will be effective upon publication of the final results of this new shipper antidumping duty administrative review for all shipments of stainless steel wire rod from India entered, or withdrawn from warehouse, for consumption on or after the publication date, as provided for by section 751(a)(1) of the Act: (1) The cash deposit rate for the reviewed company will be the rate established in the final results of this new shipper review; (2) if the exporter is not a firm covered in this new shipper review, but was covered in a previous review or the original less-than-fair-value (LTFV) investigation, the cash deposit rate will continue to be the company-specific rate published for the most recent period; (3)

if the exporter is not a firm covered in this review, a previous review, or the original LTFV investigation, but the manufacturer is, the cash deposit rate will be the rate established for the most recent period for the manufacturer of the merchandise; and (4) the cash deposit rate for all other manufacturers and/or exporters of this merchandise, shall be 48.80 percent, the ''all others'' rate established in the LTFV investigation (58 FR 63335, December 1, 1993).

These requirements, when imposed, shall remain in effect until publication of the final results of the next administrative review.

This notice also serves as a preliminary 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 new shipper administrative review and notice are in accordance with section 751(a)(2)(B) of the Act (19 U.S.C. 1675(a)(2)(B)) and 19 CFR 353.22(h).

Dated: January 31, 1997.

Robert S. LaRussa,

Acting Assistant Secretary for Import Administration.

[FR Doc. 97–3357 Filed 2–10–97; 8:45 am]

BILLING CODE 3510–DS–P

[A–570–601]

Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From the People's Republic of China; Final Results and Partial Termination of Antidumping Duty Administrative Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

ACTION: Notice of final results and partial termination of antidumping duty administrative review on tapered roller bearings and parts thereof, finished and unfinished, from the People's Republic of China.

SUMMARY: On August 5, 1996, the Department of Commerce (the Department) published the preliminary results of its administrative review of the antidumping duty order on tapered roller bearings (TRBs) and parts thereof, finished and unfinished, from the People's Republic of China (PRC). The period of review (POR) is June 1, 1994, through May 31, 1995.

Based on our analysis of comments received, we have made changes to the margin calculations, including corrections of certain clerical errors. Therefore, the final results differ from the preliminary results. The final weighted-average dumping margins are listed below in the section entitled ''Final Results of Review.''

We have determined that sales have been made below normal value (NV) during the POR. Accordingly, we will instruct the U.S. Customs Service to assess antidumping duties based on the difference between export price (EP) or constructed export price (CEP) and NV.

We have terminated this review with respect to Shanghai General Bearing Company (Shanghai) based on our revocation of the company from this order in the final results of the 1993–94 review. *See Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, from the PRC* (to be published in Vol. 62 of the Federal Register in February 1997) (*TRBs VII*).

EFFECTIVE DATE: February 11, 1997.

FOR FURTHER INFORMATION CONTACT: Charles Riggle, Andrea Chu, Kristie Strecker, or Kris Campbell, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington DC 20230; telephone (202) 482–4733.

APPLICABLE STATUTE AND REGULATIONS: Unless otherwise indicated, all citations to the statute and to the Department's regulations 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).

SUPPLEMENTARY INFORMATION:

Background

On August 5, 1996, we published in the Federal Register the preliminary results of administrative review of the antidumping duty order on TRBs from the PRC. *See Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From the People's Republic of China; Preliminary Results of Antidumping Duty Administrative Review,* 61 FR 40610 (August 5, 1996) (*Preliminary Results*). We gave interested parties an opportunity to comment on our preliminary results and held a public hearing on September 25, 1996. The following parties submitted comments: The Timken Company (Petitioner); Guizhou Machinery Import and Export Corporation (Guizhou Machinery), Jilin Province Machinery Import and Export Corporation (Jilin), Liaoning MEC Group Company Limited (Liaoning), Luoyang Bearing Corporation (Luoyang), Shandong Machinery and Equipment Import & Export Group Corporation (Shandong), Tianshui Hailin Bearing Factory (Tianshui), China National Machinery Import and Export Corporation (CMC), China National Automotive Industry Import & Export Guizhou Corporation (Guizhou Automotive), Wanxiang Group Corporation (Wanxiang), Xiangfan Machinery Foreign Trade Corporation Hubei China (Xiangfan), Zhejiang Machinery Import & Export Corporation (Zhejiang), and Wafangdian Bearing Industry Corporation (Wafangdian) (collectively referred to as Guizhou Machinery et al.); Premier Bearing and Equipment Company (Premier); Great Wall Industry Corporation (Great Wall); East Sea Bearing Company Limited/Peer Bearing Company (East Sea); Transcom, Incorporated (Transcom); and L&S Bearing Company/LSB Industries (L&S).

We have conducted this administrative review in accordance with section 751(a)(1) of the Act and 19 CFR 353.22.

Scope of Reviews

Imports covered by these reviews are shipments of TRBs and parts thereof, finished and unfinished, from the PRC. This merchandise is classifiable under the *Harmonized Tariff Schedule* (HTS) item numbers 8482.20.00, 8482.91.00.60, 8482.99.30, 8483.20.40, 8483.20.80, 8483.30.80, 8483.90.20, 8483.90.30 and 8483.90.80. Although the HTS item numbers are provided for convenience and customs purposes, our written description of the scope of this proceeding is dispositive.

Facts Available

In accordance with section 776(a) of the Act, we have determined that the use of adverse Facts Available is appropriate for certain firms, as discussed in the *Preliminary Results* at 40613–14.

Analysis of Comments Received

1. Separate Rates

Comment 1

Petitioner states that the Department incorrectly determined that all fourteen PRC companies that participated in this review are entitled to a separate rate. Petitioner requests that the Department review these firms as a single entity.

Petitioner claims that the Department's finding that a PRC list of products subject to direct government control does not name ''TRBs'' is

inaccurate because the list does name ''bearings'' (citing ''Temporary Provisions for Administration of Export Commodities''). Petitioner states that the fact that TRBs, as ''bearings,'' appear on this list eliminates a significant reason for the Department's decision to determine separate rates.

Petitioner adds that, in the preliminary results, the Department misapplied its standard criteria by ignoring the presumption that respondents constitute a single entity. Petitioner argues that, in fact, the Department has presumed in favor of the absence of *de jure* and *de facto* control and has accepted unsupported claims and non-market-economy (NME) laws as the basis for single rates despite common ownership of entities. Petitioner cites as evidence for the switch in the presumption the fact that, in the preliminary results, the Department stated that ''there is no evidence that [the authority of general managers to enter into contracts] is subject to any level of government control'' (citing the *Preliminary Results* at 40612). Petitioner claims that, instead, the Department should have to find that ''it has firm evidence that this authority is not subject to any level of government control.''

Petitioner also argues that the Department should make its separate-rate analysis consistent with rules for evaluating affiliated parties and for collapsing firms (citing section 771(33) of the Act with respect to the determination of affiliated parties). In this regard, Petitioner states that the Department should consider whether the common owners have the ability to exercise restraint or direction over the companies, including whether the owners can shift production or export activities among firms. Petitioner argues that, if the Department undertook such an analysis, it would find that none of the respondents is entitled to a separate rate because the PRC government has the ability, whether or not it exercises it in an apparent manner, to control export and pricing activities, select key management, direct the disposition of revenues (including export revenues), negotiate contracts, and shift exports to firms with low dumping margins.

Petitioner contends further that the Department's *de jure* and *de facto* separate-rates analysis places an impossible burden of proof on domestic interested parties because a state-controlled economy can amend its laws and regulations without in fact relinquishing control. Petitioner claims that the state can simply delete any evidence of *de jure* control from laws, regulations, corporate charters and other documents. Given this situation, Petitioner argues, both the domestic industry and the Department are confronted with the requirement that they prove a negative without having access to information that would indicate continuing control over production and pricing decisions by the state. Thus, Petitioner states, claims made by plant managers, themselves interested in obtaining separate rates, become the basis for the Department's *de facto* analysis and, without access to necessary information, domestic interested parties confront an irrebuttable presumption.

Guizhou Machinery *et al.* respond that the Department properly determined that the PRC respondents are entitled to separate rates. Guizhou Machinery *et al.* argue that, whether the Department states, ''there is no evidence of control'' or it has ''firm evidence'' of no control, both statements indicate that the Department in fact found no evidence of control. Guizhou Machinery *et al.* assert that Petitioner objects to the test itself, not the words the Department used to describe its findings.

Guizhou Machinery *et al.* also contend that Petitioner's proposal to apply the affiliated-party definition in section 771(33) of the Act would eliminate the possibility of separate rates for PRC-owned firms. Guizhou Machinery *et al.* acknowledge that, in *Compact Ductile Iron Waterworks Fittings from the PRC,* 58 FR 37908 (July 14, 1993) (*CDIW*), the Department determined that it would not consider a request for separate rates for any state-owned company on the basis that no state-owned company could be sufficiently independent of state control to be entitled to separate rates. However, Guizhou Machinery *et al.* note, the Department subsequently departed from the *CDIW* decision and returned to its former practice, with some modifications (citing *Final Determination of Sales at Less Than Fair Value: Silicon Carbide From the People's Republic of China,* 59 FR 22585 (May 2, 1994) (*Silicon Carbide*)). Guizhou Machinery *et al.* argue that, in the preliminary results, the Department properly employed its more recent separate-rates analysis methodology from *Silicon Carbide.*

Guizhou Machinery *et al.* add that nothing in the Statement of Administrative Action (SAA) suggests that Congress or the Administration intended that the Department would apply the affiliated-party provision in NME cases in a manner that would result in eliminating separate rates and, if the SAA had intended that result, the SAA would not be silent on the question. Guizhou Machinery *et al.* add that, in the House Report to the URAA, there is no mention of regulatory control by state or provincial governments and no mention of ''affiliation'' stemming from the fact that two entities are both regulated by the same governmental entity. Further, Guizhou Machinery *et al.* claim, while the SAA explicitly discusses the question of affiliation with respect to a number of price and cost issues, it does not mention separate rates issues. Guizhou Machinery *et al.* add that section 771(33) has its roots in Article 4.1, note 11 of the Agreement on Implementation of Article VI of the Uruguay Round of the General Agreement on Tariffs and Trade (GATT), which contemplated control only over producers and exporters, not affiliation of otherwise competing exporters because of government authority or centrally exercised control.

Finally, with respect to Petitioner's argument that the nature of the *de jure* and *de facto* tests imposes an impossible burden of proof on Petitioner, Guizhou Machinery *et al.* state that it is not reasonable to believe that the PRC would repeal all of its laws, regulations, and corporate charters solely to guarantee that the Department will be incapable of discovering any evidence of *de jure* control in antidumping proceedings.

Department's Position

We disagree with Petitioner. We have calculated separate rates for the responding PRC companies in these final results because each has demonstrated an absence of government control over its export activities.

In *CDIW,* we adopted the position that state ownership (*i.e.,* ''ownership by all the people'') ''provides the central government the opportunity to manipulate [the exporter's] prices, whether or not it has taken advantage of that opportunity during the period of investigation.'' *CDIW* at 37909. We determined, therefore, that state-owned enterprises would not be eligible for separate rates. However, we have modified our separate-rates policy as set forth in *CDIW.* We subsequently determined that ownership ''by all the people'' in and of itself cannot be considered dispositive in establishing whether a company can receive a separate rate. *See Silicon Carbide* at 22586. As such, it is our policy that a PRC-based respondent is entitled to a separate rate if it demonstrates on a *de jure* and a *de facto* basis that there is an absence of government control over its export activities.

A separate-rate determination does not presume to speak to more than an

individual company's independence in its export activities. The analysis is narrowly focused and the result, if independence is found, is accordingly narrow—we analyze that single company's U.S. sales of the subject merchandise separately and calculate a company-specific antidumping rate. Thus, for purposes of calculating margins, we analyze whether specific exporters are free of government control over their export activities, using the criteria set forth in *Silicon Carbide* at 22585. Those exporters who establish their independence from government control are entitled to a separate margin calculation. Thus, a finding that a company is entitled to a separate rate indicates that the company has sufficient control over its export activities such that the manipulation of such activities by a government seeking to channel exports through companies with relatively low dumping rates is not a concern. *See Disposable Pocket Lighters from the PRC*, 60 FR 22359, 22363 (May 5, 1995) (*Disposable Lighters*); *Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, from the PRC*, 61 FR 65527, 65527–65528 (December 13, 1996) (*TRBs IV–VI*); *TRBs VII*, Comment 1.

Having rejected the *CDIW* position that state ownership *per se* eliminates the possibility of a company gaining a separate rate, we do not accept Petitioner's argument that the statutory definition of affiliated persons at section 771(33) of the Act should determine our separate-rates analysis. The application of this standard is overly broad for the purpose of determining whether to assign separate rates to the PRC-owned companies under review.

First, the type of state ''ownership'' involved (ownership by ''all of the people'') is not the type of ''ownership'' addressed by section 771(33). Ownership by all of the people signifies only that ''no individual can take the company . . . it belongs to the community.'' *Silicon Carbide* at 22586. It does not mean that a single entity ''controls'' all such firms. Id.

Second, even if such firms did meet the section 771(33) ''affiliated party'' standard, this definition does not determine the issue of whether we should calculate separate rates for the state-owned firms in this review. Instead, in order to make that determination, we must consider the specific issue of *de jure* and *de facto* government control over export activities. This is analogous to our practice in market-economy cases of calculating individual dumping rates for affiliated parties unless we determine that there is a significant potential for manipulation of pricing or production decisions. With respect to NME firms, we examine the potential for manipulation by the government using the *de jure* and *de facto* test set forth in *Silicon Carbide*. Thus, if the Silicon Carbide test shows that no government entity controls the export activities of the firms in question so as to present a significant potential for manipulation of such activities, it is not appropriate to assign a single rate.

In investigating the extent of government control over these firms'' export activities, we obtained information regarding this specific issue, and the PRC companies that responded to our questionnaire submitted information indicating a lack of both *de jure* and *de facto* government control over their export activities. Contrary to Petitioner's assertions, our determination in this regard did not hinge on the fact that the term ''TRBs'' does not appear on the ''Temporary Provisions for Administration of Export Commodities.'' Further, we are not persuaded to change our separate-rates determinations based on the fact that the term ''bearings'' appears on the list, particularly since the term ''bearings'' appears on a section of the list that simply indicates that an exporter must obtain an ''ordinary'' license in order to export bearings. Instead, as detailed in the *Preliminary Results* (at 40611), the record evidence in this case, including our verification findings, clearly indicates a lack of both *de jure* and *de facto* government control over the export activities of the firms to which we have assigned separate rates.

We also do not accept Petitioner's argument that we have misapplied the presumption of state control in this case. Given the information that respondents provided in this review, our statement in the Preliminary Results that ''there is no evidence of government control over exports'' is equivalent to an affirmative statement that ''the government does not control the export activities of these companies.'' We were able to make this determination because the companies provided information affirmatively indicating a lack of government control.

Finally, contrary to Petitioner's claim that the necessary information concerning the *de facto* portion of the analysis is inaccessible to both Petitioner and to the Department, such information was, in fact, subject to verification and was discussed in the relevant verification reports. Based on our analysis of the *Silicon Carbide* factors, the verified information on the record supports our determination that these respondents are, both in law and in fact, free of government control over their export activities. Thus, it would be inappropriate to treat these firms as a single enterprise and assign them a single margin. Accordingly, we have continued to calculate separate margins for these companies. *See TRBs IV–VI* at 65528.

Comment 2

Petitioner claims that the Department improperly granted Shandong and Wanxiang separate rates based on voluntary responses to the separate-rates questionnaire, although these companies did not request review and did not respond to any other part of the Department's questionnaire. Petitioner states that the result of this finding, which will allow these companies to have their POR entries assessed at their POR deposit rates, is an abuse of the single-rate methodology. Petitioner states that it is inappropriate that these ''non-respondents'' are able to obtain more favorable treatment than other non-respondents. Petitioner claims that this approach is unfair because it did not know of the existence of these companies and could not have asked that the review cover them. Petitioner suggests that the Department defer granting separate rates for Shandong and Wanxiang until it conducts a review in which they are named in a review request, in which case they must fully participate in the review. Petitioner makes the same suggestion for Great Wall, a company that requested a separate rate but whose separate-rates response the Department did not analyze in the preliminary results. Petitioner adds that, even if these three firms are permitted to establish separate-rate entitlement in this review, the rate applicable for this period should be the rate applicable had they not submitted their voluntary separate rates responses, which is the PRC rate.

Guizhou Machinery *et al.* respond that Petitioner provides no support for its objection to the Department's stated intention to liquidate Shandong and Wanxiang's POR entries at the deposit rate in effect at the time of entry. Guizhou Machinery *et al.* and L&S state that, since the Department did not review these companies'' entries during this segment of the proceeding, the Act requires the liquidation of their POR entries at the deposit rate in effect at the time of entry. Guizhou Machinery *et al.* state no party requested review of Shandong and Wanxiang nor did the Department name them in the notice of initiation. Citing 19 CFR 353.22(e), Guizhou Machinery *et al.* contend that, pursuant to the Department's regulations, non-reviewed companies

are subject to assessment of antidumping duties at the rate in effect at the time of entry which, for these companies, is 8.83 percent.

Great Wall requests that the Department analyze the information that it submitted during the course of the review regarding the extent of government control over export activities and grant Great Wall a separate rate, thereby permitting assessment of Great Wall's POR entries at its POR deposit rate.

Department's Position

We disagree with Petitioner. For these final results, we have determined that the export activities of Shandong, Wanxiang, and Great Wall are not subject to *de jure* or *de facto* government control. Accordingly, these firms are not part of the ''PRC enterprise'' under review and, because no interested party requested a review of these firms, they are not subject to this review. Because we did not include these firms in this review, we will instruct Customs to apply the respective deposit rates to these companies'' POR entries for purposes of assessment.

As explained in our response to comment 1, it is our policy to treat all exporters of subject merchandise in NME countries as a single government-controlled enterprise in the absence of sufficient evidence to the contrary. We assign that enterprise a single rate (the ''PRC rate'), except for those exporters that demonstrate an absence of government control over export activity. Pursuant to this policy, if any company for which a review was requested is found to be part of the ''PRC enterprise,'' the entire enterprise (including those companies that we do not name in the initiation) is subject to the review. Thus, we request that the PRC government identify all firms that exported during the POR and contact such firms regarding their participation in the review. This ensures that we fully capture the presumed ''PRC enterprise'' (further explained in our response to comment 27). Any company that does not place information on the record indicating that it is separate from the PRC government with respect to export activities will be covered by the review as part of the PRC enterprise and will receive the PRC rate as an assessment rate for POR entries. The PRC enterprise is not subject to review only if all firms for which a review is requested respond and demonstrate that they are independent from government control over exports. That is not the case in this review.

The three firms at issue have demonstrated that they are independent from PRC-government control over their export activities. *See Preliminary Results* at 40611–12 regarding Shandong and Wanxiang; *see Memorandum from Analyst to File: Separate-Rate Determination for Great Wall Bearing Company*, February 3, 1997, regarding Great Wall. Thus, we have determined that they are not part of the PRC enterprise. Because these companies are not part of the PRC enterprise and no review of these companies was requested, they are not subject to this review. Therefore, the automatic assessment provisions (19 CFR 353.22(e)) apply. Petitioner's contention that we should, in effect, review companies for which no review was requested is inconsistent with our normal practice of conducting reviews upon request only, as provided in section 751(a) of the Act. Accordingly, as with all unreviewed companies, POR entries of Shandong, Wanxiang and Great Wall will be liquidated at the deposit rates.

2. Valuation of Factors of Production

Comment 3

Petitioner argues that the Department should base the values of all factors of production (FOP) on the annual report of SKF India (SKF). Petitioner notes that, for the preliminary results, the Department used the SKF report to value three factors (overhead; selling, general, and administrative expenses (SG&A); and profit), whereas the Department derived values for the direct labor and raw-material factors from two other, unrelated, sources (*Investing, Licensing & Trading Conditions Abroad, India* (*IL&T India*) statistics and Indian import statistics, respectively). Petitioner claims that it is inherently distortive to use sources other than the SKF report to value labor and raw materials because SKF's labor and raw-material costs are included in the costs used in calculating SKF's overhead, SG&A, and profit ratios, which the Department uses in its surrogate calculation.

Petitioner also contends that SKF's materials and labor costs are the ''best information'' with respect to these factors because they represent actual costs in the preferred surrogate country, whereas the steel-import statistics and labor data have little connection with costs related to production of TRBs.

Thus, Petitioner argues, whereas SKF's costs and expenses represent those of a producer of the class or kind of merchandise subject to review, the surrogate data for raw materials and direct labor which the Department used cover a broad range of industries and products. With respect to raw materials, Petitioner asserts that the ''other'' alloy-steel category from the Indian import statistics, which the Department used to value material costs for the preliminary results, is broad and may or may not include imports of the steel used to produce bearings. Petitioner contends that, even if this category includes steel used to produce bearings, such steel likely represents only a small part of steel imports in the basket category. With respect to direct labor, Petitioner claims that the classification the Department used covers, in addition to bearings producers, hundreds of industry sectors under broad headings unrelated to bearings production and argues that there is no rational basis for using such a non-specific source as a surrogate. Petitioner states that it is appropriate to apply SKF's average labor cost to all types of labor, including direct production, production overhead, and SG&A, since all of these labor categories would be part of the aggregate labor cost in SKF's annual report.

Petitioner states that the use of the SKF report for all FOP values is consistent with the importance the courts attach to internal coherence and the use of a single source when possible (citing *Timken Co.* v. *United States*, 699 F. Supp. 300, 306, 307 (1988), *affirmed*, 894 F.2d 385 (Fed. Cir. 1990) (collectively *Timken*)). Petitioner urges the Department to use the same annual report.

Petitioner argues in the alternative that, in the event the Department does not use the SKF report to value all FOP, the Department must adjust the overhead, SG&A, and profit rates to reflect the use of lower materials and labor values from the separate sources. Petitioner claims that the Department's preliminary calculations were distortive because the Department used SKF's full material and labor costs in the cost of manufacturing (COM) denominator but applied this ratio to material and labor factors that it developed using lower-valued sources (Indian import statistics and ILT labor data, respectively). Petitioner concludes that, because of SKF's overhead, SG&A and profit percentages are linked to SKF's own materials and labor costs, those percentages must be adjusted upward (by reducing the denominators used to derive these percentages) if the Department multiplies these ratios by material and labor costs from other sources to derive the per-unit overhead, SG&A, and profit rates.

Petitioner proposes that, in order to derive non-distortive material and labor portions of the overhead and SG&A ratio denominators, the Department should

multiply the total weight of materials for SKF by the highest value of steel that it uses in the final results and should multiply the total number of hours worked at SKF by the *IL&T India* labor value it uses for the final results. Petitioner adds that this calculation is preferable to the overhead, SG&A, and profit denominators that the Department used in the preliminary results because it will result in a materials cost exclusive of Indian import duties.

Guizhou Machinery *et al.* respond that it is irrelevant whether the SKF report represents a single source for valuing all FOP components and note that the Department consistently uses multiple sources of information for surrogate data in NME cases, selecting the best source for each element of the FOP. Guizhou Machinery *et al.* argue that the fact that SKF India is a producer of TRBs in the surrogate country does not mean that its report is a proper source for all surrogate data, adding that, in most NME cases, the Department uses multiple sources of information for surrogate data, choosing the best one for each element for the factors of production. Guizhou Machinery *et al.* state that Petitioner's citation to Timken is misplaced because, in that case, the Court of International Trade (CIT) remanded the case to the Department because the rationale for selecting a particular value for steel scrap was inconsistent with the record and the Department had not explained the inconsistency. Guizhou Machinery *et al.* claim that the Department was not criticized in Timken for the use of different sources of surrogate data. East Sea adds that the SKF report, though audited, is not verified data and notes that the Department has a preference for verifiable, public information.

With respect to Petitioner's proposal that the Department use SKF data to determine the raw-material-factor value, East Sea and Guizhou Machinery *et al.* argue that the raw-material data in the SKF report is inferior to import statistics due to a lack of detail regarding the types of steel SKF used. Guizhou Machinery *et al.* state that, in this review, the raw-material-input value is the critical factor in the analysis and there is no evidence to indicate that SKF India used the same kind of steel as the respondents, whereas import statistics allow the Department to pinpoint a particular input. East Sea notes that the SKF report does not provide separate prices for bar, rod or steel sheet but instead provides a single value for all steel used in the factory, including steel used in the production of non-subject merchandise. East Sea submits that Petitioner, Respondents, and the Department do not know what types of steel were included in SKF's material-cost calculation. East Sea suggests that the steel referenced in the SKF report could be tube steel (instead of bar steel), stainless steel (a much more expensive product), already machined ''green parts'' supplied by SKF's many related companies, or innumerable other types of steel. Guizhou Machinery *et al.* add that Petitioner has provided no information demonstrating that the SKF report covers the specific steel inputs relevant to subject merchandise.

With respect to Petitioner's claim that the Department should calculate the labor factor using SKF data, Guizhou Machinery *et al.* contend that Petitioner has provided no evidence to support its claim that the labor costs of a subsidiary of a Swedish company, SKF, are a better surrogate for labor costs than is an average for the surrogate country. Guizhou Machinery *et al.* state that it is the Department's practice to use industry-wide data, not producer-specific data, where possible, and suggest that Petitioner's proposal would risk introducing abnormalities unique to that producer. East Sea adds that, because the SKF report does not differentiate between administrative and manufacturing personnel, the Department cannot use the SKF data to value labor. East Sea explains that the majority of workers producing subject merchandise in this review are unskilled laborers and, because the Department verified the Chinese bearing producers, the Department has specific knowledge of the skill level in China.

With respect to Petitioner's argument that, if the Department continues to value the material and labor factors using non-SKF sources, the Department must adjust the overhead, SG&A, and profit rates to reflect the use of lower materials and labor values, Guizhou Machinery *et al.* respond that the Department's use of data in SKF's annual report to establish percentages or ratios to be used for determination of the surrogate values for overhead and SG&A is fully consistent with the Department's standard surrogate methodology. Guizhou Machinery *et al.* state that the Department's NME/surrogate-country methodology is based upon the application of reliable and representative ratios and input values from multiple sources and contend that the Department does not typically ''adjust'' the component values used to derive SG&A and overhead ratios in the manner suggested by Petitioner. Consequently, Guizhou Machinery *et al.* argue, the Department should not adjust the expenses taken from the SKF report, as suggested by Petitioner, to formulate representative ratios for use in determining actual amounts for overhead and SG&A. In support of this contention, Guizhou Machinery *et al.* cite *Final Determination of Sales at Less Than Fair Value: Coumarin From the People's Republic of China,* 59 FR 66895 (December 28, 1994) (*Coumarin*), in which the Department calculated materials costs from various sources and used the Reserve Bank of India Bulletin (RBI) data to calculate SG&A but did not adjust SG&A and overhead costs.

East Sea adds that it would be illogical to adjust overhead and SG&A as the Petitioner suggests for three reasons: (1) the Department has no idea what kind of steel SKF uses and replacement of SKF's material costs in the overhead and SG&A denominators with Indian import costs does not improve the reliability of the SKF overhead or SG&A data; (2) SKF's overhead rate reflects the experience of a sophisticated bearing factory and the Department has long recognized that industrialized countries have higher overhead rates than do companies in less industrialized countries, so that the overhead rate should not be adjusted upward; and (3) SKF's overhead costs reflect the unique experience of SKF, which is the leading producer in the world and uses the finest raw materials and state-of-the-art technology to produce its bearings—as such, the Department would be mixing apples and oranges to substitute Indian import steel prices for SKF's own prices in order to create a hybrid overhead or SG&A rate.

Department's Position:

We agree with Respondents. Section 773(c)(1) of the Act states that, for purposes of determining NV in a NME, ''the valuation of the FOP shall be based on the best available information regarding the values of such factors. . . .'' As we stated in *TRBs IV–VI* and *TRBs VII*, our preference is to value factors using published information (PI) that is closest in time with the specific POR. *See also Final Determination of Sales at Less Than Fair Value: Certain Partial-Extension Drawer Slides From the People's Republic of China*, 60 FR 54472, 54476 (October 24, 1995) (*Drawer Slides*). Based on the record evidence we have determined that surrogate-country import statistics (Indonesian for valuing steel used to produce cups and cones, Indian for steel used to produce rollers and cages), exclusive of import duties, comprise the best available information for valuing raw-material costs. Our reasons for preferring data for Indonesia, rather

than for our primary surrogate, India, for valuing steel used to produce cups and cones are set forth in our response to Comment 4.

We prefer published surrogate import data to the SKF data in valuing the material FOP for the following reasons. First, we are able to obtain data specific to the POR, which more closely reflect the costs to producers during the POR. Second, the raw-material costs from the SKF report do not specify the types of steel SKF purchased. The record does not indicate whether SKF purchased bar steel (the type used by the Chinese manufacturers) or more expensive tube steel to produce bearings parts. Third, although we agree with Petitioner that SKF is a producer of subject merchandise, the report also identifies other products it manufactures. From the information in the SKF report, we are unable to allocate direct labor and raw-materials expenses to the production of subject merchandise. For these reasons, we have valued the material FOP using surrogate import data.

Furthermore, we agree with Respondents that Petitioner's citation to *Timken* for the proposition that the Department must use a single surrogate source when possible is misplaced. That case, although critical of the Department, does not state that all factors must be valued in the same surrogate country. Indeed, the opinion in *Timken* explicitly states that ''Commerce may avail itself of data from a country other than the designated conduit, adoption of such an inter-surrogate methodology [although departing from the normal practice at that time] remains within the scope of Commerce's discretionary power.'' *Timken* at 304.

We also disagree with Petitioner's contention that we should adjust the overhead and SG&A rates if we continue to use the SKF report to value these rates while valuing the material and labor FOP using other sources. As noted above, we prefer to base our factors information on industry-wide PI. Because such information is not available regarding overhead and SG&A rates for producers of subject merchandise during the POR (except for the indirect labor portion of overhead and SG&A, which we valued separately—see Comment 8, below), we used the overhead and SG&A rates applicable to SKF India, a company that produces subject and non-subject merchandise.

In deriving these rates, we used the SKF data both with respect to the numerators (total overhead and SG&A expenses, respectively) and denominator (total cost of manufacturing). This methodology allowed us to derive internally consistent ratios of SKF India's overhead and SG&A expenses. These ratios, when multiplied by the FOP we used in our analysis, thereby constitute the best available information concerning the overhead and SG&A expenses that would be incurred by a PRC bearings producer given such FOP. Petitioner's recommended adjustment would affect (reduce) the denominator, but it would leave the overhead and SG&A expenses in the numerator unchanged. As such, we find that this adjustment would itself distort the resulting ratio, rather than curing the alleged distortion in our calculations.

Finally, with respect to Petitioner's assertion that the overhead, SG&A, and profit denominators we used in the preliminary results improperly included import duties paid, we note that Petitioner has not provided any information regarding the amount of import duties that are included nor has Petitioner provided a means of identifying and eliminating such duties from our calculations. Although we would not include duties paid on the importation of merchandise by SKF, we have no evidence as to the amount of duties, if any, that are included in SKF's raw-materials costs. Therefore, we did not subtract any amount for import duties in our calculation of overhead and SG&A percentages. *See TRBs IV–VI* at 65529–65530 and *TRBs VII*, Comment 2.

2. (a) Material Valuation

Comment 4

East Sea and Guizhou Machinery *et al.* contend that the Indian import category (7228.30.19) which the Department used to value the steel used to produce cups and cones in the preliminary results is an inappropriate source because the values derived using this category do not accurately reflect the cost to PRC producers of the hot-rolled alloy-steel bar used to produce these components. Respondents state that the Department should value this steel using a source that more accurately reflects the input costs incurred by PRC producers.

East Sea argues that Indian import category 7228.30.19 contains a wide variety of steel products and a correspondingly wide range of prices. In this regard, East Sea notes that the average price per metric ton of steel contained in this category ranges from $610 to $4,860. East Sea states that the overall steel value per metric ton the Department derived using this category (over $1,400) far exceeds the value of steel used by PRC producers to manufacture TRBs.

East Sea states that it is Department practice to compare the surrogate steel prices it selects with world prices to determine if the proposed surrogate values for steel are aberrational. East Sea notes that, in *Heavy Forged Hand Tools from the PRC*, the Department determined that Indian import statistics were aberrational in comparison with Indonesian and U.S. import statistics (citing *Final Results of Antidumping Duty Administrative Review: Heavy Forged Hand Tools from the PRC*, 60 FR 49241, 49254 (September 22, 1995) (*Hand Tools*), *Furfuryl Alcohol from the PRC*, 60 FR 225444 (May 8, 1995) (*Furfuryl Alcohol*), and *Certain Cased Pencils from the PRC*, 59 FR 55625 (November 4, 1994) (*Pencils*)). East Sea adds that the Department's Proposed Rules also indicate that the Department will test surrogate values against international prices.

East Sea suggests, as an alternative to the Indian data the Department used in the preliminary results, an ''international'' price of $673 per metric ton, which it derived using U.S., Japanese, and European Union (E.U.) import statistics. East Sea contends that this value approximates the corresponding steel value used in a recent review of *TRBs from Romania*, where the surrogate value for steel used in cups and cones was $718 per metric ton (citing *Preliminary Results of Antidumping Administrative Review: Tapered Roller Bearings from the Romania*, 68 FR 15465 (April 8, 1996)).

East Sea argues in the alternative that, if the Department continues to value cups and cones using Indian import statistics, it should modify this value by excluding from its calculations all individual steel import values in excess of $1,421 per metric ton as not reflective of the price of bearing-quality steel. East Sea states that this ceiling is not arbitrary because it is the average value derived in the preliminary results and is the highest surrogate value that the Department has ever selected in its bearings cases.

Guizhou Machinery *et al.* agree with East Sea that: (1) the surrogate value that the Department used in the preliminary results is aberrational when compared with U.S., E.U., and Japanese import statistics, and (2) the Department has an established practice, as noted in the Proposed Regulations, of testing potential surrogate values against international prices (citing, *inter alia, Disposable Lighters; Coumarin; Silicon Carbide; Drawer Slides; Helical Spring Lock Washers from the PRC*, 58 FR

48833, 48835 (September 20, 1993) (*Lock Washers*); and *Saccharin from the PRC*, 59 FR 58818 (November 15, 1994) (*Saccharin*)). Guizhou Machinery *et al.* add that the Indian import values that the Department used in the preliminary results are nearly three times the value of Indian export prices of the same steel and state that this constitutes further evidence that the import values are aberrational.

With respect to the appropriate alternative to Indian import values, Guizhou Machinery *et al.* support East Sea's proposed surrogate value of $673 per metric ton, based on an average of U.S., E.U., and Japanese import statistics, as the best alternative value. Guizhou Machinery *et al.* state that this value is in accord with the Department's practice of basing factor values on multiple sources when necessary and is preferable to using data from other countries listed on the Department's Surrogate Country Selection Memorandum because none of these countries is a significant producer of bearings.

Petitioner contends that Respondents' arguments that the value of steel in Indian import category 7228.30.19 used in the preliminary results far exceeds the value of steel used to manufacture TRBs are incorrect. Petitioner maintains that this category is the best valuation source for the steel used to produce cups and cones if the Department determines not to use the SKF Report for this purpose (*see* Comment 3).

Petitioner states that Indian data is preferable to the U.S./E.U./Japan average import value proposed by Respondents because India meets the statutory criteria for factor valuation, *i.e.*, it is a comparable economy to the PRC and is a significant producer of comparable merchandise (citing section 773(c) of the Act). Petitioner claims that the use of a developed-country average, as suggested by Respondents, would violate the statute and adds that the Department previously rejected the use of E.U. statistics for valuation purposes in the 1989–90 review of this order. Petitioner adds that Respondents' analysis of Japanese import statistics is based on a questionable reading of Japanese HTS classifications.

With respect to the cases that Respondents cite in support of their position that their proposal is in accord with Department practice regarding seeking alternative valuation sources where the primary surrogate value is aberrational, Petitioner responds that, in those cases, unlike this proceeding, the Department had a plausible reason to deviate from its preferred practice because the preferred data were unsupported by reliable evidence and were contradicted by consistent information from other sources, which usually included another surrogate.

Petitioner states that the cases Respondents cite may be distinguished from the present review as follows: (1) in *Coumarin*, the rejected Indian source conflicted with other sources within India; (2) in *Silicon Carbide*, the Department did not use the preferred data because they either pertained to further-processed products or involved a small tonnage priced too high to be considered reasonable; (3) in *Disposable Lighters*, the Department used exports from India instead of imports because imports were not significant; (4) in *Pencils*, the Department used imports from a secondary surrogate instead of the primary surrogate (India) because the Indian values were inconsistent with both Pakistani values and values provided in the petition; (5) in *Lock Washers*, the Indian values the Department rejected were over 1,000 percent higher than the comparison values; (6) in *Drawer Slides*, the Indian values the Department rejected were several times higher than the comparison values; (7) in *Saccharin*, the Department used an average of export statistics from five developed countries because it had difficulty finding an appropriate surrogate; (8) in *Hand Tools*, the Department rejected Indian import values in favor of Indonesian and U.S. values because imports into India were not significant; (9) in *Furfuryl Alcohol*, the Department rejected the primary surrogate's (Indonesia) import data in favor of export data from the same surrogate; and (10) in *Steel Pipe*, the Department excluded certain imports that were clearly of a higher quality than the steel used by Respondent in that case.

Petitioner adds that East Sea's alternative proposal, that, if the Department continues to use Indian import statistics it should exclude all individual import values greater than $1,421, is incorrect because it focuses only on individual import values that may be aberrationally high while ignoring those values that may be aberrationally low.

Department Position

We agree with East Sea and Guizhou Machinery *et al.* None of the eight-digit tariff categories within the Indian 7228.30 steel group corresponds specifically to bearing-quality steel used to manufacture cups and cones, and we do not agree with Petitioner that the best alternative, aside from valuing steel using the SKF Report, is to use the eight-digit ''others'' category (7228.30.19) within this group. Instead, we have determined that the use of Indian import data is not appropriate to value steel used to produce cups and cones in this case because we are unable to isolate an Indian import value for bearing-quality steel and, more importantly, the steel values in the Indian import data are not reliable, as further discussed below.

As in *TRBs IV–VI* and *TRBs VII*, we have examined each of the eight-digit categories within the Indian 7228.30 group and have found that, although bearing-quality steel used to manufacture cups and cones is most likely contained within this basket category, there is no eight-digit sub-category that is reasonably specific to this type of steel. We eliminated the specific categories of alloy steel that are clearly not bearing-quality steel as follows. Under the Indian tariff system, bearing-quality steel used to manufacture cups and cones is contained within the broad category 7228.30 (Other Bars & Rods, Hot-Rolled, Hot-Drawn & Extruded). However, none of the named sub-categories of this grouping (7228.30.01—bright bars of alloy tool steel; 7228.30.09—bright bars of other steel; 7228.30.12—bars and rods of spring steel; and 7228.30.14—bars and rods of tool and die steel) contains steel used in the production of subject merchandise. This leaves an ''others'' category of steel, 7228.30.19. However, we have no information concerning what this category contains, and none of the parties in this proceeding has suggested that this category specifically isolates bearing-quality steel. Further, the value of steel in this eight-digit residual category is greater than the value of the general six-digit basket category (7228.30) which, in turn, is valued too high to be considered a reliable indicator of the price of bearing-quality steel, as shown below.

Where questions have been raised about PI with respect to particular material input prices in a chosen surrogate country, it is the Department's responsibility to examine that PI. *See Drawer Slides* at 54475–76, *Cased Pencils*, 59 FR 55633, 55629 (1994), *TRBs IV–VI* at 65531, and *TRBs VII*. Because all parties raised questions about the validity of the Indian import data used to value cups and cones in the preliminary results, we compared the value of Indian imports in category 7228.30 with the only record source that specifically isolates bearing-quality steel used to manufacture cups and cones: U.S. import data regarding tariff category 7228.20.30 (''bearing-quality steel''). We found that, for the time period covered by the POR, the value of

the Indian basket category 7228.30 was significantly higher than that for the bearing-quality steel imported into the United States. It was also significantly higher in comparison with E.U. import statistics.[1] The Indian eight-digit ''others'' category recommended by Petitioner was higher than any of these sources.

In light of these findings, we have determined that the Indian import data that we used to value cups and cones in the preliminary results are not reliable. For these final results, we have used import data from another surrogate country, Indonesia, a producer of merchandise comparable to TRBs, to value steel used to produce these components. As with the Indian data, we were unable to isolate the value of bearing-quality steel or identify an eight-digit category containing such steel imported into Indonesia; however, unlike the Indian data, the Indonesian six-digit category 7228.30 is consistent with the value of U.S. imports of bearing-quality steel, as well as the comparable six-digit category in the United States. Thus, we have determined that Indonesian category 7228.30, which is the narrowest category we can determine would contain bearing-quality steel, is the best available information for valuing steel used to produce cups and cones. Although Indonesia is not the first-choice surrogate country in this review, in past cases the Department has used values from other surrogate countries for inputs where the value for the first-choice surrogate country was determined to be unreliable. *See Drawer Slides* at 54475–76, *Cased Pencils* at 55629, and *Lock Washers* at 48835. Further, Indonesia has previously been used as a secondary source of surrogate data in cases involving the PRC where, as here, use of Indian data was inappropriate even though India was the primary surrogate. *See, e.g., Chrome-Plated Lug Nuts from the PRC; Final Results of Antidumping Duty Administrative Review*, 61 FR 58514, 58517–18 (November 15, 1996).

Petitioner's attempt to distinguish the instant proceeding from the cases in which we have departed from a primary surrogate in fact demonstrates that there are a variety of factual situations in which recourse to a secondary source is appropriate with respect to the valuation of a given factor. Accordingly, we must determine the reliability of each factor based on the facts of each case. In this review, as noted above, a comparison of the Indian import values for the basket category containing steel used by the PRC respondents to produce cups and cones with other, more precise, data regarding such ''bearing-quality'' steel indicates that the Indian values are inappropriate. In contrast, the Indonesian data that we have chosen closely approximate observable market prices for this specific input and therefore constitute a more appropriate valuation source.

Finally, we note that, because we are valuing the steel used to produce cups and cones using Indonesian import data, we are valuing the scrap offset to this steel value using the same source.

Comment 5

Petitioner asserts that the Department used the incorrect Indian tariff classification number to value steel for cages in the preliminary results. Petitioner states that the Department used subheading 7209.42.00, a category that does not specify carbon content, an essential characteristic that Respondents used in their descriptions of the Chinese grade GB699–65 steel used to produce cages. Petitioner states that this steel type is low-carbon steel, with a carbon content ranging between 0.07 and 0.14 percent by weight. Petitioner suggests that, if the Department does not value steel using the SKF Report, it should use Indian subheading 7211.41.00, which specifies a carbon content of less than 0.25 percent carbon by weight, to value steel used to produce cages.

Guizhou Machinery *et al.* respond that subheading 7211.41.00 is not an appropriate valuation source for cage steel because there is insufficient information on the record regarding the thickness of steel entering into this category. In this regard, Respondents note that all that is known is that the thickness of such steel is greater than 600 mm, while the thickness of subheading 7209.42.00 has more defined boundaries (between 0 and 600 mm). Respondents also state that, although subheading 7211.41.00 lists carbon content, it does not specify the content of a number of other elements, including manganese, silicon, and chromium. Accordingly, Respondents contend, the fact that Petitioner's preferred subheading specifies carbon content is insufficient reason to change its established preference.

Department's Position

We disagree with Petitioner. As in past reviews, we are using Indian tariff subheading 7209.42.00. This subheading involves cold-rolled steel sheet, which the PRC respondents use to produce cages. Conversely, the subheading that petitioner recommends (7211.41.00) involves hot-rolled sheet and is not, therefore, an appropriate category for valuing steel used to produce cages.

Comment 6

Petitioner states that the Department's FOP Memorandum indicates that it used Indian tariff subheading 7204.49 to value non-alloy scrap resulting from the production of cages while the actual calculations indicate that the Department used subheading 7204.41.00. Petitioner suggests that, if the Department in fact uses subheading 7204.49 for the final results, it should only use data for item 7204.49.09 (''other'), which will allow the Department to exclude the inapplicable data for ''defective sheet of iron and steel'' at item 7204.49.01.

Guizhou Machinery *et al.* respond that the Department should use subheading 7204.49, as it stated in its FOP Memorandum. Respondents state that subheading 7204.41.00 is inappropriate because it does not include waste from steel-sheet products. Respondents add that, contrary to Petitioner's assertion, the Department need not exclude subheading 7204.40.01, since this category specifically includes scrap from steel sheet.

Department's Position

We disagree with Guizhou Machinery *et al.* For these final results, we have used Indian import category 7204.41.00 to value scrap used in the production of cages. As we noted in *TRBs VII* (Comment 5), this category best describes the types of scrap created during the production of cages, *i.e.*, turnings, shavings, chips, trimmings, stampings, etc. Further, although we agree with Petitioner that our FOP Memorandum and our calculations were inconsistent in the preliminary results, its comments regarding the exclusion of certain data from subheading 7204.49 are moot because we have not used this subheading for the final results.

Comment 7

Petitioner states that Respondents failed to make allowance for defective products in their calculations of per-unit material and labor quantities. Petitioner recommends adjustment of

[1] Although the E.U. import data do not explicitly identify ''bearing-quality steel,'' the relevant subheadings (7228.30.40, 7228.30.41, and 7228.30.49) provide narrative descriptions that closely match the chemical composition of the bar steel that the PRC respondents used to produce cups and cones. *See Memorandum from Analyst to File: Factors of Production for the Final Results of the 1994–95 Administrative Review of TRBs from the PRC*, February 3, 1997.

Respondents'' COM upward to account for defective products.

Petitioner states that, in calculating materials and labor usage per unit of output, most Respondents reported that they divided the weight of steel issued and the total labor hours worked by the number of units produced. Petitioner contends that these calculations do not take into account that a percentage of total units produced will inevitably be defective products which consume materials, labor, and overhead but cannot be sold. Petitioner claims for instance that, in the previous review, Shanghai General Bearing Company [2] reported publicly that it uses a ''two-percent allowance . . . based on the company's empirical evidence of how much production fails to pass inspection'' (citing Shanghai General Public Verification Report for 1993–94 Review). Petitioner suggests that the Department revise its calculations of COM upward by 0.2 percent for all respondents in order to account for unreported defective production.

Guizhou Machinery *et al.* respond that the Department's questionnaire does not request that Respondents provide any data on production defect rates and, therefore, the Department has no basis for making any inferences regarding the production of defective bearings. Guizhou Machinery *et al.* add that Petitioner offers no evidence to support the theory that the experience of Shanghai General is representative of other Chinese producers.

East Sea claims that Petitioner's suggestion that the Department increase COM by 0.2 percent is misguided because there is no evidence that Respondents have accounted improperly for defective products. East Sea states that, in fact, it has reported FOP for finished products, *i.e.*, factors data required to produce satisfactory, non-defective products.

Department's Position

We disagree with Petitioner. While we agree that, in calculating per-unit material and labor quantities, Respondents must account for defective products properly, Petitioner has provided no evidence that Respondents did not do so. The fact that one company, Shanghai General, that stated explicitly it accounted for defective products properly does not mean that Respondents in this review did not, particularly since that statement was made in a previous review. In fact, Respondents generally account for defective products by including all material and labor quantities for all products produced (including defective products) in the numerator of the per-unit material and labor calculations while basing the denominator (number of units produced) only on those units that pass inspection and are saleable. Where we find, generally through verification, that this is not the case, we adjust the denominator accordingly. *See TRBs IV–VI* at 65540 (Comment 23). However, as Guizhou Machinery *et al.* note, we did not ask Respondents to provide specific data regarding production-defect rates in our questionnaire nor would we use such rates in our calculations. Therefore, it would be inappropriate to draw an adverse inference from the lack of data on the record regarding such rates.

2.(b) Labor Valuation

Comment 8

Petitioner objects to the Department's treatment of indirect labor. Specifically, Petitioner claims that, in the preliminary results, the Department valued indirect labor as a percentage of SKF's total labor cost and included a portion of indirect labor in overhead and a portion in SG&A. Petitioner contends that, instead of valuing indirect labor in this manner, the Department should value this expense using its FOP methodology, as it did with direct labor, then combine direct and indirect labor to derive a total labor expense. Petitioner states that, unlike indirect labor, the Department calculated direct labor in the manner the statute envisions, as a factor of production to which the Department applied the Indian surrogate value.

Petitioner suggests valuing indirect labor as follows. Petitioner claims that most respondents reported that indirect overhead labor is 20 percent of direct labor and that indirect SG&A labor is also 20 percent of direct labor. Petitioner suggests that, since indirect-labor hours are 40 percent of direct-labor hours, the Department should calculate a total (direct plus indirect) labor value by multiplying the direct-labor hours by 1.4, then applying the Indian surrogate-labor value to this quantity.

Guizhou Machinery *et al.* respond by noting that, in NME cases, the Department has treated indirect labor as an overhead cost, not as a direct labor cost. Guizhou Machinery *et al.* add that the questionnaire requests that Respondents report assembly labor and indirect labor separately and contend, therefore, that the Department should reject Petitioner's proposal.

Department's Position

We agree with Petitioner, in part. Petitioner is correct in asserting that, where we have the data to calculate expenses incurred by NME respondents using the factors of production methodology (*i.e.*, multiplying a respondent's reported per-unit usage rates by surrogate values), we should do so. *See* section 776(c) of the Act. With respect to indirect labor, data on the record allow us to calculate the per-unit quantities of such labor attributable to overhead and to SG&A. We also have reliable surrogate information regarding labor values in India (IL&T data). Accordingly, for the final results, we valued indirect labor attributable to overhead and indirect labor attributable to SG&A by multiplying the respective per-unit labor hours by the IL&T labor rate.

However, although we agree with Petitioner regarding the appropriate methodology for deriving the indirect labor expense, we disagree with Petitioner's proposal that we should include the total per-unit indirect-labor expense together with the per-unit direct-labor expense, effectively calculating a single, per-unit labor expense. In recommending that we create a single, total labor amount, presumably to be included as part of COM (Petitioner does not specify where to include this total labor value), Petitioner incorrectly attributes all indirect labor to COM instead of allocating this expense to both overhead and SG&A, as reported by Respondents. In this respect, the methodology that we used in the preliminary results, wherein we allocated indirect labor to overhead and to SG&A using the allocation percentages reported by Respondents, conforms to our practice of considering indirect labor as labor attributable to both overhead and to SG&A operations (*e.g.*, supervisory and sales personnel). *See Final Determination of Sales at Less Than Fair Value: Sebacic Acid from the PRC*, 59 FR 28053, 28059–60 (*Sebacic Acid*). Accordingly, while we have valued indirect labor in the manner that Petitioner recommends, we have allocated this expense to both overhead and SG&A.

Comment 9

Petitioner argues that, in calculating the surrogate value for labor, the Department should make allowance for vacation, sick leave and casual leave when calculating the number of weeks

[2] Because we revoked Shanghai General in the 1993–94 administrative review, we are not addressing issues involving this company in the 1994–95 review. However, we include reference to Shanghai General here because Petitioner's contention concerns the application of Shanghai General data to other respondents that are involved in this review.

per month actually worked. Petitioner states that the Department calculated the hourly wage rate on the basis of 4.333 working weeks per month, based on a full 52-week year, which assumes that workers never get sick, take vacations or have other days off. Petitioner observes that *IL&T India* shows that mandatory benefits include one day of paid vacation for every 20 days worked, sick leave of seven days a year with full pay, and seven to ten days of casual leave. Petitioner claims that Respondents have not allocated any portion of vacation or sick leave to the labor hours they reported as their factors of production. Petitioner states that the goal is to determine the cost to an employer of each hour that an employee is on the job and, therefore, the labor hours used in the denominator of the surrogate labor-rate calculation must include only time on the job. Petitioner suggests that the number of weeks per month should be recalculated to take into account at least the minimum benefits and derives a figure of 3.72 working weeks per month using this approach.

Guizhou Machinery *et al.* respond that the Department should reject Petitioner's argument to adjust the calculated labor rate which the Department used in the preliminary results for vacation, sick leave and casual leave. Guizhou Machinery *et al.* claim that Petitioner provides no support for the statement that hourly labor costs should reflect only the expenses accrued to an employer for the time the employee is on the job. Guizhou Machinery *et al.* state that the real hourly cost to the employer reflects many factors, including fringe benefits such as paid vacation, sick leave, *etc.* Guizhou Machinery *et al.* suggest that the Department's calculations should include the cost of fringe benefits such as vacation and sick leave in the numerator and, because the numerator does include such fringe benefit costs, the denominator should likewise reflect these fringe benefits by including hours related to vacation and sick leave. .

Department's Position

We disagree with Petitioner. In our preliminary results we valued direct labor using rates reported in *IL&T India*, which states that fringe benefits normally add between 40 percent and 50 percent to base pay. *See Memorandum to the File from Case Analyst: Factors of Production Values Used for the Eighth Antidumping Duty Administrative Review (Memorandum)*, September 1, 1995, attachment 5. Accordingly, we multiplied base pay by 1.45 in order to incorporate fringe benefits. *Memorandum* at 3–4.

Whereas Petitioner suggests we calculate a wage rate based only on time spent on the job, we find that expenses related to holidays, vacation, sick leave, *etc.*, belong in the numerator of the surrogate labor-rate calculation and time spent on vacation and sick leave belongs in the denominator of the calculation. Because the employer incurs expenses both for employees on vacation and employees on the job, it incurs a fully loaded labor cost to produce the merchandise. By adjusting the base pay to include such fringe benefits as vacation, sick leave, casual leave, etc., we calculated a fully loaded direct-labor rate that more accurately represents the actual direct-labor cost to the manufacturer. *See TRBs VII* at 49–50.

2.(c) Overhead, SG&A and Profit Valuation

Comment 10

Petitioner contends that the Department incorrectly designated the line item ''power and fuel'' in the SKF Report as a material cost, not an overhead cost, in its calculation of overhead expenses. Petitioner argues that power and fuel are not materials incorporated into the subject merchandise and Respondents did not report this expense as a material factor or any other factor. Rather, Petitioner contends, energy is generally used to operate the manufacturing plants and is properly considered as part of factory overhead. For the final results, Petitioner suggests that the Department include power and fuel costs in SKF's overhead cost or calculate this expense as a separate factor but notes that no purpose is served by isolating the energy costs as a separate factor.

East Sea argues that the statute does not specifically list ''power and fuel'' as part of overhead, citing section 773(c)(3)(C) of the Act. East Sea asserts, therefore, that the Department's inclusion of these items within raw materials was not improper.

Department's Position

We agree with Petitioner that power and fuel are not direct material inputs. Power and fuel consumption cannot be directly linked to the output of the subject merchandise. Therefore, for these final results, we have incorporated power and fuel as part of overhead.

Comment 11

Petitioner contends that the Department incorrectly designated the line item ''stores and spares consumed'' in the SKF Report as a material cost, not an overhead cost, in its calculation of overhead expenses. Petitioner states that this line item concerns expenses related to tools, grinding wheels, and spare parts used in the production process or incorporated into the equipment and machinery, but which are not incorporated into the finished product. Petitioner argues that Respondents did not report ''stores and spares consumed'' as part of the materials factor of production, which is proper because this item is an overhead expense. Petitioner explains that ''stores and spares'' are listed under ''expenses for manufacture,'' not under ''raw materials'' in the SKF Report, and notes that the SKF Report refers to ''stores and spares'' as tools.

East Sea contends that the footnotes of the SKF Report state that ''stores and spares consumed'' includes ''work-in-process.'' East Sea states that it is unclear whether this line item relates to steel or other types of materials and, given the lack of clarity, it would be unfair to allocate all of this item to overhead. East Sea suggests that, because this item relates to ''stores'' taken from inventory, it is logical to classify this expense as non-overhead.

Department's Position

We agree with Petitioner. Because this line item involves expenses relating to equipment and machinery used in the production process but not incorporated into the finished product, we consider this expense as part of overhead, even though the SKF Report does not describe the nature of this line item entirely. Accordingly, for the final results, we have treated ''stores and spares consumed'' as an overhead item.

Comment 12

Petitioner argues that the Department incorrectly designated the line item ''traded goods'' in the SKF Report as a materials cost to be included in the denominator of the calculation of the overhead, SG&A, and profit rates. Petitioner states that ''traded goods'' are finished products purchased and sold by SKF that have nothing to do with its manufacturing operations. Petitioner notes that the SKF Report segregates ''purchases of traded goods'' from ''raw materials and bought out components consumed'' and, in a different part of the report, separates them from products SKF ''manufactured and sold during the year.'' Petitioner states further that the report identifies ''purchases of traded goods'' as ''ball and roller bearings,'' ''bearing accessories and maintenance products,'' and ''textile machinery components.'' Petitioner notes that, in past reviews, the Department included

only steel costs in the cost of materials, not finished products. Petitioner states that this prior approach is correct and, because purchases of traded goods are already manufactured and do not affect production, the Department should exclude them from the overhead denominator.

East Sea responds that Petitioner's argument with regard to ''traded goods'' is misguided and that the Department's calculations in the preliminary results concerning this line item were correct.

Department's Position

We disagree with Petitioner. In past reviews we did not include a line item for ''purchases of traded goods'' in the COM that we used as the denominator of the overhead, SG&A, and profit-rate calculations because the SKF reports that we used in those reviews did not include this line item. In this review, the SKF Report includes a separate line item for this cost. We have included it in the denominator of these calculations (as part of the COM) because, in calculating SKF's COM, we must include those line items listed on the SKF Report that reflect the costs associated with the production of the merchandise that are not overhead or SG&A expenses.

According to the description in the SKF Report, ''purchases of traded goods'' are properly considered as COM expenses. They are not overhead or SG&A expenses but instead reflect the common practice of manufacturers purchasing finished and semi-finished goods to meet their clients'' demand. SKF does not incur direct materials or direct labor expenses with respect to these products but instead incurs the expense of purchasing them. Because these purchased goods are an integral portion of cost of goods sold, they are ordinary business expenses that we cannot ignore, as suggested by Petitioner, simply because they involve products that SKF did not manufacture. Therefore, for the final results, we have included ''purchases of traded goods'' as part of the denominators we used in the overhead, SG&A, and profit-rate calculations.

Comment 13

Petitioner states that the Department did not include interest expenses SKF incurred in the constructed value (CV) calculations. Petitioner recommends that the Department include these expenses in the calculation of SG&A. Petitioner states that, according to the Department's *Antidumping Manual* and Department practice, interest expenses should be included in the CV.

East Sea responds that, although Petitioner points to the *Antidumping Manual* as support that SKF's interest expenses are SG&A expenses, the interest expenses to which the manual refers are selling expenses and there is no evidence that any of SKF's interest expenses pertain to sales. Accordingly, East Sea asserts that the Department should not include interest expenses in its CV calculations.

Department's Position

We agree with Petitioner that, consistent with our practice, the interest expenses in question are ordinary business expenses relating to SG&A. Therefore, we have included, in the SG&A expense for these final results, interest expenses as reported in the SKF Report.

Comment 14

Petitioner states that, for the preliminary results, the Department calculated profit on an after-tax basis. This methodology, Petitioner contends, is contrary to the Department's policy to achieve an ''apples-to-apples comparison'' (citing the Department's Antidumping Manual). Petitioner states that, because the export prices and constructed export prices used in the margin calculations include all profits, *i.e.*, are pre-tax values, the Department must calculate the profit used in establishing NV on the same basis.

East Sea responds that Petitioner cites no case law to support its assertion and the Department should continue to calculate SKF's profit net of expenses.

Department's Position

We agree with Petitioner that we should use a pre-tax amount to calculate the profit ratio, for the reasons that Petitioner provided in its comment. Therefore, for the final results, we have calculated a profit rate for NV on a pre-tax basis.

Comment 15

East Sea argues that the Department improperly designated the line item ''goodwill,'' as listed in the SKF Report, as an SG&A expense. East Sea states that goodwill expenses are related to fixed assets and are listed as such in the SKF Report. East Sea adds that there is no Departmental precedent for including goodwill as part of SG&A and, therefore, the Department should remove this expense from the SG&A calculation.

Petitioner responds that the fact that the SKF Report states that these expenses are related to fixed assets is not a sufficient reason to disregard them in calculating the SG&A expense. Petitioner states that, using the same reasoning, the Department would have to eliminate depreciation from the overhead expense, which would clearly be incorrect. Petitioner adds that East Sea provided no evidence that SKF, the surrogate producer, did not comply with Indian Generally Accepted Accounting Principles (GAAP) or that its accounting practices should otherwise be disregarded and the goodwill expense disallowed.

Department's Position

We agree with Petitioner that the fact that the SKF Report states that the goodwill expense line item is related to fixed assets does not render it a material cost. However, the evidence on the record does not allow us to determine the extent to which SKF's goodwill expense is attributable to overhead or SG&A. For these final results, we have allocated 50 percent of SKF's goodwill expense to overhead and 50 percent to SG&A.

Comment 16

East Sea argues that the Department improperly designated the line item ''rates and taxes'' in the SKF Report as an overhead expense instead of including it in SG&A. East Sea states that this expense is an SG&A expense because taxes are traditionally considered an administrative expense, not a manufacturing expense.

Petitioner responds that shifting allocations from overhead to SG&A or vise versa should not affect the bottom line of the NV calculation. Petitioner states, however, that it is more reasonable to assign the ''rates and taxes'' line item to overhead because SKF is a manufacturing company and, presumably, most of its rates and taxes would relate to its plant and equipment and other aspects of its manufacturing operations.

Department's Position

We agree with East Sea that we should allocate the ''rates and taxes'' line item to SG&A and not to overhead. This allocation methodology is consistent with our practice in previous administrative reviews of this proceeding. *See TRBs IV–VI* at 65540.

Comment 17

East Sea contends that the Department should not include the line item ''profit (loss) on fixed assets sold'' as part of overhead. East Sea states that SKF incurred this expense independent of any manufacturing or selling activities; rather, as its title suggests, it is related to the value of fixed assets.

Petitioner responds that selling fixed assets that were used in manufacturing

is not a manufacturing activity, any more than an accounting entry to reflect depreciation is a manufacturing activity. Petitioner contends, however, that this line item does identify the relevant capital cost of the assets used in manufacturing and therefore, as with depreciation, the loss on the sale of fixed assets should be included in overhead.

Department Position

We agree with Petitioner that the loss SKF India incurred in selling fixed assets used to manufacture merchandise clearly is related to manufacturing activities. Therefore, we have included this loss as an overhead item.

Comment 18

East Sea argues that the Department improperly allocated all of SKF's line item ''repairs to buildings'' to overhead in the preliminary results. East Sea suggests that Department allocate this item partially to SG&A as there is no proof that repairs were made solely to manufacturing buildings.

Department's Position

We agree with East Sea that it is improper to include all of SKF's building-repair expenses in overhead because depreciation associated with office buildings and office equipment should be included in SG&A. Therefore, for the final results, we allocated repair costs to overhead and SG&A according to the function and value of the assets; that is, we included in overhead only the depreciation expenses allocated to manufacturing. We obtained the information pertaining to the function and value of SKF's assets from the SKF Report.

Comment 19

East Sea claims that the Department should allocate insurance to both overhead and SG&A on a 75-percent/25-percent basis as there is no proof that insurance costs are related to overhead alone.

Petitioner contends that it does not make a difference in the CV calculation whether the insurance is allocated to SG&A or overhead. Petitioner adds, however, that SKF is a manufacturing company and most of its insurance costs would relate to its plant and equipment and similar items related to its manufacturing operations, i.e., overhead. Petitioner also asserts that certain PRC companies have included insurance as part of factory overhead. Moreover, Petitioner argues that East Sea's recommended 75-percent/25-percent ratio is totally arbitrary.

Department's Position

We agree with East Sea that we should allocate insurance expenses to both overhead and SG&A. However, because East Sea did not provide any support for the 75-percent/25-percent allocation ratio, we are not using this ratio for the final results. Furthermore, even though, as Petitioner notes, SKF India is a manufacturing company, we have no information which will allow us to allocate insurance expenses precisely. For the final results, we allocated insurance expenses equally to SG&A and overhead (*i.e.*, 50 percent to SG&A and 50 percent to overhead), due to the fact that the SKF Report does not identify the nature of these expenses.

Comment 20

East Sea contends that the Department should continue its past practice of using an eight-percent profit rate for the final results. East Sea emphasizes that SKF India is related to SKF Sweden and, therefore, the transfer price and other related-party transactions between parent and subsidiary could radically affect SKF's profit margins.

Petitioner argues that the former eight-percent rate was an arbitrary rate and is contrary to the new law. Petitioner adds that East Sea does not provide any evidence that such related-party transactions actually occurred or that, if they occurred, they had any actual impact upon SKF India's profits.

Department's Position

We agree with Petitioner. Consistent with section 773(c) of the Act, we calculated a profit rate using surrogate data, in this case the SKF Report. Regarding the appropriateness of this report for the profit calculation, we note that East Sea did not provide any evidence to support its claim that the profit rate is inappropriate because the company had affiliated-party transactions.

Comment 21

Petitioner contends that the Department improperly accepted CMC's claim that it incurred no U.S. selling expenses on constructed export price sales made during the POR. Petitioner recommends that the Department calculate these expenses on the basis of the facts available and use the highest SG&A expense of any respondent in this review.

Department's Position

We disagree with Petitioner. We acknowledge that, aside from our initial questionnaire, we did not pursue the issue of CMC's U.S. selling expenses in either the supplemental questionnaire or by conducting a verification of CMC's U.S. facility. Because we did not provide CMC an opportunity to cure any perceived deficiency in its response concerning such expenses and because we do not have information on the record contradicting the information that CMC provided, we have accepted this information for the final results.

3. Freight

Comment 22

Petitioner claims that the Department calculated freight expenses incorrectly by multiplying the surrogate freight rate by the net weight of each bearing rather than by the gross weight of the bearing as packaged for shipment. Petitioner states that a reasonable allowance for the weight of packaging materials should be made in calculating both ocean-freight and inland-freight rates, arguing that packaging does not travel free of charge. Petitioner suggests that the Department could use, as a PI source on the record for this review, a packing list of CMC Guizhou, submitted by Distribution Services, Ltd. (DSL), on September 27, 1995. Petitioner states that the packing list shows both gross and net weights of pallets of several common TRB models and that the average weight difference is about eight percent. Therefore, Petitioner asserts, the Department should multiply the net weights by 1.08 to reflect the weight of packaging.

Department's Position

We agree with Petitioner that a cost is incurred with respect to shipment of packing materials. Upon reviewing the packing list of CMC Guizhou, we have determined that the packing document DSL submitted in this review is an independent and reliable source for such information. Accordingly, for the final results, we have derived the gross weight used in calculating the ocean-freight expense by multiplying the net weight by 1.08.

Comment 23

Petitioner states that the Department erroneously used the Indian wholesale-price index (WPI) to adjust for inflation of ocean-freight cost. Petitioner contends that, because the Department used the U.S. dollar rates quoted by Maersk, Inc., a U.S. company, any adjustment for inflation should be based on dollar inflation. Petitioner suggests that the Department adjust ocean freight costs using the U.S. producer-price index for finished goods, the U.S. equivalent of the Indian WPI.

Department's Position

We agree with Petitioner that we should adjust ocean-freight costs using the U.S. producer-price index because ocean-freight costs are based on U.S. rates in U.S. dollars. For the final results, we deflated the July 1996 ocean-freight-rate quotes from Maersk Inc. using the U.S. WPI to reflect the POR costs.

Comment 24

Petitioner contends that the Department has understated the marine-insurance expense by applying an insurance rate per ton applicable to sulfur dyes from India. Petitioner argues that insurance protects against lost value and that, if a container of bearings were lost at sea, there is no basis to suppose that payment for the loss of one ton of sulfur dyes would have any relationship to the value of the bearings. Petitioner adds that the Department's questionnaire indicates that insurance premiums are normally based on the value of the merchandise. Petitioner recommends that the Department calculate a marine-insurance factor based on the ratio of the insurance charge per ton of sulfur dye divided by the value of sulfur dye per ton (based on U.S. Customs value) and apply this factor to the price of TRBs sold in the United States.

Guizhou Machinery *et al.* respond that it is not reasonable to assume that the difference in Indian marine-insurance rates applicable to sulfur dyes and TRBs can be measured accurately simply by comparing the difference in product values. Guizhou Machinery *et al.* further assert that Petitioner's argument is based on customs values obtained from the *Sulfur Dyes* petition, information which has not been previously submitted on the record for the current review. Guizhou Machinery *et al.* state that the Department's approach of using the marine-insurance rates from the sulfur-dyes investigation is consistent with its calculations in other NME cases.

Department's Position

We disagree with Petitioner with respect to our use of the sulfur-dyes data. We have relied on the public information on marine insurance for sulfur dyes that we used for the preliminary results, as these data are the only public information available to us; further, we have used the same rate repeatedly for other PRC analyses. *See Final Results of Administrative Review: Certain Helical Spring Lock Washers from the PRC*, 61 FR 41994 (August 13, 1996) (*Lock Washers*), and *TRBs IV–VI* at 65537.

Comment 25

Guizhou Machinery *et al.* claim that, with respect to Guizhou Machinery and Guizhou Automotive, the Department did not convert the charge for marine insurance from rupees into U.S. dollars and, therefore, this expense is overstated. Guizhou Machinery and Guizhou Automotive explain that the Department calculated marine insurance by multiplying the rate per kilogram by the net weight of the bearing and then adjusted for inflation, yielding a figure in rupees, which must be converted into U.S. dollars in order to calculate a U.S. price. Guizhou Machinery and Guizhou Automotive request that the Department convert all marine-insurance rates in rupees to U.S. dollars.

Additionally, Guizhou Machinery and Guizhou Automotive claim that the Department calculated the foreign-inland-freight charge incorrectly. Respondents explain that, for all other companies, the Department calculated this charge properly but, for Guizhou Machinery and Guizhou Automotive, the Department's formula resulted in an inflated expense. Guizhou Machinery and Guizhou Automotive request that the Department correct this error for the final results.

Petitioner agrees that the Department should check its calculations and ensure that amounts denominated in rupees are converted into dollars and that it should apply the proper formula for inland freight.

Department's Position

We agree with both parties. For the final results, we have corrected these errors.

4. Facts Available

Comment 26

Petitioner disagrees with the Department's acceptance of Premier's FOP data even though, in most cases, the data did not relate to the manufacturer whose merchandise Premier sold to the United States. Petitioner recommends the use of facts available to calculate Premier's rate. Petitioner argues that there is no indication that Premier's selective reporting is representative of its suppliers'' actual experience, noting that the questionnaire states that, if a producer uses more than one facility to produce subject merchandise, it must report the factor use at each location. Petitioner asserts that the Department's acceptance of Premier's selective responses, as well as the use of other surrogate producers' costs when those of Premier's suppliers were not available, is contrary to the Department's policy regarding the appropriate deposit rate for unreviewed non-PRC exporters of subject merchandise from the PRC. Petitioner states that Premier and its suppliers should not be allowed to select the suppliers on the basis of whose data the Department will calculate Premier's margin.

Petitioner states that only Premier knows the efforts it made to supply this information and, moreover, Premier's efforts are irrelevant because the focus should be on the efforts Premier's suppliers made. Petitioner contends that, since certain suppliers refused to come forward and claim eligibility for a separate rate, the Department must presume them to be part of the single entity to which the PRC rate applies and, as non-responsive companies, they are subject to the use of adverse facts available. Petitioner adds that all companies are conditionally covered in this review and are subject to the PRC rate.

Finally, Petitioner argues that the Department cannot justify its approach on practical grounds. In this regard, Petitioner contends that, although the Department states there is little variation in factor-utilization rates among the TRB producers from whom it has FOP data, the available data reflects only a small number of PRC producers and the preliminary results show margins ranging from zero to 129.97 percent.

Premier responds that, despite its repeated efforts to obtain FOP data directly from its PRC-based suppliers, it was unsuccessful in obtaining this data. Premier claims that it has been as responsive and cooperative as possible with the Department in the course of this review. Premier explains that, given this lack of supplier data for certain U.S. sales, it analyzed the record to identify FOP data that could be used in place of the data its suppliers had refused to supply, and it submitted FOP data for models that constituted 94 percent of its POR U.S. sales as follows: for 69 percent of its U.S. sales, Premier provided FOP data for the supplier from whom Premier purchased the merchandise; for 25 percent of its U.S. sales, Premier supplied data from other Chinese producers. Premier states that, accordingly, it could not locate any FOP data for only six percent of its U.S. POR sales and the Department was correct to use Premier's U.S. sales and FOP data when calculating Premier's dumping margin.

Premier claims that it did not choose the production facility from which to

obtain cost data selectively, stating that it linked its FOP reporting to its suppliers if that supplier's data was on the record. Finally, Premier states that Petitioner is incorrect in asserting that the real focus should be on the PRC producers. Premier states that any PRC producer who sells merchandise to trading companies without prior knowledge that the merchandise is destined for the United States is not subject to a separate dumping-margin calculation and by law cannot be the focus for resolution of this issue.

Department's Position

We disagree with Petitioner. Premier responded to the best of its ability to our requests for information regarding FOP data. Given the level of cooperation evidenced by Premier in this review, including the submission of responsive initial and supplemental questionnaire responses as well as its participation in a complete verification of its data, and the amount of usable information provided, Premier's inability to provide certain FOP data does not warrant the use of adverse facts available in calculating a margin in this case. Premier provided enough information to allow us to calculate an accurate margin, and we used our discretion appropriately to determine how to apply facts available to account for the missing data. Accordingly, for these final results, we are following our methodology from the preliminary results.

Premier was able to provide factors data from its suppliers for models that represented most of Premier's sales by value. For those U.S. sales for which Premier was unable to provide FOP data from its own suppliers, it provided FOP data from other PRC suppliers of the same models. For such merchandise, we determined that there is little variation in factor-utilization rates among TRB producers from whom we have received FOP data. Accordingly, we used such data for Premier for U.S. sales of those models. For a small percentage of sales, Premier was unable to report any FOP data. We determined that a simple average of the calculated margins for other companies in this review is a reasonable rate to apply, as facts available, for these sales by Premier.

5. Assessment

Comment 27

Transcom and L&S, domestic importers of subject merchandise, argue that the Department's decision to apply what they consider to be punitive facts-available appraisement and deposit rates to companies that were never part of the review is unlawful. Transcom and L&S state that, for this review, there were various companies from which they purchased subject merchandise, none of which received a questionnaire or was named in the notice of initiation of review. Transcom states that entries from each of the unnamed companies were subject to estimated antidumping duty deposits at the ''all others'' rate in effect at the time of entry and argues that the Department is precluded as a matter of law from either assessing final antidumping duties on the unreviewed companies at any rate other than that at which estimated antidumping duty deposits were made or imposing the new facts-available-based deposit rate on shipments from unreviewed companies.

Transcom and L&S, citing section 751(a) of the Act, state that the Department is directed to determine the amount of antidumping duties to be imposed pursuant to periodic reviews. They add that, in accordance with 19 CFR 353.22(e), unreviewed companies are subject to automatic assessment of antidumping duties and a deposit of estimated duties at the rate previously established. Transcom and L&S note that the Court of International Trade (CIT) has concluded that, in situations where a company's entries are not reviewed, the prior cash deposit rate from the less-than-fair-value (LTFV) investigation becomes the assessment rate, ''which must in turn become the new cash deposit rate for that company'' (citing *Federal Mogul Corp.* v. *United States,* 822 F. Supp. 782, 787–88 (CIT 1993) (*Federal Mogul II*)). Transcom and L&S claim that the CIT has affirmed this rationale in other, more recent, decisions as well, concluding that the Department's use of a new ''all others'' rate calculated during a particular administrative review as the new cash deposit rate for unreviewed companies which have previously received the ''all others'' rate is not in accordance with law (citing *Federal Mogul Corp.* v. *United States,* 862 F. Supp. 384 (CIT 1994), and *UCF America, Inc.* v. *United States,* 870 F. Supp. 1120, 1127–28 (CIT 1994) (*UCF America*)).

Based on these CIT decisions, Transcom contends that an exporter that is not under review would have no reason to anticipate that antidumping duties assessed on its merchandise would vary from the amount deposited. Transcom notes that *Federal Mogul II* (at 788) states that parties rely on the cash deposit rates in making their decision whether to request an administrative review of certain merchandise. In view of the Department's regulations, Transcom claims that the absence of any notice from the Department that unnamed companies faced the possibility of increased antidumping duty liability is fundamentally prejudicial to the unnamed companies. Transcom states that previous attempts by the Department to impose a rate based on the facts available on an exporter neither named in the review request nor in the notice of initiation have been overturned, citing *Sigma Corp.* v. *United States,* 841 F. Supp. 1255 (CIT 1993) (*Sigma Corp. I*). In that case, Transcom contends, the CIT held that the Department was required to provide the company in question adequate notice to defend its interests and, because it failed to do so, ordered the liquidation of entries of merchandise exported by that company at the entered deposit rate.

Transcom argues that the Department's statement that all exporters of subject merchandise are ''conditionally covered by this review'' (*Initiation of Antidumping Duty Administrative Reviews and Request for Revocation in Part (Initiation Notice),* 59 FR 43537, 43539 (August 24, 1994)) is inadequate in that it fails to explain under what ''conditions'' exporters are covered and whether such ''conditions'' were met. If the statement is meant to include unconditionally all unnamed exporters, Transcom asserts that it is contrary to the regulatory requirement at 19 CFR 353.22(a)(1) that the review cover ''specified individual producers or resellers covered by an order.'' Because the importers in question were never served notice that they were subject, conditionally or otherwise, to review, Transcom claims that the Department is precluded from applying a punitive rate to the company's exports.

Transcom contends that, in accordance with section 776 of the Act, the Department must have requested and been unable to obtain information before applying adverse facts available. Transcom claims that the Department may not resort to facts available ''because of an alleged failure to provide further explanation when that additional explanation was never requested'' (quoting *Olympic Adhesives, Inc.* v. *United States,* 899 F.2d 1565, 1574 (1990); also citing *Mitsui & Co., Ltd.* v. *United States,* 18 CIT 185 (March 11, 1994); *Usinor Sacillor* v. *United States,* 872 F. Supp. 1000 (1994); and *Sigma Corp. I* at 1263). Finally, Transcom argues that the facts-available-based PRC-wide rate cannot be applied to exports by companies outside of China because these companies are not PRC companies.

L&S requests that the Department liquidate entries of the company's

imports from companies that were not specifically reviewed at the entered rate rather than the punitive ''PRC-wide'' rate. L&S also states that the prospective deposit rate for these unreviewed companies should be 2.96 percent, which was the ''all others'' rate in the initial investigation.

Petitioner states that it is its intention that all exporters are covered by this review and points out that the Department's notice of initiation specified that all ''other exporters * * * are conditionally covered.'' Therefore, Petitioner argues, all other suppliers of Transcom not entitled to a separate rate should be expressly listed in the final results as among those to which the ''PRC rate'' applies.

Department's Position

We disagree with Transcom and L&S. It is our policy to treat all exporters of subject merchandise in NME countries as a single government-controlled entity and assign that entity a single rate, except for those exporters which demonstrate an absence of government control, both in law and in fact, with respect to exports. Our guidelines concerning the *de jure* and *de facto* separate-rates analyses, as well as the company-specific separate-rates determinations, are discussed in the *Preliminary Results* at 40611–12. We have determined that companies in the government-controlled entity failed to respond to our requests for information in this review and, accordingly, we have established the rate applicable to such companies (the PRC rate) using uncooperative facts available. As discussed below, the Act mandates application of facts available for such companies because they are subject to the review and they failed to cooperate by responding to our requests for information.

Pursuant to our NME policy, we presume that all PRC exporters or producers that have not demonstrated that they are separate from PRC government control belong to a single, state-controlled entity (the ''PRC enterprise'') for which we must calculate a single rate (the ''PRC rate'). The CIT has upheld our presumption of a single, state-controlled entity in NME cases. *See UCF America, Inc.* v. *United States*, 870 F. Supp. 1120, 1126 (CIT 1994), *Sigma Corp I*, and *Tianjin Machinery Import & Export Corp.* v. *United States*, 806 F. Supp. 1008, 1013–15 (CIT 1992). Section 353.22(a) of our regulations allows interested parties to request an administrative review of an antidumping duty order once a year during the anniversary month. This regulation specifically states that interested parties must list the ''specified individual producers'' to be covered by the review. In the context of NME cases, we interpret this regulation to mean that, if at least one named producer or exporter does not qualify for a separate rate, the PRC enterprise as a whole (*i.e.*, all exporters that have not qualified for a separate rate) is part of the review (this is analogous to our practice in market-economy cases of including in reviews persons affiliated to a company for which a review was requested). On the other hand, if all named producers or exporters are entitled to separate rates, there has been no request for a review of the PRC enterprise and, therefore, the NME rate remains unchanged. *Accord Federal-Mogul II* (''[i]n a situation where a company's entries are unreviewed, the prior cash deposit rate from the LTFV investigation becomes the assessment rate, which must in turn become the new cash deposit rate for that company'').

In this review, numerous companies named in the notice of initiation did not respond to our questionnaires. We sent a letter to the PRC embassy in Washington and to the Ministry of Foreign Trade and Economic Cooperation (MOFTEC) in Beijing, requesting the identification of TRB producers and manufacturers, as well as information on the production of TRBs in the PRC and the sale of TRBs to the United States. MOFTEC informed us that the China Chamber of Commerce for Machinery and Electronics Products Import & Export (CCCME) was responsible for coordinating the TRBs case. MOFTEC also said it forwarded our letter and questionnaire to the CCCME. We also sent a copy of our letter and the questionnaire directly to the CCCME, asking that the questionnaire be transmitted to all companies in the PRC that produced TRBs for export to the United States and to all companies that exported TRBs to the United States during the POR.

Because we did not receive information concerning many of the companies named in the notice of initiation, we have presumed that these companies are under government control. In accordance with our NME policy, therefore, the government-controlled enterprise, which is comprised of all exporters of subject merchandise that have not demonstrated they are separate from PRC control, is part of this review. Therefore, we must assign a review-specific ''PRC'' rate to that enterprise. Because we did not receive responses from these exporters, we have based the PRC rate on the facts available, pursuant to section 776(c) of the Act. This rate will form the basis of assessment for this review as well as the cash deposit rate for future entries. In this regard, Transcom's reliance on *Olympic Adhesives* and other cases is misplaced because the PRC entity to which we assigned the review-specific PRC rate was requested to respond to our questionnaire.

We acknowledge a recent CIT decision cited by Transcom and by L&S, *UCF America Inc.* v. *United States*, Slip Op. 96–42 (CIT Feb. 27, 1996), in which the Court affirmed the Department's remand results for reinstatement of the relevant cash deposit rate but expressed disagreement with the PRC-rate methodology which formed the underlying rationale for reinstatement. In *UCF*, the Court suggested that the Department lacks authority for applying a PRC rate in lieu of an ''all others'' rate. However, despite the concerns expressed by the Court, it is our view that we have the authority to use the PRC rate in lieu of an ''all others'' rate. *See Hand Tools* at 15221. Further, a subsequent CIT decision accepted our application of a review-specific PRC rate to non-responding PRC firms not individually named in the notice of initiation. *See Yue Pak, Ltd.* v. *United States*, Slip Op. 96–65, at 66 (April 18, 1996).

The PRC rate is consistent with the statute and regulations. As discussed above, in NME cases, all producers and exporters which have not demonstrated their independence are deemed to comprise a single enterprise. Thus, we assign the PRC rate to the PRC enterprise just as we may assign a single rate to a group of affiliated exporters or producers operating in a market economy. Because the PRC rate is the equivalent of a company-specific rate, it changes only when we review the PRC enterprise. As noted above, all exporters or producers will either qualify for a separate company-specific rate or will be part of the PRC enterprise and receive the PRC rate. Consequently, whenever the PRC enterprise has been investigated or reviewed, calculation of an ''all others'' rate for PRC exporters is unnecessary.

Thus, contrary to the argument by Transcom and L&S, the Department's automatic-assessment regulation (19 CFR 353.22(e)) does not apply to this review except in the case of companies that demonstrate that they are separate from PRC government control and are not part of this review. *See Comment 2*, above.

We also disagree with the assertion by Transcom and L&S that companies not

named in the initiation notice did not have an opportunity to defend their interests by demonstrating their independence from the PRC entity. Any company that believes it is entitled to a separate rate may place evidence on the record supporting its claim. The companies referenced by Transcom and L&S made no such showing, despite our efforts to transmit the questionnaire to all PRC companies that produce TRBs for export to the United States.

Furthermore, Transcom's argument that the facts-available-based PRC-wide rate cannot be applied to exports by companies outside of China because these companies are not PRC companies is also unfounded. Because these exporters' Chinese suppliers did not respond to the Department's questionnaire, we were unable to determine, with respect to sales by these exporters, whether the exporter or the Chinese suppliers were the first sellers in the chain of distribution to know that the merchandise they sold was destined for the United States. *See Yue Pak* at 6. When resellers choose to use uncooperative suppliers that are under an antidumping order, they must bear the consequences. *See Yue Pak* at 16. Otherwise, uncooperative PRC exporters would be free to hide behind and continue exporting through low-rate resellers in other countries.

6. Miscellaneous Issues

Comment 28

Guizhou Machinery *et al.* state that the Department identified Xiangfan as ''Xiangfan International Trade Corporation'' in the preliminary results, despite the fact the Xiangfan provided information on the record indicating that its name had changed to ''Xiangfan Machinery Foreign Trade Corporation, Hubei China.'' Guizhou Machinery *et al.* request that the Department identify Xiangfan by this name for the final results.

Petitioner responds that this name change illustrates the ease with which entities can make name changes and thereby circumvent the order. Petitioner asks that the Department consider such evidence when making its separate-rates determinations.

Department's Position

We agree with Guizhou Machinery *et al.* and have made this change for the final results. This name change by a single company in this review does not affect our separate-rates analysis (*see* our responses to Comments 1 and 2).

Comment 29

Guizhou Machinery *et al.* request that the Department specifically identify all branches of CMC that sold subject merchandise to the United States during the POR. Respondents state that, although the Department properly included sales made by CMC branches CMC Bali, CMC Yantai, and Yantai CMC Bearing Company in its analysis of CMC, it did not identify these exporters. Respondents state that such identification is necessary in order to ensure that entries of merchandise from these exporters receive the appropriate deposit and assessment rates.

Petitioner responds that the Department has not made an individual separate-rate finding for each of these firms and, therefore, it should deny Respondents' request.

Department's Position

We agree with Guizhou Machinery *et al.* We included all sales by the above-named companies in our analysis of CMC in these final results and our assessment and cash deposit rates reflect this analysis.

Final Results of Review

As a result of our analysis of the comments we received, we determine the following weighted-average margins to exist for the period June 1, 1994 through May 31, 1995:

Manufacturer/exporter	Margin (percent)
Premier Bearing and Equipment, Limited	2.76
Guizhou Machinery Import and Export Corporation	17.65
Luoyang Bearing Factory	0.00
Jilin Machinery Import and Export Corporation	29.40
Wafangdian Bearing Factory	29.40
Liaoning Co.; Ltd	9.72
China National Machinery Import and Export Corp	0.00
China Nat'l Automotive Industry Import and Export Corp	25.66
Tianshui Hailin Import and Export Corp	24.17
Zhejiang Machinery Import and Export Corp	2.75
Xiangfan Machinery Foreign Trade Corporation, Hubei China	0.00
East Sea Bearing Co., Ltd	3.23
PRC Rate	29.40

The Department shall determine, and the Customs Service shall assess, antidumping duties on all appropriate entries. Individual differences between export price or constructed export price and NV may vary from the percentages stated above. The Department will issue appraisement instructions directly to the Customs Service.

Furthermore, the following cash deposit requirements will be effective upon publication of these final results for all shipments of the subject merchandise entered, or withdrawn from warehouse, for consumption on or after the publication date, as provided for by section 751(a)(1) of the Act: (1) for the companies named above that have separate rates and were reviewed (Premier, Guizhou Machinery, Jilin, Luoyang, Liaoning, Tianshui, Zhejiang, CMC, China National Automotive Industry Import and Export Guizhou, Xiangfan, East Sea, and Wafangdian), the cash deposit rates will be the rates listed above; (2) for Shandong, Wanxiang, and Great Wall, which we determine to be entitled to separate rates, the rate will continue be that which currently applies (8.83 percent); (3) for all remaining PRC exporters, all of which were found not to be entitled to separate rates, the cash deposit will be 29.40 percent; and (4) for other non-PRC exporters of subject merchandise from the PRC, the cash deposit rate will be the rate applicable to the PRC supplier of that exporter. These deposit requirements shall remain in effect until publication of the final results of the next administrative review.

This notice 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 APOs of their responsibility concerning disposition of proprietary information disclosed under APO in accordance with 19 CFR 353.34(d). Timely written notification of the 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 19 CFR 353.22.

Dated: February 3, 1997.

Robert S. LaRussa,

Acting Assistant Secretary for Import Administration.

[FR Doc. 97–3355 Filed 2–10–97; 8:45 am]

BILLING CODE 3510–DS–P

[A–570–601]

Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From the People's Republic of China; Final Results of Antidumping Duty Administrative Review and Revocation in Part of Antidumping Duty Order

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

ACTION: Final results of antidumping duty administrative review and revocation in part of antidumping duty order on tapered roller bearings and parts thereof, finished and unfinished, from the People's Republic of China.

SUMMARY: On September 26, 1995, the Department of Commerce (the Department) published the preliminary results of its administrative review of the antidumping duty order on tapered roller bearings (TRBs) and parts thereof, finished and unfinished, from the People's Republic of China (PRC). The period of review (POR) is June 1, 1993, through May 31, 1994.

Based on our analysis of comments received, we have made changes to the margin calculations, including corrections of certain clerical errors. Therefore, the final results differ from the preliminary results. The final weighted-average dumping margins are listed below in the section entitled ''Final Results of Review.''

We have determined that sales have been made below foreign market value (FMV) during the period of review. Accordingly, we will instruct the U.S. Customs Service to assess antidumping duties on all appropriate entries.

We have also determined that one company has demonstrated that it has made sales at not less than fair value for three consecutive review periods. Therefore, we are revoking the order in part with respect to this firm.

EFFECTIVE DATE: February 11, 1997.

FOR FURTHER INFORMATION CONTACT: Charles Riggle, Hermes Pinilla, Andrea Chu, Kristie Strecker, or Kris Campbell, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution, Avenue N.W., Washington, D.C. 20230; telephone (202) 482–4733.

APPLICABLE STATUTE AND REGULATIONS: Unless otherwise indicated, all citations to the statute and to the Department's regulations are references to the provisions as they existed on December 31, 1994.

SUPPLEMENTARY INFORMATION:

Background

On September 26, 1995, the Department published in the Federal Register the preliminary results of its administrative review of the antidumping duty order on TRBs from the PRC. *See Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From the People's Republic of China; Preliminary Results of Antidumping Duty Administrative Reviews,* 60 FR 49572 (September 26, 1995) *(Preliminary Results).* We gave interested parties an opportunity to comment on our preliminary results and held a public hearing on November 29, 1995. The following parties submitted comments: The Timken Company (Petitioner); Shanghai General Bearing Company, Limited (Shanghai); Guizhou Machinery Import and Export Corporation (Guizhou Machinery), Henan Machinery and Equipment Import and Export Corporation (Henan), Jilin Province Machinery Import and Export Corporation (Jilin), Liaoning MEC Group Company Limited (Liaoning), China National Machinery Import and Export Corporation (CMC), and Wafangdian Bearing Industry Corporation (Wafangdian) (collectively referred to as Guizhou Machinery *et al.*); Premier Bearing and Equipment Limited (Premier); Peer Bearing Company/Chin Jun Industrial Limited (Chin Jun); Transcom, Incorporated (Transcom); and L&S Bearing Company/LSB Industries (L&S).

On June 30, 1994, Shanghai submitted a request, in accordance with 19 CFR 353.25(b), that the antidumping duty order be revoked with respect to Shanghai's sales of this merchandise. In accordance with 19 CFR 353.25(a)(2)(iii), this request was accompanied by certifications from the firm that it had sold subject merchandise at not less than FMV for a three-year period, including this review period, and would not do so in the future. Shanghai also agreed to its immediate reinstatement in the antidumping duty order, as long as any firm is subject to this order, if the Department concludes under 19 CFR 353.22(f) that, subsequent to revocation, it sold the subject merchandise at less than FMV.

On March 13, 1996, we published in the Federal Register our notice of intent to revoke the order in part. *See Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From the People's Republic of China; Intent to Revoke the Order (In Part),* 61 FR 10314 (March 13, 1996). We gave interested parties an opportunity to comment on our intent to revoke in part. Petitioner submitted comments; Shanghai submitted rebuttal comments.

We have conducted this administrative review in accordance with section 751(a)(1) of the Tariff Act of 1930, as amended (the Act), and 19 CFR 353.22.

Scope of Reviews

Imports covered by these reviews are shipments of TRBs and parts thereof, finished and unfinished, from the PRC. This merchandise is classifiable under the *Harmonized Tariff Schedule* (HTS) item numbers 8482.20.00, 8482.91.00.60, 8482.99.30, 8483.20.40, 8483.20.80, 8483.30.80, 8483.90.20, 8483.90.30 and 8483.90.80. Although the HTS item numbers are provided for convenience and customs purposes, our written description of the scope of this proceeding is dispositive.

Best Information Available

In accordance with section 776(c) of the Act, we have determined that the use of the best information available (BIA) is appropriate for a number of firms. For certain firms, total BIA was necessary, while for other firms only partial BIA was applied. Our application of BIA is discussed further in the *Analysis of Comments Received* section of this notice.

Analysis of Comments Received

Comment 1

Petitioner argues that the Department's preliminary finding that there are 11 independent Chinese TRB producers entitled to separate antidumping duty rates is inconsistent with the preliminary determination that the TRB industry is not sufficiently market-oriented to allow for the use of home market prices. Petitioner states that, where the government retains significant control over an entire industry, there is sufficient direct, or indirect, control to warrant treating all of the producers as ''related'' for purposes of section 773(e)(4)(F) of the Act and also to calculate only a single margin for these companies. Petitioner notes that, in analyzing *de facto* state control, the Department considers whether the plants have independent authority to set prices and the ability to retain profits. However, Petitioner insists, where input and factor prices are established by state control and where ownership of the company and the concept of profits are unclear, there is no truly independent authority to set prices and retain profits. Petitioner cites the April 25, 1995 public version of Jilin's supplemental questionnaire

response which states, at 3, that Jilin's profits may be used, *inter alia*, ''for employee bonuses and welfare.'' Petitioner claims that, in market-oriented companies, employee bonuses and welfare would be regarded as expenses, not profits (citing *Compact Ductile Iron Waterworks Fittings and Accessories from the People's Republic of China*, 58 FR 37908, 37910 (July 14, 1993) (*CDIW*)).

Petitioner contends that, if the Department calculates separate rates, there is a strong incentive to channel U.S. exports through exporters with the lowest margins, and that the record establishes that various TRB producers not only market their own bearings but also perform sales and marketing functions with respect to TRB models produced by other companies. Petitioner argues that new importations will inevitably be channeled through companies with the lowest margins, adding that such behavior is a manifestation of the state control that permeates the industry and the economy.

Petitioner contends further that the Department's *de jure* and *de facto* separate-rates analysis places an impossible burden of proof on domestic interested parties due to the fact that a state-controlled economy can amend its laws and regulations without in fact relinquishing control. Petitioner claims that the state can simply delete any evidence of *de jure* control from laws, regulations, corporate charters and other documents. That being the case, Petitioner argues, the domestic industry, as well as the Department itself, are confronted with the requirement that they prove a negative without having access to information that would indicate continuing control over production and pricing decisions by the state. Thus, Petitioner states, claims made by plant managers, themselves interested in obtaining separate rates, become the basis for the Department's *de facto* analysis. Finally, Petitioner argues that domestic interested parties do not have access to information that might allow them to rebut the claims of *de facto* independence, causing irrational results and defeating the purpose of the statute (citing *Rhone Poulenc* (page cite omitted) and *The Timken Co.* v. *United States*, 11 CIT 786, 804, 673 F. Supp. 495, 513 (1987)).

Guizhou Machinery *et al.* acknowledge that in *CDIW* the Department determined that it would not consider a request for separate rates for any state-owned company on the basis that no state-owned company could be independent enough of state control to be entitled to separate rates. However, Guizhou Machinery *et al.* note, citing *Final Determination of Sales at Less Than Fair Value: Silicon Carbide From the People's Republic of China*, 59 FR 22585 (May 2, 1994) (*Silicon Carbide*), that the Department subsequently departed from the *CDIW* decision and returned to its former practice, with some modifications, and argue that, in the preliminary results, the Department properly employed its more recent separate-rates analysis methodology from *Silicon Carbide*.

Guizhou Machinery *et al.* add that the Department has rejected Petitioner's claim that separate rates should only be applied to companies which are also found to be part of a market-oriented industry. Guizhou Machinery *et al.* note that the Department has previously stated that the separate-rates analysis and the market-oriented-industry (MOI) test should not be linked in the manner Petitioner appears to be suggesting (citing *Final Determination of Sales at Less Than Fair Value: Disposable Pocket Lighters From the People's Republic of China*, 60 FR 22359, 22363 (May 5, 1995) (*Disposable Lighters*)).

Shanghai concurs with Guizhou Machinery *et al.* that an MOI determination and the separate-rates methodology are not synonymous and that a negative determination with respect to the former cannot rationally dictate a negative determination with respect to the latter. Shanghai asserts that the Department properly determined that Shanghai was entitled to a separate rate notwithstanding the determination that the TRB industry in the PRC is not an MOI. Shanghai states that the separate-rates analysis involves an assessment different from the determination of whether an MOI exists and that to prove an industry in the PRC is market-oriented would require proof negating the existence of any state influence over any factor of production throughout all segments of an industry, potentially involving hundreds of business units. Shanghai argues that such a task would be virtually impossible to achieve—even for the U.S. TRB industry.

Shanghai claims that this is particularly true with respect to itself, a joint-venture company created under a law guaranteeing that it operates as a market-oriented producer. Shanghai states that record evidence shows it operates according to market influences, with all input-purchase decisions based on its own assessment of production and quality requirements and with all price negotiations conducted at arm's length. Shanghai states that the PRC government exercises no control over the prices of inputs, the type or volume of production, product prices or distribution of profits. Shanghai adds that there are no restrictions on its uses of revenues and profits, it has exclusive control over and access to its bank accounts, and it can earn foreign currency and retain as much of the foreign currency as it desires. Therefore, Shanghai asserts that, regardless of the Department's conclusion that the TRB industry in China is not market-oriented, it is entitled to a separate rate.

Department's Position

We agree with respondents that MOI determinations and separate-rate determinations differ with respect to both the analysis we perform and the pact of the decision. We also agree with Guizhou Machinery *et al.* that we have departed, where appropriate, from the *CDIW* decision. In *CDIW*, we took the position that state ownership (*i.e.*, ''ownership by all the people'') ''provides the central government the opportunity to manipulate the exporter's prices, whether or not it has taken advantage of that opportunity during the period of investigation.'' Thus, we concluded in *CDIW* that state-owned enterprises would not be eligible for separate rates.

However, we have modified our separate-rates policy as set forth in *CDIW*. We subsequently determined that ownership ''by all the people'' in and of itself cannot be considered as dispositive in establishing whether a company can receive a separate rate. *See Silicon Carbide* at 22585. It is our policy that a PRC-based respondent is entitled to a separate rate if it demonstrates on a *de jure* and a *de facto* basis that there is an absence of government control over its export activities.

A separate-rate determination does not presume to speak to more than an individual company's independence in its export activities. The analysis is narrowly focused and the result, if independence is found, is resultingly narrow—the Department analyzes that single company's U.S. sales separately and calculates a company-specific antidumping rate. Thus, for purposes of calculating margins, we analyze whether specific exporters are free of government control over their export activities, using the criteria set forth in *Silicon Carbide* at 22585. Those exporters who establish their independence from government control are entitled to a separate margin calculation.

Thus, a finding that a company is entitled to a separate rate indicates that the company has sufficient control over its export activities to prevent the manipulation of such activities by a

government seeking to channel exports through companies with relatively low dumping rates. *See Disposable Lighters* at 22363. A market-oriented-industry determination, by way of contrast, focusses on overall control of the domestic industry, rather than simply on its export activities, and therefore leads to a decision as to whether home market or third-country prices within the industry are sufficiently market-driven that such prices may be used to establish FMV.

Petitioner's argument that there is sufficient direct or indirect government control to treat all exporters as ''related'' is unsupported by the record and is not dispositive, since our separate-rates inquiry focuses on the extent of a respondent's independence with respect to export activities. The PRC companies that responded to our questionnaire submitted information indicating a lack of both *de jure* and *de facto* control over their export activities. Contrary to Petitioner's claim that the necessary information concerning the *de facto* portion of the analysis is inaccessible to both Petitioner and to the Department, such information was in fact subject to verification and was discussed in the relevant verification reports. Based on our analysis of the *Silicon Carbide* factors, the verified information on the record supports our determination that these 11 respondents are, both in law and in fact, free of government control over their export activities. Thus, it would be inappropriate to treat these firms as a single enterprise and assign them a single margin. Accordingly, we have continued to calculate separate margins for these companies. *See Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From the People's Republic of China; Final Results of Antidumping Duty Administrative Reviews* (*TRBs IV–VI*), 61 FR 65527, 65528 (December 13, 1996).

Comment 2

Petitioner argues that the Department should base the values of all factors of production (FOP) on the annual report of SKF India (SKF). Petitioner notes that, for the preliminary results, the Department used the SKF report to value three factors (overhead; selling, general, and administrative expenses (SG&A); and profit), whereas the Department derived values for the direct labor and raw material factors from two other, unrelated sources (*Investing, Licensing & Trading Conditions Abroad, India* (*IL&T India*) statistics and Indian import statistics, respectively). Petitioner argues that the annual report of SKF is the only record source that yields values for all five factors and that, as such, the SKF report is a single, coherent source that includes segregated information on each of the principal FOP and other costs necessary to construct FMV. Petitioner contends that the statute instructs the Department to value FOP based on the best information regarding the values of such factors in a market-economy country or countries that are (A) at a level of economic development comparable to that of the non-market-economy (NME) country, and (B) significant producers of comparable merchandise (citing sections 773(c) (1) and (4) of the Act). Petitioner further claims that the Department's use of other sources to value labor and raw materials, while using SKF's labor and raw materials information to derive overhead, SG&A and profit, is inherently distortive, given the ratios the Department calculated from these figures.

Petitioner states that the use of the SKF report for all FOP values is consistent with the importance the courts attach to internal coherence and the use of a single source when possible (citing *Timken Co.* v. *United States*, 12 CIT 955, 962, 963, 699 F. Supp. 300, 306, 307 (1988), *affirmed* 894 F.2d 385 (Fed. Cir. 1990) (collectively *Timken*)). Petitioner suggests that the SKF report most nearly approximates a verified, surrogate questionnaire response of the type the Department formerly sought from producers in potential surrogate countries.

Petitioner further contends that, whereas SKF's costs and expenses represent those of a producer of the class or kind of merchandise subject to review, the surrogate data for direct labor and raw materials the Department used cover a broad range of industries and products. Petitioner claims that the direct labor classification the Department used covers, in addition to bearings producers, hundreds of industry sectors under broad headings unrelated to bearings production and argues that there is no rational basis for using such a non-specific source as a surrogate. Petitioner claims that the *IL&T India* labor costs cover an aggregate of all Indian industries without distinction and that the *IL&T India* report itself points out (at 45) that wages and fringe benefits ''vary considerably by industry, company size and region.'' Therefore, Petitioner argues, it is not rational to view the *IL&T India* information as representative of labor costs in bearing production in India.

Petitioner asserts that the ''other'' alloy steel category from the Indian import statistics, which the Department used to value material costs for the preliminary results, is similarly broad and may or may not include imports of the steel used to produce bearings. However, even if included, Petitioner claims that bearing steel represents only a part of steel imports in the basket category.

Petitioner notes that record evidence (referencing the SKF India report, a 1989–1990 report of Asian Bearing, an Indian TRB producer, and the results of a remand in the original less-than-fair-value (LTFV) investigation) shows the costs of raw materials and labor incurred by actual bearings producers in India to be consistently higher than the trade statistics values the Department used in the preliminary results, either because the industries or product categories covered by the labor and raw materials sources are overly broad or because domestic prices are different from those of imports.

Petitioner argues in the alternative that, in the event that the Department does not use the SKF report to value all FOP, the Department must adjust the overhead and SG&A rates to reflect the use of lower materials and labor values from the separate sources. Petitioner claims it would be distortive to include SKF's full materials and labor costs in the cost of manufacture (COM) denominator of the overhead and SG&A calculations unless they are also the basis for valuing the raw materials and direct labor factors in the constructed value (CV) calculation. Petitioner proposes that the Department multiply the total weight of materials for SKF by the average value of steel that it uses in the final results and multiply the total number of hours worked at SKF by the *IL&T India* labor value used for the material and labor figures the Department included in the overhead and SG&A calculations.

Petitioner states that the most obvious adjustment needed to the materials element of the overhead and SG&A calculations is due to the Department's use of Indian steel values free of duties; specifically, because the Indian import data the Department applied in the preliminary results are based on pre-duty import values, it is inappropriate to use an SKF materials value that includes duties in the overhead and SG&A calculations. Petitioner suggests that, if the Department does not apply the proposed adjustment (*i.e.*, total SKF material weight times the Indian value used), the amount of duties paid by SKF on imported materials, as indicated in the SKF report, must be segregated from the materials total in the overhead and SG&A calculations in order to derive apples-to-apples ratios.

Guizhou Machinery *et al.* respond by arguing that it is irrelevant whether the SKF report represents a single, coherent source for valuing all FOP components and note that the Department consistently uses multiple sources of information for surrogate data in NME cases (citing *Final Determination of Sales at Less Than Fair Value: Sebacic Acid from the People's Republic of China,* 59 FR 28053 (May 31, 1994) (*Sebacic Acid*), and *Final Determination of Sales at Less Than Fair Value: Certain Cased Pencils from the People's Republic of China,* 59 FR 55625 (November 8, 1994)), selecting the best source for each element of the FOP. Guizhou Machinery *et al.* add that Petitioner's citation to *Timken* is misplaced and state that, in that instance, the Department was not criticized for the use of different sources but for the disparity between the ratios resulting from the Department's calculation and other ratios on the record. Shanghai concurs that, in the past, the Department has not required the use of a ''single, coherent source'' for all FOP information when that source is a single, private company, particularly one engaged in lines of business other than the manufacture of subject merchandise. Shanghai states that the Department correctly calculated surrogate labor costs and that the *IL&T India* data represent a better choice than the SKF report. Shanghai explains that the SKF data constitutes unverified data covering several different product lines of a single producer and that there is a much greater risk of unacceptable distortions and aberrations in data derived from one producer with disparate products than could exist with aggregate national data.

Guizhou Machinery *et al.* further state that the fact that the SKF report contains costs and expenses incurred by a producer of the class or kind of merchandise subject to review does not make the report a better source of surrogate data. On the contrary, Guizhou Machinery *et al.* state, whereas there is no evidence to indicate that SKF used the same type of steel as respondents, the Indian import statistics enable the Department to pinpoint a particular type of steel.

With respect to Petitioner's argument that the overhead and SG&A rates must be adjusted to reflect the use of lower materials and labor values from separate sources, Guizhou Machinery *et al.* cite *Final Determination of Sales at Less Than Fair Value: Coumarin From the People's Republic of China,* 59 FR 66895 (December 28, 1994) (*Coumarin*), in which the Department calculated materials costs from various sources and used the Reserve Bank of India Bulletin (RBI) data to calculate SG&A but did not adjust SG&A and overhead costs simply because it did not use the same source as material costs. Shanghai adds that, in the event that the Department rejects the use of SKF materials, labor and other costs except overhead, profit and SG&A, the Department should not further adjust overhead and SG&A as suggested by Petitioner's alternative argument. Shanghai notes that the SKF report indicates that, in addition to TRB production, SKF has other lines of business, including the manufacture of textile machine components and other types of bearings. Shanghai contends that the report does not allow for the allocation of labor or materials to TRB production for SKF's overhead and SG&A and there is insufficient information on which to base adjustments to overhead and SG&A based on different valuations of materials and labor used for TRB production. Guizhou Machinery *et al.* state that the Department's use of data contained in SKF's annual report to establish percentages or ratios to be used for determination of surrogate value for overhead and SG&A is fully consistent with the Department's standard surrogate methodology.

Guizhou Machinery *et al.* state that the Department's NME/surrogate-country methodology is based upon the application of reliable and representative ratios and input values selected from multiple sources and that the Department does not typically ''adjust'' the component values used to derive SG&A and overhead ratios in the manner proffered by Petitioner. Consequently, Guizhou Machinery *et al.* argue, the Department should not adjust the expenses taken from the SKF report, as suggested by Petitioner, in determining representative ratios for use in determining actual amounts for overhead and SG&A.

Guizhou Machinery *et al.* argue further that Petitioner's assertion that the Department must deduct import duties from the materials elements of the overhead and SG&A rate calculation is based on the assumption that steel inputs were imported, but Petitioner has provided no evidence regarding which particular materials were imported. Guizhou Machinery *et al.* claim that the annual report itself contradicts Petitioner's suggestion because it shows that almost half of the materials purchased by SKF India were from local sources, which would suggest that the effect of import duties would not affect the entire materials component of the calculation. Additionally, Guizhou Machinery *et al.* claim that Petitioner has not accounted for the fact that Indian producers are entitled to duty drawback upon exportation of finished products that incorporate imported materials, which further reduces the effect of import duties. Shanghai suggests that, because the SKF report contains no information concerning the proportion of materials represented by TRB steel costs, what portion of SKF's steel was imported, or how much was paid in duties, if the Department continues to use the SKF report for overhead and SG&A, it should make no further adjustment to the rate it used for the preliminary results.

In response to Petitioner's argument that it is inherently distortive to use the SKF report for overhead, SG&A and profit but not for materials and labor, Guizhou Machinery *et al.* and Chin Jun argue that the use of the SKF report for the materials component would be more distortive than the import statistics used by the Department due to a lack of detail regarding the types of steel SKF used. Chin Jun notes that the SKF report does not provide separate prices for bar, rod or steel sheet but instead provides a single value for all steel used in the factory, including steel used in the production of non-subject merchandise. Chin Jun submits that the Petitioner, the Department, and respondents have no idea what types of steel were included in SKF's material-cost calculation. Guizhou Machinery *et al.* add that Petitioner has provided no information demonstrating that the SKF report covers the specific steel inputs relevant to subject merchandise. Chin Jun suggests that the steel referenced in the SKF report could be tube steel (instead of bar steel), stainless steel (a much more expensive product), already machined ''green parts'' supplied by SKF India's many related companies, or innumerable other types of steel.

Guizhou Machinery *et al.* and Chin Jun also dismiss Petitioner's claim that the SKF report most nearly approximates a verified surrogate questionnaire response. Respondents state that an annual report, though perhaps audited, is not verified and note that the Department has a preference for verifiable, public information (citing *Sebacic Acid, Final Determination of Sales at Less Than Fair Value: Manganese Sulphate from the People's Republic of China,* 60 FR 52155 (October 5, 1995) (*Manganese Sulphate),* and *Final Determination of Sales at Less Than Fair Value: Certain Carbon Steel Butt-Weld Pipe Fittings from the People's Republic of China,* 58 FR 21058 (May 18, 1992)). Chin Jun adds that the SKF report has data only through March 1991 and this review

includes 1993–94 transactions. Therefore, Chin Jun reasons, the SKF data is so stale that the use of it would not be proper. Chin Jun states that the Department's preference is to use data which is contemporaneous to the period of review.

Guizhou Machinery *et al.* respond to Petitioner's contention that the cost of direct materials of actual bearings producers in India is shown to be consistently higher than the trade-statistic values used in the preliminary results by stating that such a fact does not render the trade statistics incorrect and that, furthermore, there is nothing in the law requiring the Department to use the highest value in choosing surrogate values.

Transcom submits that the Department should rely on the Indian import statistics in factor valuation, rather than on the company-specific data contained in the SKF report, because the Indian data are contemporaneous with the period of review, while the SKF data are outdated. Transcom agrees with Chin Jun and Guizhou Machinery et al. that the import data provide a more detailed description, and therefore more exact valuation, of steel used by the Chinese producers, whereas the SKF report does not provide sufficient information concerning the type of steel for which costs are reported and provides no guidance in determining a surrogate valuation of the FOP used in producing bearings in China.

Petitioner responds to Chin Jun's argument that the use of SKF data is inappropriate as SKF is typical of neither China nor India by stating that the report is consistent with that of Asian Bearing, another producer in India, which the Department declined to use. Petitioner claims that the Department did not use data from SKF Sweden or consolidated data from the SKF Group, but data from SKF India, which reflect the operating conditions of an Indian bearing company.

Department's Position

We agree with respondents. Section 773(c)(1) of the Act states that, for purposes of determining FMV in a NME, ''the valuation of the FOP shall be based on the best available information regarding the values of such factors. * * *'' Our preference is to value factors using published information (PI) that is most closely concurrent to the specific POR. *See Final Determination of Sales at Less Than Fair Value: Certain Partial-Extension Drawer Slides From the People's Republic of China,* 60 FR 54472, 54476 (October 24, 1995). Based on the record evidence we have determined that surrogate country import statistics (Indonesian for valuing steel used to produce cups and cones, Indian for steel used to produce rollers and cages), exclusive of import duties, comprise the best available information for valuing raw material costs. Our reasons for preferring data for Indonesia, rather than for our primary surrogate, India, for valuing steel used to produce cups and cones are set forth in our response to Comment 3.

We prefer published surrogate import data to the SKF data in valuing the material FOP for the following reasons. First, we are able to obtain data specific to the POR, which more closely reflect the costs to producers during the POR. Second, the raw material costs from the SKF report do not specify the types of steel purchased by SKF. The record does not indicate whether SKF purchased bar steel (the type used by the Chinese manufacturers) or more expensive tube steel to produce bearings parts. Third, although we agree with Petitioner's point that SKF is a producer of subject merchandise, the report also identifies other products it manufactures. From the information contained in the SKF report, we are unable to allocate direct labor and raw materials expenses to the production of subject merchandise. For these reasons, we have valued the material FOP using surrogate import data.

Furthermore, we agree with respondents that Petitioner's citation to *Timken* for the proposition that we must use a single surrogate source when possible is misplaced. That case, which criticized the Department's failure to justify its choice between adjustment factors, does not state that all factors must be valued in the same surrogate country. Indeed, the opinion in *Timken* explicitly states that ''Commerce may avail itself with data from a country other than the designated conduit, adoption of such an inter-surrogate methodology [although departing from the normal practice at that time] remains within the scope of Commerce's discretionary powers.'' 12 CIT at 959.

The fact that the 1989–90 report of Indian producer Asian Bearing, like the SKF data, shows higher raw materials costs than the import data we used in the preliminary results does not compel the conclusion that we must use some domestic Indian data source. In addition to being stale, the Asian Bearing data suffers from the same defects as the SKF data. The purpose of the NME factor methodology is not to construct the cost of manufacturing the subject merchandise in India *per se* but to use data from one or more surrogate countries to construct what the cost of production would have been in China, were China a market-economy country. *See Sulfanilic Acid from the People's Republic of China; Final Results and Partial Recession of Antidumping Duty Administrative Review,* 61 FR 53702, 53710 (Comment 12) (Oct. 15, 1996).

We also disagree with Petitioner's contention that we should adjust the overhead and SG&A rates if we continue to use the SKF report to value these rates while valuing the material and labor FOP using other sources. As noted above, we prefer to base our factors information on industry-wide PI. Because such information is not available regarding overhead and SG&A rates for producers of subject merchandise during the POR, we used the overhead and SG&A rates applicable to SKF India, a company that produces subject and non-subject merchandise.

In deriving these rates, we used the SKF India data both with respect to the numerators (total overhead and SG&A expenses, respectively) and denominator (total cost of manufacturing). This methodology allowed us to derive ratios of SKF India's overhead and SG&A expenses. These ratios, when multiplied by the FOP we used in our analysis, thereby constitute the best available information concerning the overhead and SG&A expenses that would be incurred by a bearings producer given such FOP. Petitioner's recommended adjustment would affect (reduce) the denominator, but it would leave the overhead and SG&A expenses in the numerator unchanged. As such, we find that this adjustment would itself distort the resulting ratio, rather than curing the alleged distortion in our calculations.

Finally, with respect to Petitioner's assertion that the overhead, SG&A, and profit denominators we used in the preliminary results improperly included import duties paid, we note that Petitioner has not provided any information regarding the amount of import duties that are included nor has Petitioner provided a means of identifying and eliminating such duties from our calculations. Although we would not include duties paid on the importation of merchandise by SKF, we have no evidence as to the amount of duties, if any, that are included in SKF's raw materials costs. Therefore, we did not subtract any amount for import duties in our calculation of overhead and SG&A percentages. *See TRBs IV–VI* at 65529–65530.

Comment 3

Shanghai and Chin Jun submitted comments regarding the appropriate Indian import classification number(s)

to be used in valuing the steel that comprises the raw materials factor of production. Chin Jun argues that category 7228.30.19, which the Department used to value steel used to manufacture cups and cones, contains a wide variety of steel products and a correspondingly wide range of prices. Chin Jun points out that the average price per metric ton of steel contained in this category ranges from $610 to $3,087. Chin Jun further argues that, as bearing-quality steel is available throughout the world at prices less than $800 per metric ton, the Department should, if it uses category 7228.30.19 to value hot-rolled alloy steel bar, exclude steel prices in excess of $1,000 per metric ton as being not reflective of the price of bearing-quality steel.

Shanghai states that, although the Indian Trade Classification system is derived from the international harmonized schedules, it does not entirely duplicate the harmonized schedules. Nevertheless, Shanghai contends, the eight-digit subdivisions of the International Trade Commission (ITC) are described with sufficiently familiar terminology to determine which subdivisions are likely to include steel similar to or the same as the steel used in the production of cups and cones. Shanghai asserts that the Department should select an eight-digit subdivision covering imports of types of steel which most closely match the qualities of the steel used to produce the product at issue, citing *Sigma Corp.* v. *United States*, CIT, No. 91–02–00154, Slip Op. 93–230, December 8, 1993 (15 ITRD 2500), and *Tehnoimportexport* v. *United States*, 16 CIT 13, 783 F. Supp. 1401 (1992). Furthermore, given the lack of a specific harmonization of the Indian Trade Classification System at the eight-digit subdivision level, Chin Jun and Shanghai both argue that the Department should, as it has previously, test the reliability of whichever subdivision it chooses by comparing the values within that subdivision with world steel prices from other available information (citing *Certain Partial-Extension Steel Drawer Slides with Rollers from the People's Republic of China (Drawer Slides*), 60 FR 54472, 54475 (October 24, 1995), and *Heavy Forged Hand Tools From the People's Republic of China (Hand Tools*) 60 FR 49251, 49254 (September 22, 1995), as examples). Shanghai claims that the aberrationally high values of the steel included in category 7228.30.19, in comparison with world steel prices on the record in this review, compel the conclusion that it should not be used.

Shanghai submits that categories 7227.90.30 and 7228.30.01 more accurately reflect the steel used to manufacture cups and cones than does the residual category, 7228.30.19, which the Department used. Shanghai states that there is a category reported under 7227.90, ''Other Hot-Rolled Bars & Rods of Other Alloy Steel in Irregularly Wound Coils,'' which is consistent with U.S. HTS 7227.90.30 which contains ball-bearing-grade steel.

Shanghai suggests that the fact that an eight-digit category comparable to the U.S. HTS listing for ball-bearing-quality steel bars does not exist in the Indian import statistics probably reflects the absence of imports of that type of steel into India. Therefore, Shanghai argues, it would be unreasonable and arbitrary to assume ball-bearing-grade steel enters under the residual category 7228.30.19. Instead, Shanghai says that other eight-digit subdivisions among the Indian import statistics do describe types of steel closely correlated to the type of steel used to produce bearings.

Shanghai suggests that the Department use category 7227.90.11, speculating that the type of ball-bearing steel used by Chinese producers might enter India under this category number. Differences between steel included in this category and the steel used to produce TRBs is, Shanghai states, insignificant. Alternatively, Shanghai suggests use of category 7228.30.01, ''Bright Bars of Alloy Tool Steel,'' noting that ball bearing steel is a ''tool'' steel as defined by its carbon content. Shanghai claims that this category and U.S. HTS category 7228.30.20.001, ''Other Bars and Rods of Other Alloy Steel * * * *, Not Further Worked than Hot-Rolled * * * of Ball Bearing Steel,'' share the particular characteristics of the type of steel used to manufacture cups and cones. Shanghai adds that, notwithstanding use of the term ''bright,'' category 7228.30.01 is, by definition, not further worked than hot-rolled, hot-drawn or extruded steel and, therefore, is not further worked with respect to any of a number of surface treatments, *i.e.*, polishing and burnishing, lacquering, enameling, painting, varnishing, *etc.* Accordingly, Shanghai concludes that the ''bright steel'' cannot be steel with a finish inappropriate for bearing manufacture. In contrast to these two categories, Shanghai states, the residual category contains unknown types of steel.

Shanghai states that the values of steel covered by category 7228.30.19 are aberrationally high and should not be used. Shanghai explains that the Department's use of import statistics as surrogate information has been affirmed in the past only where the import categories accurately reflect the material used to produce the product at issue and argues that the clearly greater cost of the steel covered by category 7228.30.19 indicates that the types of steel in this category are not representative of bearing-grade steel. Thus, Shanghai claims, the steel values included in category 7228.30.19 are clearly aberrational, rendering the Department's surrogate steel costs for cups and cones an inaccurate representation of the actual experience of Chinese producers. Because of the lack of specific harmonization of the Indian Trade Classification system at the eight-digit subdivision levels, Shanghai urges the Department to weigh the reliability of whichever subdivision it proposes to use by comparing the values within that subdivision with other available information on world steel prices. Citing *Drawer Slides*, Shanghai claims that in the past the Department has tested the reliability of Indian import values by comparing them with other record data. In *Hand Tools*, Shanghai quotes the Department as saying, ''where we have other sources of market value such as Indonesian import statistics or U.S. import statistics, we have compared the Indian import statistics to these sources of market value to determine whether the Indian import values are aberrational, *i.e.*, too high or too low'' (at 49251). Accordingly, Shanghai suggests that the Department compare the values reported in category 7228.30.19 with the substantial evidence of relevant world steel prices already in the record of this administrative review. The high values in category 722.30.19 should not be used, respondent argues, because they are aberrational; the import values reported in either category 7227.90.11 or category 7228.30.01 are more consistent with world steel prices and should be used instead.

Chin Jun also claims that the Department's calculation of the value of category 7228.30.19 contains apparent clerical errors, adding that, aside from the apparent clerical errors, the price for said category far exceeds the value of steel used to produce TRBs. With regard to the calculation, Chin Jun argues that the Department apparently double-counted by adding the subtotal for category 7228.30.19 with the total of all steel under heading 7228.30. Regarding its second point, Chin Jun argues that the Department has previously concluded that it must compare surrogate steel prices with world prices in order to determine if the proposed surrogate values are aberrational (citing *Hand Tools*). Chin Jun claims that a

comparison of the Indian import statistics with other sources, *e.g.*, U.S. import data, will confirm that the Indian import data are aberrational and must be adjusted.

Petitioner contends that Shanghai's discussion of the steel category to be used for cups and cones is largely based on speculation unsupported by record evidence and is, to a large extent, factually wrong. First, Petitioner notes Shanghai's assertion that the absence in the Indian import statistics of a specific subdivision for bearing-quality steel indicates only a lack of imports of this type of steel during the period covered by the statistics. Petitioner claims that there is no basis for such speculation.

Second, with respect to Shanghai's argument that the exact type of bearing steel used by PRC-based producers could enter India under category 7227.90.11, Petitioner notes that category 7227.90.11 refers to bars and rods of bearing-quality steel in coils. Petitioner argues that Shanghai does not cite any record evidence to suggest that any respondent uses bar in coil. Petitioner adds that bar steel not in coil could not be entered into India under category 7227.90.11.

Petitioner contends that Shanghai's claim regarding category 7228.30.01 as the proper category of Indian steel imports for the type of steel used in the production of cups and cones is inappropriate because category 7228.30.01 represents bright bars. Petitioner claims that, to the best of its knowledge, no one has ever before suggested in the course of this or any other proceeding that bright bars are used to manufacture bearings. Petitioner states that the distinguishing feature of ''bright bars'' is a bright, smooth finish and such bars are not used in the manufacture of TRBs, as the high finish would be destroyed, given the cutting and grinding involved in TRB production. Furthermore, whereas Shanghai argues that the term ''bright'' in Indian subcategory 7228.30.01 does not denote bright, high-finish surfaces which would indicate the product was further worked so as to fall outside that category, Petitioner claims that Shanghai's only support for such argument is to cite a definition in the U.S. HTS. Petitioner argues that such a definition has no application or relevance to the Indian schedules. Rather, Petitioner observes, the definition is listed among ''Additional U.S. Notes'' as opposed to the internationally accepted ''Notes'' to Chapter 72.

Petitioner also argues that Shanghai's assertion that category 7228.30.19 includes steel other than alloy tool steel is wrong, contending that the ''other'' in category 7228.30.19 refers to ''other than'' any other subheading under heading 7228. Petitioner states that, by excluding not only category 7228.30.01 but any other specific eight-digit categories which are known to not include bearing steel, *i.e.*, ''bright bars of other steel'' (7228.30.09), ''bars and rods of spring steel'' (7228.30.12), and ''bars and rods of tool and die steel'' (7228.30.14), category 7228.30.19 remains the only category under heading 7228 that would contain bearing steel.

Finally, Petitioner responds to Shanghai's argument that the steel values included in category 7228.30.19 are aberrational and are not representative of the cost of bearing-grade steel. Petitioner claims that Shanghai is arguing, without any factual support, that the lowest price in the basket category is for bearing steel and that anything else is aberrational. Petitioner further states that Shanghai attempted to support its argument that the value assigned to steel used to manufacture cups and cones is too high in comparison with relevant world steel prices, without attempting to define ''world steel prices'' or how Shanghai decided the comparison prices were appropriate.

Petitioner states that Chin Jun's argument that the value of steel in category 7228.30.19 used in the preliminary results far exceeds the value of steel used to manufacture TRBs is incorrect. Petitioner suggests that the available information concerning actual prices of bearing steel in India contradicts Chin Jun's statement (citing Petitioner's February 21, 1995 submission containing worksheets for the *Results of Remand of Final Determination of Sales at Less Than Fair Value: Tapered Roller Bearings From the People's Republic of China* (February 15, 1989), as well as data in the annual reports for SKF and Asian Bearing). Based on such data, Petitioner claims that the surrogate value of the steel used to manufacture cups and cones is too low to be representative of bearing-steel prices in India. Petitioner adds that the costs or prices in a market-economy country at a comparable level of development to the PRC, *i.e.*, India, are at issue—not world prices.

Department Position

We agree that none of the eight-digit tariff categories within the 7228.30 steel group correspond specifically to bearing-quality steel used to manufacture cups and cones, but we do not agree with Petitioner that the best recourse is to the eight-digit ''others'' category (7228.30.19) within this group.

We have determined that the use of Indian import data is not appropriate to value cups and cones in this case because, as noted in the arguments above and as shown below, we are unable to isolate an Indian import value for bearing-quality steel and, for the reasons discussed below, the steel values in the Indian import data are not reliable. *See Drawer Slides* at 54475–76; *TRBs IV-VI* at 65532.

We have examined each of the eight-digit categories within the Indian 7228.30 group and have found that, although bearing-quality steel used to manufacture cups and cones is most likely contained within this basket category, there is no eight-digit sub-category that is reasonably specific to this type of steel. We eliminated the specific categories of alloy steel, identified by Petitioner and respondents, that are clearly not bearing-quality steel as follows. Under the Indian tariff system, bearing-quality steel used to manufacture cups and cones is contained within the broad category 7228.30 (Other Bars & Rods, Hot-Rolled, Hot-Drawn & Extruded). However, none of the named sub-categories of this grouping (7228.30.01—bright bars of alloy tool steel; 7228.30.09—bright bars of other steel; 7228.30.12—bars and rods of spring steel; and 7228.30.14—bars and rods of tool and die steel) contains steel used in the production of subject merchandise. This leaves an ''others'' category of steel, 7228.30.19. However, we have no information concerning what this category contains, and none of the parties in this proceeding has suggested that this category specifically isolates bearing-quality steel. Further, the value of steel in this eight-digit residual category is greater than the value of the general six-digit basket category (7228.30), which in turn is valued too high to be considered a reliable indicator of the price of bearing-quality steel, as shown below.

Where questions have been raised about PI with respect to particular material inputs in a chosen surrogate country, it is the Department's responsibility to examine that PI. *See Drawer Slides* at 54475–76 and *Cased Pencils*, 59 FR 55633, 55629 (1994). Because all parties raised questions about the validity of the Indian import data used to value cups and cones in the preliminary results, we compared the value of Indian imports in category 7228.30 with the only record source that specifically isolates bearing-quality steel used to manufacture cups and cones: import data regarding U.S. tariff

category 7228.20.30 (''bearing-quality steel''). We found that, for the time period covered by the POR, the value of the Indian basket category 7228.30 was significantly higher than the bearing-quality steel imported into the United States. It was also significantly higher in comparison with E.U. import statistics.[1] The Indian eight-digit ''others'' category recommended by Petitioner, valued higher than the broad six-digit heading, was even more unreliable in comparison with the value of bearing-quality steel.

In light of these findings, we have determined that the Indian import data that we used to value cups and cones in the preliminary results are not reliable. For these final results, we are using import data from a secondary surrogate, Indonesia, a producer of merchandise comparable to TRBs, to value steel used to produce these components. As with the Indian data, we were unable to isolate the value of bearing-quality steel or identify an eight-digit category containing such steel imported into Indonesia; however, unlike the Indian data, the Indonesian six-digit category 7228.30 closely approximates the value of U.S. imports of bearing-quality steel, as well as the comparable six-digit category in the United States. Thus, we have determined that Indonesian category 7228.30, which is the narrowest category we can determine would contain bearing-quality steel, is the best available information for valuing steel used to produce cups and cones. Although Indonesia is not the first-choice surrogate country in this review, in past cases the Department has used values from other surrogate countries for inputs where the value for the first-choice surrogate country was determined to be unreliable. *See Drawer Slides* at 54475–76, *Cased Pencils* at 55629, and *Lock Washers* at 48835. Furthermore, Indonesia has previously been used as a source of surrogate data in cases involving the PRC. Because we are valuing the steel used to produce cups and cones using Indonesian import data, we are valuing the scrap offset to this steel value using the same source.

We also disagree with Shanghai regarding the appropriateness of Indian category 7227.90.11 as the steel type for cups and cones. Respondents reported that they use hot-rolled steel bar to manufacture cups and cones. Category 7227.90.11 is coil steel and is necessarily produced by a different mill than bar steel. No respondent reported using coil steel to manufacture cups and cones. In addition, during factory tours of various PRC-based bearings producers we found no evidence that any producer uses coil steel to manufacture cups and cones. Finally, we disagree with Shanghai regarding the use of category 7228.30.01, bright bars of alloy tool steel. No party has suggested that such steel is used for the production of bearings.

Although we acknowledge the clerical errors noted by Chin Jun in our calculation of the value of steel used to manufacture cups and cones, we have changed our surrogate source for the value of this steel as explained above. Therefore, no recalculation is necessary.

Comment 4

Shanghai argues that the prices it actually pays for steel are sufficiently market-driven to be used instead of surrogate values. Shanghai states that the domestic steel producers from whom Shanghai purchased steel compete against steel producers from market-economy countries. Shanghai takes the position that the Department should not employ surrogate methodology in NME cases when the producer is a foreign-invested joint-venture company, adding that the Department's current methodology does not recognize the special status accorded such companies under PRC law. Shanghai also notes that there are no import restrictions limiting its ability to purchase either domestic or imported steel based on rational business decisions. Shanghai claims that under PRC joint-venture law it has the legal right to purchase steel from any suppliers in the world and states that the prices at which it purchased steel from domestic suppliers during this POR were consistent with world steel prices for comparable types of steel.

Shanghai argues that, where input prices and production costs of merchandise under investigation are subject to free-market forces sufficient enough to allow their use in determining FMV, the Department should apply its normal methodology (citing *S. Rep. No. 100–71, 100th Cong., 1st Sess.*, at 108 (1987)). Shanghai claims that the Department has stated that the presumption that no domestic factor of production is valued on market principles ''can be overcome for individual factors by individual respondents with a showing that a particular NME value is market driven'' (quoting *Ceiling Fans*).

Petitioner counters that there is no basis for adopting Shanghai's claim that its actual domestic steel purchases were market-driven, claiming that steel purchased in the PRC is not free of the effects of state controls on labor, energy, input and infrastructure prices. Petitioner states that Shanghai has offered no basis for concluding that either the PRC bearings industry or the PRC steel industry meet the Department's criteria for being deemed a MOI. Petitioner adds that the participation of a market-economy investor will not purge the PRC inputs of the effects of state control.

Department's Position

We agree with Petitioner. Shanghai has provided no evidence to support its contention that either the steel industry or the bearings industry in the PRC is an MOI. To the extent that Shanghai is free to source its steel either domestically or from imports, the fact that it purchased only domestic steel confirms only that domestic steel was consistently priced lower than steel available on the world market. This does not support a claim that PRC steel is provided at market prices. In *Ceiling Fans*, as in this case, we considered values of FOP to be market-driven when sufficient evidence exists to demonstrate that such factors were purchased from a market-economy supplier and paid for with a convertible currency. Absent such evidence from Shanghai, we have valued Shanghai's PRC-sourced steel inputs using surrogate values.

Comment 5

Petitioner notes that in the preliminary results the Department valued scrap using the Indian tariff headings 7204.29 for alloy-steel scrap and 7204.49 for non-alloy-steel scrap. Petitioner contends that both headings are wrong and that the Department should use subheadings 7204.29.09 and 7204.41.00, respectively, as it did in the preliminary results of the three previous reviews.

Petitioner claims that using the entire heading 7204.29 is wrong because it includes ''waste and scrap of high speed steel'' under subheading 7204.29.01 and such steel is not used to produce bearings. Petitioner states that the category of 7204.29.09, ''waste and scrap of other alloy steel,'' includes bearing steel.

Petitioner argues that heading 7204.49 is wrong because it excludes ''turnings, shavings, chips, milling waste, sawdust, filings, trimmings and stampings, whether or not in bundles'' (heading 7204.41). Petitioner claims that these excluded types of scrap are precisely the

[1] Although the E.U. import data do not explicitly identify ''bearing quality steel,'' the relevant subheading (7228.30.40) provides a narrative description that closely matches to the chemical composition of the bar steel that the PRC respondents used to produce cups and cones. *See Memorandum from Analyst to File: Factors of Production for the Final Results of the 1993–94 Administrative Review of TRBs from the PRC,* February 3, 1997.

types of scrap generated in bearing production. Furthermore, Petitioner states, the category used by the Department in the preliminary results is largely composed of ''defective sheet of iron and steel'' (subheading 7204.49.01). Petitioner argues that inclusion of ''defective sheet'' in cage production is inappropriate because scrap generated during cage production is in the nature of stampings, trimmings, shavings, chips, milling waste or filings. Finally, Petitioner claims that inclusion of defective sheet is incorrect because it leads to the result that the value obtained by the Department for this non-alloy-steel scrap is somewhat higher in value than the value found for alloy-steel scrap.

Guizhou Machinery *et al.* respond that Petitioner provides no evidence to support its arguments. For instance, Guizhou Machinery *et al.* claim, Petitioner provides no evidence to support its assertion that ''high-speed'' steel is not used for bearings. Instead, Guizhou Machinery *et al.* argue, inclusion of the high-speed steel is reasonable given the fact that respondents use high-quality steel in the production of bearings, cups and cones. In addition, Guizhou Machinery *et al.* state that the U.S. HTS does not even segregate heading 7204.29 between high-speed and other alloy-steel scrap, suggesting that the differences between the types of scrap are not significant.

With respect to category 7204.49, Guizhou Machinery *et al.* state that Petitioner provides no evidence of its argument that this category is inappropriate because it excludes turnings, shavings, chips, milling waste, sawdust, filings, trimmings and stampings, whether or not in bundles, which Petitioner claims are precisely the kinds of scrap generated in bearing production—or that it includes defective sheet of iron and steel. Guizhou Machinery *et al.* state that scrap types such as sawdust, which are unrecoverable, do not enter into the calculation of scrap credit. Rather, respondents contend the calculation is based on scrap that was sold or reused. Furthermore, respondents claim that the scrap for which the Department gave credit did include defective steel, citing a verification report.

Department's Position

We used Indian import statistics to value the steel for cages and rollers and, therefore, we have used Indian import statistics to value scrap for these components. In the same manner, we used Indonesian statistics to value both the steel and scrap for cups and cones. We agree with Petitioner that, in order to determine the best category by which to value scrap, it is appropriate to set aside those specific categories that did not include bearing steel.

Consistent with our previous reviews, we agree with Petitioner that, for the Indian scrap values, categories 7204.41.00 and 7204.29.09 best capture the types of residues generated as scrap. Category 7204.41.00 describes the types of scrap created during production of cages, i.e., turnings, shavings, chips, trimmings, stampings, etc. Similarly, category 7204.29.09 (Waste and Scrap of Other Alloy Steel) includes bearing steel which is applicable to other bearing components. Therefore, we used category 7204.41.00 from the Indian import statistics to value scrap for cages and category 7204.29.09 from the Indian import statistics to value scrap for rollers.

The Indonesian statistics do not provide a category comparable to Indian category 7204.29.09 for which to value scrap. We have chosen a comparable category, 7204.29.00 (Other Waste and Scrap), and used the Indonesian import statistics from this HTS number to value scrap for cups and cones (see our response to Comment 3).

Comment 6

Petitioner contends that the steel import prices the Department used in the preliminary results do not reflect market-economy transactions. (For certain steel inputs for certain respondents, the Department used the actual values at which Chinese trading companies imported the steel into the PRC and paid in convertible currencies.) Petitioner notes that steel is a ''controlled commodity'' in the PRC and that China Foreign Trade Development Companies, Inc., is generally the PRC importer. Petitioner insists that, given this fact pattern involving contracts for a controlled commodity, the purchase of which must be carried out through the mandatory intervention of a state trading company, any such purchase cannot rationally be considered an arm's-length transaction reflecting uncontrolled market prices. Petitioner claims that the Department departs from using surrogate values only when the actual imports from a market economy reflect market-economy practices and prices, citing *Final Determination of Sales at Less Than Fair Value: Oscillating Fans and Ceiling Fans From the People's Republic of China,* 56 FR 55271 (October 25, 1991) (*Ceiling Fans*). Petitioner contends that, under the circumstances of this case, the state-controlled trading company is by law given a leading role in negotiating the terms of sale and that such trading companies, acting as coordinators of steel purchases for the entire Chinese economy, would enjoy such market power as to enable them to obtain better prices than any individual bearings producer in a market economy.

Petitioner suggests, in addition, that steel supplied by the China Foreign Trade Development Companies to PRC producers might be part of, or related to, broader deals between those producers and the trading companies which, for reasons unrelated to the factors that would govern normal purchases directly from a market-economy company, could affect the prices paid by the producers for reasons unrelated to the factors that would govern normal commercial transactions between market-oriented companies.

Guizhou Machinery *et al.* respond that, consistent with section 773(c) of the Act and with 19 CFR 353.52, the Department has established a practice of using actual import prices if they are from market-economy countries. Guizhou Machinery *et al.* contend that the ''Department practice allows for the valuation of inputs in NME cases based on market prices paid by the manufacturer for goods obtained from a market-economy source because these prices reflect commercial reality'' (citing *Coumarin* at 66895). Guizhou Machinery *et al.* state that Petitioner's assertion that the contracts do not reflect market-economy transactions because steel is a ''controlled commodity'' and because the contracts involved a ''state trading company'' is irrelevant because such arguments do not negate the fact that the sellers, who establish the sales prices, are market-economy companies (citing *Hand Tools* and *Final Determination of Sales at Less Than Fair Value: Saccharin from the People's Republic of China,* 59 FR 58818 (November 15, 1994) (*Saccharin*)). In addition, Guizhou Machinery *et al.* contend that Petitioner's statement that steel supplied to PRC-based producers from the PRC trading company might have been part of related or broader deals is merely speculation with no support on the administrative record. Guizhou Machinery *et al.* discuss Petitioner's reference to *Timken* from Comment 2, stating that the Court of International Trade (CIT) and the Court of Appeals for the Federal Circuit (CAFC) did not rule that the Department cannot use different sources to obtain surrogate values for the various CV components but, rather, that the Department cannot use surrogate-value data which yield distortive results and which are inconsistent with other record evidence. Guizhou Machinery *et al.* assert that Petitioner has not shown

that the use of market-oriented import prices combined with the use of Indian import statistics for scrap yields distortive or inconsistent results; in respondents'' view, both represent ''market-oriented'' prices. Guizhou Machinery *et al.* claim that the Department has used different sources to obtain surrogate values for input materials in many cases and that the Department should not abandon its use of market-oriented import prices or alter its calculations in the final results.

Department's Position

Although we agree with respondents that we do not need to value all factors of production in a single surrogate country, we agree with Petitioner that we should not use purchases of steel from PRC trading companies in this review. Our established policy allows for the valuation of inputs in NME cases based on market prices paid by the manufacturer for inputs purchased from a market-economy source because those prices reflect commercial reality. *See Saccharin* at 58822–23. Therefore, where the manufacturer obtained the input from the trading company—a PRC source rather than a market-economy source—and paid for the input in PRC currency, we determine that the prices paid by the producers for these inputs do not reflect market prices. In such situations, the price paid by the trading company is not the relevant inquiry. We note that Guizhou Machinery *et al.* misread *Coumarin*. In that case, as in this case, we did not use purchases from market-economy suppliers but instead applied surrogate values because producers obtained the input from a PRC trading company. *See Coumarin* at 66900. *See also TRBs IV–VI* at 65533.

Comment 7

Shanghai argues that the Department should calculate all of Shanghai's relevant steel costs on the basis of steel purchases Shanghai made directly from market-economy countries during the POR. For certain components Shanghai used PRC-sourced steel as well as steel purchased from market-economy countries during the POR. Shanghai argues that the Department's use of a weighted-average of PRC-sourced and imported steel was improper and that the Department should have based Shanghai's constructed steel values solely on the verified costs of Shanghai's market-economy-sourced steel imports. Actual market costs incurred during the POR for the exact type and grade of steel used for the production of subject merchandise are, Shanghai contends, the best evidence of the market cost of steel. Shanghai cites S. Rep. No. 93–1298, 93d Cong., 2d Sess. 174 (1974), in support of its view that surrogate values are meant to be applied only when market-based values are unavailable. Shanghai claims that the surrogate methodology is meant as a way to ascertain what the prices or costs of an NME producer would be if set by the market.

Citing *Ceiling Fans* (at 55274), Shanghai states that its actual cost for the imported steel are the most reliable and accurate data for determining the value of steel inputs. Not using these verified costs would, Shanghai argues, defeat the statutory intent and undermine the accuracy, fairness and predictability of the FMV calculations.

Petitioner argues that, contrary to Shanghai's assertion, the Department should disregard import prices because those prices are subject to state-controlled influences and, therefore, are unreliable. Petitioner suggests that the Department should rely on the Indian prices to value all of Shanghai's steel usage. Petitioner argues that steel is not traded freely in China and most bearing producers must purchase their imported inputs through state-controlled trading companies. Petitioner claims these imports are incorporated directly into the state-controlled system and, because they are indistinguishable from other Chinese domestic prices and are inherently suspect, they must be disregarded in the final results.

Whereas Shanghai argues that import prices should be used for all its steel inputs, Petitioner, citing 19 CFR 353.52, says that such argument disregards the statutory requirement that, when normal valuation cannot be used because of state-controlled-economy influences, the Department is to base the value on its FOP methodology, deriving values for each factor from prices or costs in a surrogate country. Petitioner contends that the Department should use, for the final results, prices of imported steel only for acquisitions that are shown to be free of state-controlled influences. Petitioner further contends that, in this review, no such acquisitions exist and, therefore, the Department should use Indian surrogate values to value all steel inputs in this review.

Department's Position

We agree with Shanghai with respect to steel sourced directly from market-economy suppliers. Accuracy is enhanced when the NME producer's actual costs can be used. We verified that a portion of Shanghai's steel inputs during the POR were sourced from market-economy countries and were paid for in a market-economy currency. Shanghai's imports were purchased directly from the market-economy supplier and did not involve PRC-based trading companies. *See Verification Report* at 4. Therefore, we have not calculated weighted-average steel costs based on PRC-sourced and imported steel for Shanghai for these final results.

Comment 8

Petitioner claims that, if the Department uses the value of steel imported into the PRC, there are no available scrap values directly related to respondents' steel-acquisition costs. Petitioner notes that the net cost of raw materials inputs is based on the steel cost minus a value for scrap credit and argues that applying a value to the steel from one source and scrap credit from a different source is inherently distortive. Petitioner claims that the courts have ruled this practice to be unsupported, citing *Timken*. Petitioner notes that the Department addressed the issue on remand by using a single source to value both materials and scrap, a flat ratio of scrap equal to 20 percent of the value of the steel input. Petitioner states that the same principle should apply to this review, *i.e.*, in order to avoid inherent distortions where the Department values steel and scrap using different sources, the Indian scrap value should be applied as a percentage rather than as an absolute amount.

Guizhou Machinery *et al.* contend that, contrary to Petitioner's argument, the CIT and the CAFC did not rule in *Timken* that the Department cannot use different sources to obtain surrogate values for the various CV components but, rather, that the Department cannot use surrogate value data which yield distorted results and which are inconsistent with other record evidence. Guizhou Machinery *et al.* argue that Petitioner has not shown that the use of market-oriented import prices for steel with the use of Indian import statistics for scrap credit yields distorted results or that it is inconsistent with other information on the administrative record for this review. Guizhou Machinery *et al* also contest Petitioner's claim that the use of two different sources to value steel and scrap is ''inherently distorted'' and point out that in many cases the Department has used different sources to value input materials and scrap.

Shanghai states that the Department may exercise its discretion to identify the best available information even if derived from different sources and that the Department's ''mix-and-match'' methodology is supported by the statute, citing *Lasko Metal Products Inc.* v. *United States,* No. 93–1242 (Fed. Cir.

Dec. 29, 1994). Shanghai suggests that Petitioner objects to the use of steel values based on PRC imports and scrap values based on Indian imports as another attack on the use of steel values based on PRC imports.

Department's Position

We agree with respondents. Because Shanghai purchased inputs from a market-economy supplier and paid in a convertible currency, we valued those inputs using respondent's actual costs. The absence of a direct scrap-offset value should not prohibit us from using the actual market-economy price paid in convertible currency by an NME manufacturer.

In the *Final Determination of Sales at Less Than Fair Value: Circular Welded Non-Alloy Steel Pipe From Romania,* 61 FR 24274, 24277 (May 14, 1996), we calculated a ratio of scrap value to steel value as suggested by Petitioner. However, in that instance, we had no public information by which to arrive at a scrap/steel ratio for our first-choice surrogate country. Therefore, we calculated the ratio using scrap values and steel values from the second-choice surrogate country and applied the ratio to the surrogate steel values from the first-choice surrogate country to determine a value for scrap.

In this case, where producers have used PRC-sourced steel inputs, we have valued those inputs based on Indonesian import statistics for steel used to manufacture cups and cones and based on Indian import statistics for steel used to manufacture rollers and cages (*see* our response to Comment 5). In other words, we have valued saleable scrap for each component using the same respective source by applying Indonesian scrap values to cups and cones and Indian scrap values to rollers and cages. Because Shanghai used imported steel it purchased directly from a market-economy supplier and paid for with a market-economy currency, we have valued Shanghai's steel inputs using the company's actual costs. In the absence of a corresponding scrap price, we valued the volume of scrap actually produced in Shanghai's production with cups and cones using Indonesian scrap values and valued the volume of scrap actually generated in Shanghai's production of rollers and cages using Indian scrap values.

Petitioner's contention that using a steel value from one source and scrap credit value based on a different source is inherently distortive is unfounded. Petitioner has provided no evidence to indicate that the value of scrap is in any way tied to the cost of raw steel. Furthermore, this approach allows us to use the actual amounts of scrap generated by the Chinese production processes rather than the scrap ratios associated with Indian factories, which may be less accurate. Because we are using the same source to value scrap for all respondents, we do not agree that we should change our methodology simply because Shanghai's steel bar was valued using Shanghai's actual costs for its market-economy purchases. Accordingly, where steel inputs were based on actual costs of steel purchased directly from market-economy sources, we have continued to value scrap using the surrogate sources noted above.

Comment 9

Petitioner states that the Department's analysis memoranda for some respondents show a ''scrap input value'' included in valuing certain materials. Petitioner asserts that, to the extent raw materials from which certain TRBs or parts were manufactured were assigned a scrap value, the value of those materials was understated. In terms of acquisition cost, Petitioner contends, new material remains new throughout the production process. Petitioner contends that the only time a scrap value has any significance is when there is a demonstration that scrap from production was recovered and sold and notes that respondents do not deny that they paid full price for the raw materials they characterize as scrap inputs. Petitioner explains that the per-kilogram value of the raw-material input piece is the same whether the companies produce one or two finished pieces from the input piece and the only difference when two pieces are produced from a single input piece is that the amount of scrap at the end of the operation is less than if only one of the two pieces had been produced from the input. Petitioner claims that, by increasing the yield from the raw material input and reducing scrap, these producers have achieved economy of production.

Petitioner asserts that the Department should revert to its position in the 1989–90 review, in which it did not value scrap steel input reused by one respondent at the cost of steel scrap (citing *Tapered Roller Bearings from the People's Republic of China,* 56 FR 87590, 87596 (December 31, 1991) (*TRBs*)). At that time, Petitioner argues, the Department noted that the respondent had failed to raise the issue early enough to permit consideration of alternatives with which to value the reused steel input. Since then, Petitioner adds, respondents have not presented alternatives for taking account of their production of two pieces from one bar. Petitioner states that the reused steel retains its value in the production process fully as much as a new-steel bar. Petitioner claims that the fact that it may be sold as scrap is irrelevant because respondents did not sell it and paid full price when it was acquired.

Guizhou Machinery *et al.* respond that, although the above-referenced analysis memoranda suggest that ''scrap input'' was separately and differently valued from ''new'' steel input, the calculations show that the Department valued scrap input the same as new-steel input. Guizhou Machinery *et al.* assert that the Department should have valued scrap input at scrap values, not the same as new steel.

Guizhou Machinery *et al.* state that some respondents accumulate scrap pieces, store them in their warehouse on site, and use large scrap pieces to manufacture smaller bearings. Guizhou Machinery *et al.* argue that, because scrap is actually used to manufacture these bearings, the input materials costs should appropriately account for the scrap value.

Guizhou Machinery *et al.* claim that Petitioner's argument suggests that, even though scrap material was actually used to manufacture certain bearings, the Department should ignore this fact and essentially ''impute'' the material cost of new steel instead. Guizhou Machinery *et al.* state that, as evidenced by the record in this review, TRBs are manufactured from different steel inputs (*i.e.*, type, grade, and quality) and that Petitioner's argument that new-steel costs should be used to value scrap input ignores the fact that different inputs are used in the manufacturing process and would be comparable to substituting the value of steel bar for steel sheet. Guizhou Machinery *et al.* claim that Petitioner's argument ignores the differences between steel bar and scrap because steel bar is a high-quality material which can be used as is, whereas scrap consists of leftover pieces which have already been ''stressed'' once. Guizhou Machinery *et al.* claim that Petitioner's argument should be rejected because its methodology would artificially inflate respondent's material costs and because steel scrap has a substantially lesser value than new steel bar, as evidenced by its sales prices in the marketplace. To avoid aberrational results for the TRB models using scrap input, Guizhou Machinery *et al.* recommend that the Department follow the methodology it used in the calculations for the preliminary results of the 1990–93 administrative reviews, which most accurately reflects the value of the actual inputs used for each particular model.

Department's Position

We agree with Petitioner. The scrap input respondents used to produce certain TRBs was not purchased as scrap. Respondents paid the full purchase price for these inputs. Sales of bearings produced from scrap are indistinguishable from those produced from new steel in respondents' reported sales listing. Valuation of the input as scrap instead of as new steel would result, therefore, in an undervaluation of respondents'' FOP. Furthermore, for the final results in all previous reviews we valued scrap steel inputs as new steel. *See TRBs IV–VI* at 65533. Accordingly, we have valued the scrap-steel input as new steel for the final results.

Comment 10

Petitioner argues that the direct-labor surrogate value should be based on the average for all industrial workers or, alternatively, on the average of skilled and unskilled labor rates in India. Petitioner notes that, although the Department had available wage rates for all industrial workers and for skilled, semi-skilled and unskilled labor in India, it only used the average of unskilled and semi-skilled labor. Petitioner claims this selection is arbitrary and is in direct conflict with the information provided by respondents on the record. Petitioner states that most respondents reported that the PRC manufacturers used skilled and unskilled labor as production workers, referring to the Public Questionnaire Responses of February 7, 1995. Petitioner argues that a reasonable use of the Department's source would be to select the average ''industrial worker'' wage or the average of the wage ranges for unskilled and skilled workers.

Guizhou Machinery *et al.* argue that, although some respondents may have reported that they employ some skilled workers, the record clearly demonstrates that the manufacture of TRBs largely involves unsophisticated processes and unskilled labor and, thus, the Department's preliminary results are reasonable and should not be revised. Guizhou Machinery *et al.* claim that Petitioner's suggested calculation revisions are not supported by record evidence and would artificially inflate the surrogate-value labor rate. Additionally, Guizhou Machinery *et al.* argue that use of Petitioner's suggestion would value skilled labor to the same degree as unskilled labor, not taking into account the low-tech nature of the manufacturing process. Guizhou Machinery *et al.* state that Petitioner has not provided any evidence which shows that respondents have equal numbers of skilled and unskilled workers in the manufacturing process.

Department's Position

We agree with Petitioner in part. We reject Petitioner's recommendation, however, that we use an average ''industrial worker'' wage rate, because it does not take into account unskilled labor. During the course of this review, we visited several TRB factories while verifying various companies and confirmed that the primary source of labor consists of unskilled personnel in the production process. *See, e.g., Memorandum for the File From Case Analyst: Verification Report for Yantai CMC Bearing, Ltd.* (September 21, 1995) and *Memorandum for the File From Case Analyst: Verification Report for Shanghai General Bearing Co., Ltd.* (September 21, 1995). The average ''industrial worker'' wage rate does not indicate if, or to what extent, unskilled labor is included. The lowest wage rate in the average ''industrial worker'' category is at the level of the highest wage rate among the average wage rates for unskilled labor. Therefore, use of the ''industrial worker'' wage rate could distort significantly the wage-rate factor.

We agree with Petitioner's alternative recommendation, however, that we calculate a wage rate between ''skilled'' and ''unskilled'' labor rates. Respondents reported that during the production process they employed certain amounts of both skilled and unskilled direct labor. Because we have average wage rates for both skilled and unskilled labor, we can more accurately value direct labor according to each respondent's own experience. Accordingly, we have calculated, for these final results, an average wage rate for skilled labor and an average wage rate for unskilled labor. We applied these rates to each respondent, weighted according to the reported amounts of skilled labor and unskilled labor.

Comment 11

Petitioner argues that the Department should make allowance for vacation, sick leave and casual leave when calculating the number of weeks per month actually worked. Petitioner states that the Department calculated the hourly wage rate on the basis of 4.333 working weeks per month, based on a full 52-week year, which assumes that workers never get sick, take vacations or have other days off. Petitioner observes that *IL&T India* shows that mandatory benefits include one day of paid vacation for every 20 days worked, sick leave of seven days a year with full pay, and seven to ten days of casual leave. Petitioner claims that respondents have not allocated any portion of vacation or sick leave to the labor hours they reported as their factors of production. Petitioner states that the goal is to determine the cost to an employer of each hour that an employee is on the job and the denominator must include only time on the job. Petitioner suggests that the number of weeks per month should be recalculated to take into account at least the minimum benefits and derives a figure of 3.94 working weeks per month using this approach. Petitioner further suggests that it would be more reasonable to use the usual vacation time of 30 days as stated in the *IL&T India* data which the Department used, thus deriving a figure of 3.72 working weeks per month.

Guizhou Machinery *et al.* state that the Department should reject the Petitioner's argument to adjust the calculated labor rate for vacation, sick leave and casual leave which the Department used in the preliminary results. Guizhou Machinery *et al.* claim that Petitioner provides no support for the statement that hourly labor costs should reflect only the expenses accrued to an employer for the time the employee is on the job. Guizhou Machinery *et al.* state that the real hourly cost to the employer reflects many factors, including fringe benefits such as paid vacation, sick leave, *etc.* Guizhou Machinery *et al.* suggest that the Department's calculations should include the cost of fringe benefits such as vacation and sick leave in the numerator and, because the numerator includes costs for fringe benefits, the denominator should likewise reflect these fringe benefits.

Department's Position

We disagree with Petitioner. In our preliminary results we valued direct labor using rates reported in *IL&T India*, which states that fringe benefits normally add between 40 percent and 50 percent to base pay. *See Memorandum to the file from Case Analyst: Factors of Production Values Used for the Seventh Antidumping Duty Administrative Review* (*Memorandum*), September 1, 1995, attachment 5. Accordingly, we multiplied base pay by 1.45 in order to incorporate fringe benefits. *Memorandum* at 3–4.

Whereas petitioner suggests we calculate a wage rate based only on time spent on the job, we find that paid holidays, vacation, sick leave, *etc.*, belong in the calculation because the employer incurs the same expenses as if the employee were on the job. By adjusting the base pay to include such fringe benefits as vacation, sick leave, casual leave, *etc.*, we calculated a direct-

labor rate which more accurately represents the actual direct-labor cost to the manufacturer.

Comment 12

Petitioner claims that indirect labor is not reflected in the SG&A and overhead rates used in the preliminary results, notwithstanding the fact that, at 49575, the *Preliminary Results* state that ''indirect labor is reflected in the selling, general and administrative and overhead rates.'' Petitioner claims that no portion of the amount shown as ''payments to and provisions for employees'' in SKF's annual report is included in either the overhead or the SG&A calculation. Petitioner states that, consistent with the 1989–90 administrative review, indirect labor must be added to the CV.

Petitioner contends further that the indirect-labor amounts supplied by respondents, reported as a percentage of direct-labor costs, are generally unsupported by explanation, calculations or documentation, and that the Department apparently made no attempt to verify the information. Petitioner suggests that the Department should use, as BIA, respondents' own indirect-labor rates—as was done in the 1989–90 review—or, alternatively, the highest indirect-labor rate on the record in this review.

Guizhou Machinery *et al.* note that the Department used the SKF annual report to calculate the SG&A rate and that, since that calculated rate was below the statutory minimum, the Department applied the statutory minimum of 10 percent in the calculation of CV. Guizhou Machinery *et al.* contend that there is no basis for asserting that the Department must add an amount to the statutory minimum for indirect SG&A labor since this is not the Department's practice.

With respect to overhead, Guizhou Machinery *et al.* point out that the SKF report includes, under the category ''expenses for manufacture administration and selling,'' items designated as ''repairs to buildings'' and ''repairs to machinery.'' Guizhou Machinery *et al.* assert that the Department can reasonably conclude that the repair expenses indicated are inclusive of the labor associated with such activities. Respondents argue that, as such, the Department should not alter the SG&A and overhead portions of its calculations for the final results.

Department's Position

We agree with Petitioner that we did not include indirect labor attributable to overhead and labor attributable to SG&A in the CV calculations in the preliminary results. For these final results, we calculated overhead and SG&A expenses using the line items in the SKF report which pertained to these expenses. The results of these calculations from the SKF report (*see* also our response to Comment 13) yielded an SG&A rate that exceeded the statutory minimum; therefore, we did not use the statutory minimum. We did not include any item from the SKF report specifically representing indirect-labor costs in calculating the overhead and SG&A expenses. We also did not include the item ''payments to and provisions for employees'' because this item does not allocate amounts between direct and indirect labor. Further, contrary to the suggestion by Guizhou Machinery *et al.*, there is no evidence in the SKF report indicating that the line items we used to calculate these expenses were inclusive of indirect labor costs.

However, we disagree with Petitioner that the indirect-labor amounts supplied by respondents are inadequate. The record evidence in this case, based on our initial and supplemental questionnaires as well as information we obtained at verification, does not indicate any misreporting of the indirect-labor ratios supplied by respondents. For these final results, we have calculated the expenses for indirect labor attributable to overhead and SG&A labor using the ratios of each as reported in the responses.

Comment 13

Petitioner states that the Department did not include interest expenses incurred by SKF in the CV calculation. Petitioner contends that interest expenses and other financing charges are ordinarily incurred in market economies where companies rely on debt as well as equity as a source of capital. Petitioner states it should be included in the CV calculation as instructed by the Department's *Antidumping Manual*, Ch. 8 at 55 (7/93 ed.). Petitioner notes that Jilin and Henan identified ''loan interest'' in their itemized list of expenses and that, in the 1989–90 review, the Department included interest expense in SG&A for its CV calculations.

Guizhou Machinery *et al.* state that Petitioner's argument should be rejected because the Department used the 10-percent statutory minimum SG&A. Guizhou Machinery *et al.* argue that Petitioner does not cite to any authority for adjusting the statutory 10-percent-minimum SG&A. In fact, Guizhou Machinery *et al.* argue, the statutory minimum SG&A includes an amount for financing charges, and any additional amount for this charge would result in double-counting. Respondents contend that Petitioner only cites legal authority for the proposition that SG&A should include an amount for interest expenses, which is already included within the statutory minimum for SG&A, such that Petitioner's claim as to this point is moot. Moreover, Guizhou Machinery *et al.* assert that Petitioner does not specify which charges from SKF's annual report should be included in the calculations.

Shanghai responds that inventory financing costs are subsumed within the statutory minimum for SG&A as interest charges and to add a separate charge to CV would result in unacceptable double-counting of these charges.

Chin Jun states that, whereas Petitioner argues that finance charges should be added, there is no record evidence regarding SKF's interest expenses which pertain exclusively to sales. Chin Jun argues that Petitioner fails to point out what surrogate finance costs should be applied and provides no evidence that SKF India, part of a huge multinational organization, would have financing charges representative of a normal Indian producer. Due to the foregoing, Chin Jun argues, the overhead rate should be reduced, not increased.

Department's Position

We agree with Petitioner that, consistent with our practice, financing charges should be treated as ordinary business expenses. Therefore, we have included, in the general expenses for these final results, interest expenses as listed in SKF's report.

As noted in our response to Comment 12, we calculated the SG&A expenses by adding each line item from the SKF report that pertained to such expenses. The line items we used in the preliminary results did not include interest expense. The recalculation of SG&A to include interest and the items discussed in Comment 12 exceeded the statutory minimum; therefore, the argument of Guizhou Machinery *et al.* and Shanghai regarding double-counting is moot.

Concerning the comment by Guizhou Machinery *et al.* that Petitioner has not sufficiently demonstrated the representativeness of SKF's interest expense and Chin Jun's comment that no document demonstrates that SKF's interest expenses pertain exclusively to sales, we note that this source constitutes the best available information and that Guizhou Machinery *et al.* have provided no alternative source for the valuation of this expense. *See TRBs IV–VI* at 65534.

Comment 14

Petitioner argues that direct and indirect selling expenses incurred in the United States must be deducted from exporter's-sales-price (ESP) transactions. Petitioner argues that section 772(e)(2) of the Act requires that expenses incurred ''by or on behalf of'' an ''exporter'' in selling the subject merchandise in the United States must be deducted from ESP. Petitioner states that such expenses may not instead be added to CV or included in a consolidated SG&A expense, which is itself reported as an item of the FOP (citing *Zenith Electronics Corp.* v. *United States,* 10 CIT 268, 276, 633 F. Supp. 1382, 1389 (1986)). Instead, Petitioner argues, expenses incurred with respect to the selling activities of affiliated importers must be separately identified and deducted from the ESP.

Petitioner adds that the Department lacks the discretion to create an exception for selling expenses incurred by U.S. subsidiaries of companies in NME countries (citing *Zenith Electronics Corp.* v. *United States,* 988 F.2d 1573 (Fed. Cir. 1993), and *Ad Hoc Comm.* v. *United States,* 13 F.3d 398, 401 (Fed. Cir. 1994)), arguing that a major reason for the creation of the ''ESP offset'' at 19 CFR 353.56(b)(2) was the recognition that ESP, unlike purchase price, required the deduction of all direct and indirect selling expenses incurred on U.S. sales (citing *Smith-Corona Group, SCM Corp.* v. *United States,* 713 F2d 1568, 1578 (Fed. Cir. 1983)). Petitioner argues that section 772 has never been amended to distinguish U.S. prices with respect to NME-produced imports; rather, the adjustments required to calculate dumping margins with respect to NME cases have been codified in section 773(c). Petitioner claims that Congress never intended that a different formula for ESP would be applied to related-party transactions in NME cases.

Petitioner recognizes that the Department has declined to make ESP adjustments on the grounds that ''there is a lack of information on the record to make adjustment to both sides of the equation * * *'' (citing *Ceiling Fans* at 55276). However, Petitioner claims that there are two major distinctions which render the precedent set in *Ceiling Fans* inapposite to this review.

First, Petitioner argues that the U.S. importers of TRBs function at a different level of trade from that derived in the Department's CV calculations, *i.e.,* that the U.S. importers are resellers that function as distributor, whereas the CV does not include any SG&A expenses which represent expenses associated with reselling. Petitioner adds that, in the preliminary results, the Department relied on the statutory minimum SG&A expenses, in which case the minimum activities of the manufacturer are represented in the CV and, as such, there is no basis to conclude that CV requires any deduction similar to the statutory deduction required from ESP.

Petitioner further distinguishes the current review from *Ceiling Fans* by arguing that the SKF report provides sufficient evidence to calculate the ESP-offset adjustment to FMV, if the Department chooses to make such an adjustment.

With respect to deductions of selling expenses from FMV, Petitioner contends that, by using the SG&A expenses of SKF in the final results, the Department would exclude those expenses analogous to resale activities. Therefore, Petitioner contends, there is no basis to conclude that CV requires any deduction similar to the statutory deduction from ESP. Petitioner also asserts that the home market or third-country selling expenses of the foreign producer/U.S. importer are not relevant to the derivation of CV and that these expenses cannot therefore be deducted from the surrogate or statutory minimum SG&A expenses used in CV. Finally, Petitioner asserts, if the Department does choose to make an ESP offset, there is no basis on which to assume that an ESP offset would be equal to U.S. selling expenses; rather, the Department should subtract only that portion of SG&A attributable to indirect selling expenses.

Shanghai states that the Department can make no adjustments to ESP because there is no information to distinguish between foreign direct and indirect selling expenses which would enable the Department to make corresponding adjustments to FMV and that the SKF report does not present any breakdown of selling expenses such as would be necessary to make the required adjustments.

Shanghai claims that the Department has recognized that section 772(e) of the statute does not require, nor does it anticipate, the unfair adjustment of U.S. price (USP) in ESP transactions without a corresponding adjustment to FMV (citing *Ceiling Fans*). Rather, Shanghai argues, the statute requires the Department to make fair comparisons between USP and FMV (citing *The Budd Company* v. *United States,* 746 F. Supp. 1093, 1098 (CIT 1990)). Shanghai asserts that such a fair comparison cannot be made if available information does not permit the corresponding FMV adjustment.

Guizhou Machinery *et al.* state that an adjustment to ESP without the companion ESP offset to FMV would lead to distorted results. Guizhou Machinery *et al.* argue that, while deductions for U.S. selling expenses and the ESP offset can be made in market-economy cases without problems, those deductions cannot be made in NME cases because there is no equivalent market-based value for indirect selling expenses on the FMV side of the equation.

Guizhou Machinery *et al.* cite *Ceiling Fans* as the Department's best explanation of the calculation problem and of why, traditionally, the Department has declined to make adjustments for U.S. selling expenses to either USP or FMV in an NME case. Guizhou Machinery *et al.* state that, while Petitioner acknowledges the Department's decision in *Ceiling Fans,* Petitioner fails to recognize that there is a direct precedent for the Department's treatment of selling expenses in this case (citing *TRBs* at 67591).

Guizhou Machinery *et al.* take issue with Petitioner's argument that this case differs from *Ceiling Fans* because in this case the U.S. importers are ''resellers'' and operate at a different level of trade from that the Department derived for CV. Guizhou Machinery *et al.* state that the U.S. importers in *Ceiling Fans,* as in virtually every ESP case, were resellers and that this review cannot be distinguished from *Ceiling Fans* on that basis. In all such cases, Guizhou Machinery *et al.* argue, the Department has determined that respondents are entitled to an ESP offset; if none can be made, the Department does not deduct selling expenses from USP. Guizhou Machinery *et al.* note further that, for the preliminary results, the Department used the statutory minimum as a surrogate value. Guizhou Machinery *et al.* argue that the statutory minimum includes all selling expenses, including indirect selling expenses normally deducted from FMV with an ESP offset, but which cannot be separately identified. Guizhou Machinery *et al.* claim that Petitioner's argument does not deal with this element of the calculation.

With respect to Petitioner's argument that, if necessary, there is record evidence that will allow for an ESP offset to FMV, Guizhou Machinery *et al.* contend that Petitioner's suggestion that the Department use SKF India's indirect selling expense as a surrogate ESP offset demonstrates the very reason why the Department avoids ESP offsets in NME cases. Guizhou Machinery *et al.* assert that the information in the SKF report does not provide a reasonable method

for determining a surrogate ESP-offset amount. Guizhou Machinery *et al.* refute Petitioner's argument as being incompatible with the Department's use of the 10-percent statutory minimum SG&A, which includes direct and indirect selling expenses. To adjust the 10-percent minimum SG&A expense by using an unsubstantiated surrogate value for an indirect ESP-offset amount would, Guizhou Machinery *et al.* claim, result in an apples-to-oranges comparison.

Department's Position

We agree with Petitioner. We have re-evaluated our practice concerning the deduction of expenses incurred by U.S. affiliates of respondent companies in NME cases and have concluded that such deductions are explicitly required by the statute, which states that ESP shall be reduced by the amount of ''expenses generally incurred by or for the account of the exporter in the United States in selling identical or substantially identical merchandise.'' *See Final Determination of Sales at Less Than Fair Value: Bicycles from the PRC,* 61 FR 19026, 19031 (April 30, 1996) (*Bicycles*),[2] and *TRBs IV-VI* at 65535. The statute provides no exceptions for cases involving NME countries. Therefore, we have subtracted direct and indirect selling expenses incurred by such U.S. affiliates in deriving the USP.

We have made an ESP offset to FMV which, in conformity with section 353.56 of our regulations, is in an amount not to exceed indirect selling expenses incurred in the United States. We based this offset on the ''other expenses'' item from the SKF report and subtracted from this item the amount for debentures as indicated in a footnote to ''other expenses'' in the SKF report. The SKF report notes that the general category of expenses containing the ''other expenses'' item includes ''selling expenses.'' However, none of the named items (*e.g.,* ''power and fuel'') pertain to selling expenses. We have concluded that, as suggested by Petitioner, the ''other expenses'' item, minus debentures, represents these ''selling expenses.''

Comment 15

Petitioner claims that the Department incorrectly calculated freight rates by multiplying the surrogate freight rate by the net weight of each bearing rather than by the gross weight of the bearing as packaged for shipment. Petitioner states that a reasonable allowance for the weight of packaging materials should be made in calculating both ocean freight and inland freight expenses, arguing that packaging does not travel free of charge. Petitioner suggests that the Department could use, as a PI source on the record for this review, a packing list of CMC Guizhou, submitted by DSL Distribution Services, Ltd., on September 27, 1995. Petitioner states that the packing list shows both gross and net weights of pallets of several common TRB models and that the average weight difference is about eight percent. Therefore, Petitioner asserts, the Department should multiply the net weights by 1.08 to reflect the weight of packaging.

Guizhou Machinery *et al.* state that the Department's freight calculations based on net weight are entirely consistent with the methodology it used in the prior administrative reviews of this case and Petitioner has not proved any legal citation or support for its claim that the Department should use gross weight. Guizhou Machinery *et al.* argue further that there is no evidence in the sources the Department used to value ocean freight and inland freight which would indicate that the rates are based on gross weights.

Guizhou Machinery *et al.* also state that the Department did not instruct the respondents to report freight expenses on a gross-weight basis. Guizhou Machinery *et al.* argue that the Department should not use, as Petitioner suggests, a public packing list of CMC Guizhou submitted on September 27, 1995, because, first, they are not aware of such a document being submitted on September 27, 1995, and second, even if it was submitted, it cannot be considered because it would have been untimely as this date is after the publication of the preliminary results.

Department's Position

We agree with Petitioner that a cost is incurred with respect to shipment of packing materials. Upon reviewing the packing list of CMC Guizhou, we have determined that the packing document DSL Distribution Services submitted in the 1994–95 review is an independent and reliable source for such information. We have therefore added this public document to the record of this review. Accordingly, for the final results, we have calculated ocean-freight expenses by multiplying the net weight by 1.08 to reflect the gross weight.

Comment 16

Petitioner states that the Department calculated ocean-freight rates based on freight rates per ton provided by the Federal Maritime Commission for shipments from Shanghai to Cincinnati via the U.S. West Coast and that, to calculate the distance, the Department added the distance between Shanghai and San Francisco in nautical miles with the overland distance between San Francisco and Cincinnati. Petitioner argues that one of the two distances should be converted into the other in order to obtain a consistent basis for the distance calculation. Petitioner also notes that, in the sample calculations in the Factors of Production Memorandum, the Department states that it obtained a freight rate per kilogram per kilometer, but the sample calculation does not demonstrate the conversion from miles to kilometers. Petitioner states that the Department made the same errors in the calculation of the insurance rate based on distance and should correct these errors.

Guizhou Machinery *et al.* respond that, while Petitioner's argument appears to be correct, the Department should correct another clerical error regarding the conversion of miles to kilometers in its ocean-freight calculation. Guizhou Machinery *et al.* claim that, although the Department's Factors of Production Memorandum states that it obtained a ''per kilogram per kilometer'' ocean-freight rate, the calculation reveals that the Department obtained a ''kilogram per mile'' rate but neglected to convert the distance stated in kilometers into miles.

Department's Position:

We agree that we made the clerical errors noted by Petitioner and by Guizhou Machinery *et al.* However, the issue is moot because we have changed the methodology for calculating ocean freight for the final results. We have calculated ocean-freight rates based on quotes from Maersk Inc., a U.S. shipping company. We prefer information from Maersk because it was able to provide port-specific information regarding shipping rates from the PRC to the United States. For these final results, we calculated average shipping rates for shipments to the east coast of the United States and west coast of the United States. We note that the differences among the east-coast ports and west-coast ports are minimal. Maersk provided the basic rates for both 20-foot and 40-foot containers, destination surcharges, FAF fuel surcharge, and region-specific surcharges. Maersk reported that the maximum payloads

[2] Although the statutory citation in this case is to the law as it existed on December 31, 1994, whereas the relevant citation in *Bicycles* is to the law as it exists subsequent to that date, both versions of the provision explicitly require the deduction of expenses generally incurred by or for the account of the exporter in the United States.

allowed for the 20-foot and the 40-foot containers were 48,000 pounds and 60,000 pounds, respectively. We converted the pounds to kilograms and divided the total cost of shipping the fully loaded container by the maximum payload weight in kilograms to derive a per-kilogram freight rate. We multiplied that rate by the net bearing weight in order to value ocean freight expenses.

Comment 17

Petitioner states that the Department erroneously used the Indian wholesale-price index (WPI) to adjust for inflation of ocean-freight cost. As the ocean-freight costs were based on U.S. rates in U.S. dollars, Petitioner contends that any adjustment for inflation should be based on dollar inflation. Petitioner suggests that the Department adjust ocean-freight costs using the U.S. producer-price index for finished goods, the U.S. equivalent of a WPI, from the same source used to derive the Indian WPI.

Department's Position

We agree with Petitioner that we should adjust ocean-freight costs using the U.S. producer-price index because ocean-freight costs are based on U.S. rates in U.S. dollars. For the final results, we deflated the July 1996 ocean-freight-rate quotes from Maersk Inc. using the U.S. producer-price index to reflect the POR costs.

Comment 18

Petitioner contends that the Department has understated the marine-insurance expense by applying an insurance rate per ton applicable to sulfur dyes from India. Petitioner argues that, absent any evidence that one ton of sulfur dyes would have a value even close to the value of one ton of bearings, there is no rational basis for the Department's approach, *i.e.*, applying insurance on the basis of weight rather than of value. Petitioner asserts that, if a container of bearings were lost at sea, there is no basis to suppose that payment for the loss of one ton of sulfur dyes would have any relationship to the value of the bearings.

Petitioner recommends that the Department calculate a marine-insurance factor based on the ratio of the insurance charge per ton of sulfur dye divided by the value of sulfur dye per ton (based on U.S. Customs value) and apply this factor to the price of TRBs sold in the United States.

Petitioner contends further that to correct the ocean-freight distance upon which it based the marine-insurance rate, the Department should recalculate marine insurance. However, Petitioner notes that the source the Department used deleted the destination in the public version and, therefore, the only information on the record is that the insurance covered shipments from somewhere in China to somewhere in the United States, which provides no basis for differentiating among shipments on the basis of distance.

Guizhou Machinery *et al.* respond that it is not reasonable to assume that the difference in Indian marine-insurance rates applicable to sulfur dyes and TRBs can be measured accurately simply by comparing the difference in product values. Guizhou Machinery et al. assert further that Petitioner's argument is based on customs values obtained from the Sulfur Dyes petition, information which has not been previously submitted on the record for the current review (citing 19 CFR 353.31). Guizhou Machinery *et al.* state that the Department's approach of using the marine-insurance rates from the sulfur-dyes investigation is consistent with its calculations in other NME cases, citing *Coumarin, Sebacic Acid* and *Saccharin*. Finally, Guizhou Machinery *et al.* argue that the Department did not understate but, rather, overstated the marine-insurance expenses due to ministerial errors in the Department's calculation. Guizhou Machinery *et al.* claim that the errors made by the Department include the failure to convert nautical miles into statute miles and then to kilometers in calculating per-unit marine-insurance rate and the failure to convert the per-unit amounts from rupees into U.S. dollars before deducting the marine-insurance expense from USP. Respondents urge the Department to reject Petitioner's request to make an upward adjustment to the marine-insurance calculations and to correct the conversion errors.

Department's Position

We disagree with Petitioner with respect to our use of the sulfur dyes data. We have relied on the public information on marine insurance for sulfur dyes that we used for the preliminary results, and we have used the same rate repeatedly for other PRC analyses. *See Final Results of Administrative Review: Certain Helical Spring Lock Washers from the PRC,* 61 FR 41994 (August 13, 1996) (*Lock Washers*), and *TRBs IV–VI* at 65537.

We agree with Petitioner that there is no basis for differentiating among shipments based on distance. The source we used for valuing marine insurance provides only a cost per ton. For the final results, we have applied marine insurance based on net weight, without making any allowance for distance shipped. Therefore, we are not correcting the clerical error alleged by Guizhou Machinery et al. with respect to the failure to convert nautical miles into statute miles and then into kilometers. We do agree, however, that we failed to convert marine insurance from rupees into dollars before deducting the expense from USP. For the final results, we converted the marine insurance into dollars using the exchange rate in effect on the date of sale.

Comment 19

Petitioner states that Shanghai's bearing weights and scrap weights were unverifiable and that the Department should therefore resort to partial BIA by adjusting the reported amounts to reflect the highest actual materials or lowest actual scrap costs.

Shanghai argues that the Department weighed actual bearings and scrap samples at verification and determined that any discrepancies found at verification were insignificant. Shanghai states that the Department has previously found no cause to resort to BIA on the basis of insignificant discrepancies (citing *Silicon Carbide* at 19749).

Department's Position

We disagree with Petitioner. Although at verification we did find discrepancies in the reported weights, we determined these discrepancies to be insignificant. Therefore, they did not undermine the validity of Shanghai's responses. In addition, we found some discrepancies to be above reported weights and others to be below; we found no pattern of under-reporting.

Comment 20

Petitioner argues that the Department reported that it was unable to verify the number of Shanghai's employees assigned to the production of TRBs, citing the verification report for this company. Petitioner claims that, as a result, the Department could not verify reported indirect labor nor was it able to determine the extent to which labor costs were understated by the omission of trained-employee hours from the direct-labor costs reported. Petitioner further argues that, given that overhead costs, SG&A and profit are all derived on the basis of materials and labor costs, the inability to verify labor hours is fatal to Shanghai's entire questionnaire response.

Petitioner argues that, if the Department uses the partial information submitted by Shanghai, labor hours

should be adjusted to account for trained employees.

Shanghai claims that Petitioner has misinterpreted the verification report. Rather than stating that the number of employees assigned to TRB production was unverifiable, Shanghai contends that the report noted that it was not verifiable from personnel department worksheets, which do not contain such information. Shanghai says that it did report the number of employees assigned to TRB production and that such information was verifiable through a variety of means. Shanghai further claims that its reported labor hours accounted for trained workers. Shanghai counters Petitioner's argument for use of BIA, stating that it did not refuse to provide information and it was able to produce, in a timely manner, any information requested by the Department.

Department's Position

We agree with Shanghai's contention that Petitioner misinterpreted our verification report. In the report, we noted that there was nothing to which we could trace the numbers from a worksheet prepared for this administrative review in order to verify the number of employees assigned to the production of subject merchandise. However, based on company records we examined at verification, we determined that Shanghai reported the number of employees assigned to the production of TRBs accurately.

We were able to verify the direct-labor hours from Shanghai's internal record-keeping from work tickets. We found at verification that by reporting direct labor from the work tickets Shanghai did not account for trained workers. To calculate direct labor for the preliminary results, we adjusted Shanghai's reported labor hours in order to account for trained workers by adding the direct-labor hours for trained workers to the direct-labor hours for skilled workers. We have applied this same methodology for these final results. Because we were able to verify Shanghai's direct labor and there was no evidence indicating that indirect labor was misreported, we have used the indirect labor as reported.

Comment 21

Petitioner asserts that the Department should apply BIA ocean-freight and marine-insurance rates to all of Henan's U.S. sales through Central Equimpex because the record includes an invoice which shows that Henan made a sale on a CIF basis, although it stated in the submission that the terms of sale were not CIF.

Henan claims that Petitioner's assertion is based on a misunderstanding of the transaction which was the subject of the invoice. Further, Henan states that the invoice does not relate to Henan's ESP sales through Central Equimpex but relates to one of Henan's direct purchase-price sales. Thus, Henan asserts, the Department can trace the sales quantity and price directly to Henan's purchase-price sales listing.

Department's Position

We agree with respondent in part. The fact that the sale was a purchase-price transaction is not relevant to the deduction of ocean-freight expenses from USP but, rather, whether ocean-freight expenses are included in the price. The record evidence is that ocean-freight expenses were included in the sale price. Moreover, because the sale in question is a purchase-price transaction and, therefore, is not related to sales made through Central Equimpex, there is no justification for applying BIA to all sales made through Central Equimpex. Furthermore, there is no evidence to support Petitioner's assertion that Henan's ESP sales listing does not reflect its transactions accurately. We have examined documentation related to the sale in question and have determined that ocean freight and marine insurance were provided by PRC-based companies. Accordingly, we have applied the surrogate ocean-freight and insurance rates for this transaction.

Comment 22

Shanghai argues that the Department must recalculate the estimated ocean-freight charges on its ESP transactions. Shanghai contends that the Department's estimated ocean-freight charges improperly included charges for U.S. inland freight and brokerage & handling which the Department deducted elsewhere from ESP. Specifically, Shanghai claims that charges for ''destination delivery charge'' included in the ocean freight rates the Department used were presumably for the costs of off-loading and transporting the merchandise from the port of entry to the warehouse in the United States. Shanghai states that it reported such costs as U.S. inland freight and/or brokerage & handling charges and the Department deducted them from ESP accordingly.

Petitioner responds that Shanghai misunderstood the Department's ocean-freight methodology. Petitioner contends that, notwithstanding other problems, the Department did not include expenses twice in its calculation of ocean freight. Petitioner argues that an examination of the component parts of the ocean-freight charge shows that the destination-delivery charge clearly covered the overland portion of the shipment, *i.e.*, from Long Beach to Cincinnati, because all other portions of the charge are related to the ocean part of the voyage.

Department's Position

Because we have changed our methodology to calculate ocean freight (*see* our response to Comment 16), this issue is moot.

Comment 23

Shanghai argues that the Department erroneously added a surrogate-based inland-freight charge to its purchases of steel imported from market-economy countries, improperly inflating the imported-steel values by double-counting freight costs. Thus, Shanghai argues, the Department should delete the surrogate-based freight charge from the costs of the imported steel.

Department's Position

We agree with Shanghai that we double-counted freight costs when we added surrogate-based freight charges to respondent's imported-steel values. Because Shanghai incurred no inland-freight charges, these should not have been added. Furthermore, because we determined that it is more accurate to value all of Shanghai's hot-rolled-steel bar using the imported steel value (*see* our response to Comment 7), we have, for these final results, not included the surrogate-based freight cost in valuing Shanghai's hot-rolled-steel-bar material inputs.

Comment 24

Shanghai states that the Department should not base the overhead rate on information contained in the SKF report because it is excessive and unrepresentative of Chinese producers. Shanghai and Chin Jun argue that, if the Department does use the SKF report to value overhead for the final results, it must recalculate the rate in order to correct several errors. In addition, Shanghai claims that the overhead rate the Department used in the preliminary results is based on Petitioner's analysis of the SKF report, an analysis which Shanghai claims contains several errors.

Shanghai and Chin Jun argue the rate the Department used in the preliminary results improperly allocates the full amount of the depreciation expense to overhead and, as a result, the Department did not consider that certain depreciation expenses should be allocated instead to SG&A. Shanghai notes that, for the final results of the

1989–90 administrative review, the Department allocated a portion of depreciation to SG&A. Shanghai and Chin Jun argue that depreciation on office buildings, furniture, fixtures and office equipment, and vehicles should be allocated to SG&A. Shanghai calculates that, according to the SKF report, 7.3 percent of total depreciation pertains to SG&A assets. Shanghai argues that total current depreciation should be decreased by 7.3 percent for SG&A, thereby reducing the amount of depreciation allocable to overhead.

Second, Shanghai notes that the SKF report does not identify to which items rent and lease expenses were applied. Shanghai points out that the line item for lease rental payments was not included under the same category as ''expenses for manufacture, administration and selling.'' Shanghai notes references to residential rental properties in the SKF report, adding that office space and housing for executives should be charged to SG&A and that these lease and rental payments, therefore, should be allocated to SG&A and not to overhead. Chin Jun adds that a portion of insurance should be applied to SG&A, as there is no evidence that these expenses are manufacturing expenses.

Third, Shanghai and Chin Jun argue that, consistent with the final results of the 1989–90 review, the Department should apply the ''rates and taxes'' line item to SG&A. Shanghai states that it is not reasonable to allocate the total amount for ''rates and taxes'' to overhead, as they are not characterized as such in the SKF report.

Chin Jun argues further that the overhead rate based on the SKF report is inappropriate because it is typical of neither China nor India. Chin Jun maintains that the Department has previously held that companies in less-developed countries, which normally use less-sophisticated technology, have lower overhead rates than companies located in developed countries (citing the investigation for this case, 52 FR 19748, 19749 (May 27, 1987)). Chin Jun and Shanghai both suggest that the Department use record evidence contained in a November 18, 1994, submission by Chin Jun, which contains data compiled by the Reserve Bank of India (RBI) as a representative surrogate-overhead figure.

Finally, Shanghai argues that, if the Department continues to use the SKF report to value overhead, the Department should adjust those rates so that they are more representative of overhead expenses of Chinese producers. Shanghai proposes that the Department adjust the overhead rate to include only those items included in Shanghai's overhead cost.

Petitioner counters that depreciation is one of the items the statute intended to be included among factors of production, before non-factor-of-production items, such as SG&A and profit, were added (citing sections 773(e)(1) and (c)(3) of the Act). The only alternative, Petitioner claims, would be to add depreciation as a separate percentage, which would not alter the calculation. Furthermore, Petitioner argues, even if the Department decided to allocate a portion of depreciation and other expenses to SG&A, any such allocation would be arbitrary.

Petitioner dismisses Shanghai's and Chin Jun's proposed alternative source—the RBI data—as covering an incredibly broad range of industries, of which the bearings industry would represent only a small part. Petitioner asserts that the SKF report provides information for a bearing producer in India and to reject it in favor of the RBI data would be unreasonable. Likewise, Petitioner rebuts Chin Jun's argument that SKF represents a modern company such as is found in developed countries, pointing out that the Department did not use data relevant to SKF Sweden nor consolidated data from the SKF Group but data from SKF India, which reflects the operating conditions of a bearings producer in India.

Finally, Petitioner rejects Shanghai's suggestion that the SKF report be adjusted to include only those items included in Shanghai's overhead. Given the non-market nature of PRC-based companies, Petitioner asserts that those companies may not incur, itemize or segregate all of the expenses recognized in a market-economy producer's financial statement. Nevertheless, Petitioner insists, expenses of the type generally incurred in the production or sale of the merchandise, even if not itemized by the NME company, would have to be added into the CV calculation somewhere.

Department's Response

We disagree with Shanghai and Chin Jun that we should use the RBI information instead of the SKF report for the calculation of the SG&A and the overhead rates. The information in this case published by RBI represents more than 600 companies in India from various industries. Because the extent to which companies incur overhead and SG&A expenses can differ so greatly between industries, we have based our overhead and SG&A surrogate values on the industry-specific experience closest to that of the merchandise under review, when appropriate industry-specific data are available. *See Final Determination of Sales at Less Than Fair Value; Polyvinyl Alcohol From the People's Republic of China* (*Polyvinyl Alcohol*), 61 FR 14057, 14059 (March 29, 1996). We have overhead and SG&A information from SKF India, a producer of subject merchandise. Accordingly, for the final results, we have continued to calculate overhead and SG&A based on the information in the SKF report.

We agree with Chin Jun and Shanghai, however, that certain adjustments to the calculation of overhead and SG&A are appropriate. For instance, we agree that it is improper to include all of SKF's depreciation in overhead because depreciation associated with office buildings and office equipment should be apportioned to SG&A expenses. Therefore, for the final results we have allocated depreciation costs to overhead and SG&A according to the function and value of the assets by including in overhead only the depreciation expenses allocated to manufacturing. We obtained the information pertaining to the function and value of SKF's assets from the SKF report.

We also agree with Chin Jun and Shanghai that we should allocate ''rates and taxes'' to SG&A and not to overhead. This allocation methodology is consistent with our practice in the 1989–90 administrative review of this proceeding and with other recent PRC cases (*see, e.g., TRBs IV–VI* at 65540).

With respect to lease rental expenses, we agree with Shanghai that the SKF report does not identify the nature of those expenses. However, we do not agree with Shanghai's contention that all of the lease rental expenses are for SG&A, as a portion of those expenses could be attributed to overhead as well. Accordingly, we allocated lease rental expenses equally to SG&A and overhead (*i.e.*, 50 percent for SG&A and 50 percent for overhead).

Comment 25

Shanghai, assuming that the Department disclosed all observations with calculated margins, requests clarification as to how the reported margin for each observation correlates with the total margin the Department calculated. Shanghai asserts that, because the value for total dumping duties due exceeds the sum of the transaction-specific dumping margins, some error in the Department's calculations of the total dumping duties due has occurred.

Department's Position

Shanghai is incorrect in assuming that all observations with calculated margins

were in the printouts we released after the preliminary results. In this case, where complete printouts are likely to be voluminous, we generally release printouts with a portion of respondent's transactions. Because a printout showing the margin calculations for all of Shanghai's sales would have been voluminous, we provided Shanghai with a printout showing the calculations for 50 percent of its sales during the POR. Upon review, other errors or corrections noted elsewhere notwithstanding, we have determined that our calculation of Shanghai's total margin is correct and reflects our analysis of Shanghai's data.

Comment 26

Jilin states that the Department calculated a margin for one of Jilin's models based on an erroneous net weight which affected the calculation of ocean freight and marine insurance. The error appears to be due to a misplaced decimal point, Jilin explains, which incorrectly resulted in a reported net weight which is 10 times the actual weight. Jilin states that the error is obvious when compared to other information on the record. Jilin notes that it included the correct net weight in its FOP data as reported by the manufacturer.

Jilin argues, first, that the size of the deduction to its USP for ocean-freight and marine-insurance expenses for that model is inconsistent with that of other respondents who sold the same model. Next, Jilin claims that a comparison of the net weight reported for that model by other respondents shows that the net-weight figure in Jilin's USP calculation is aberrational. Jilin refers to the same model number and the associated net weights reported by other respondents and points out that those net weights are consistent with each other, as well as with that reported in Jilin's FOP data. Jilin requests that the Department correct its calculations by using the net weight as reported in its sales listing but adjust the location of the decimal point to reflect the correct net weight.

Petitioner points out that Department used the exact weights reported and affirmed by Jilin in its responses. Petitioner further notes that adjusting the decimal point backward one space does not result in the net weight in Jilin's reported U.S. sales list matching that which was in Jilin's reported FOP data, which Jilin argues is the correct net weight. Petitioner contends that Jilin's claim of an alleged clerical error is an attempt to submit new information after the preliminary results and to amend its response.

Department's Position

In light of a decision by the CAFC, we have reevaluated our policy for correcting clerical errors of respondents. *See NTN Bearing Corp. v. United States,* Slip Op. 94–1186 (Fed. Cir. 1995) (*NTN*). As a result of the *NTN* decision, we now accept corrections of such clerical errors under the following conditions: (1) The error in question must be demonstrated to be a clerical error, not a methodological error, an error in judgement, or a substantive error; (2) we must be satisfied that the corrective documentation provided in support of the clerical error allegation is reliable; (3) the respondent must have availed itself of the earliest reasonable opportunity to correct the error; (4) the clerical-error allegation, and any corrective documentation, must be submitted to the Department no later than the due date for the respondent's administrative case brief; (5) the clerical error must not entail a substantial revision of the response; and (6) the respondent's corrective documentation must not contradict information previously determined to be accurate at verification. *See Certain Fresh Cut Flowers From Colombia; Final Results of Antidumping Duty Administrative Reviews,* 61 FR 42833, 42834 (August 19, 1996) (*Colombian Flowers*).

The error in question, the incorrect placement of a decimal point, is clearly clerical in nature. We have analyzed this error using the criteria set forth as a result of the *NTN* decision and have determined that it meets the conditions under which we will accept corrections. We reviewed the responses submitted by other PRC-based bearing manufacturers, as well as information from Jilin's FOP data. The net weight for the same model number reported by other suppliers is about one tenth of the amount in Jilin's U.S. sales list. We note further that the FOP data were provided by the manufacturer, Jilin's supplier, not by Jilin itself, and that the FOP data were consistent with information provided by other manufacturers of the same model. Thus, we determined that the FOP data provided by Jilin's supplier were reliable. Furthermore, Jilin availed itself of the earliest opportunity to correct the error and submitted the request for this correction no later than the time of the case brief. Finally, correction of this clerical error does not entail a substantive revision of the response. Because we did not verify Jilin's response in this review, the last criterion does not apply.

After adjusting the location of the decimal point, the net weight in Jilin's sales list is higher than that in its FOP data, and we have calculated adjustments to USP based on the higher figure from the sales list.

Comment 27

Respondents Liaoning, Wafangdian, Guizhou Machinery, and Henan allege errors regarding model comparisons in the Department's margin calculations, arguing that in some instances the Department compared the price of a component to the CV of an assembled set, while in other instances it applied BIA to U.S. sales for which both sales and FOP data were available.

Liaoning states that the Department compared sales of a cone (inner ring) to the CV of a cone assembly (inner ring, rollers and cage). Liaoning explains that the Department reduced the total CV for a complete set—consisting of a cone assembly and a cup (outer ring)—by excluding the cost for the cup, then compared the resulting cost of the cone assembly to the sale of a cone. Liaoning notes that the ''IR'' attached to the model number in its U.S. sales listing indicates ''inner ring'' and argues that the Department should, for the final results, compare the sale of the model in question to the CV for the single designated component.

Similarly, Wafangdian claims that the Department compared the U.S. sale of a cone assembly to the CV of a complete TRB set. Wafangdian states that the net weight of the model sold in the United States is consistent with the net weight reported in its February 6, 1994 FOP questionnaire response for a cone assembly.

Guizhou Machinery and Henan claim that, for sales of certain models, the Department was not able to match the related sales and cost data because the model codes they reported contained a clerical error in the code prefixes. Guizhou Machinery and Henan explain that the model codes they reported in the sales and FOP responses are often used interchangeably in the industry, where the numerical codes remain the same but purchasers sometimes refer to the numerical code with a slightly different prefix attached. Guizhou Machinery and Henan state that, the difference in prefixes notwithstanding, the identical numerical codes indicate that the models are identical and argue that the sales and cost data of such models should be compared in the final results. Guizhou Machinery and Henan suggest that other respondents' data on the record indicate that the net weights are consistent between model numbers with identical numerical codes, supporting their contention that the models themselves are identical.

Petitioner responds that these arguments are based on new facts not previously on the record and that only Wafangdian's argument warrants consideration by the Department.

Petitioner notes that, whereas Guizhou Machinery and Henan argue that the prefix is meaningless regarding identification of certain models, Liaoning contends that the ''IR'' prefix denotes that the numerical code following it refers only to a cone and is of the utmost importance. Petitioner asserts that the argument that a prefix is unimportant and, therefore, to be ignored or, conversely, that a prefix is of utmost importance constitutes factual information too late to be considered. Petitioner argues that neither it nor the Department has been able to consider or evaluate this information through reference to other public factual data placed on the record. In any event, Petitioner argues the error in the CV the Department used is the fault of the individual respondent and not a clerical error on the part of the Department.

Petitioner states that the same rates the Department used in the preliminary results should apply for the final results, except that, where BIA is used, it should represent the highest transaction rate.

Department's Position

We disagree with Petitioner as to our ability to consider clerical errors of respondents after preliminary results. *See NTN* and *Colombian Flowers*. We have evaluated the respondents' clerical errors against the criteria set forth in our response to Comment 26, and we have determined that these errors meet the conditions under which we accept corrections. We note that, with the exception of Wafangdian, all of the respondents who experienced these model-matching problems were exporters. In this case, we received identifying model numbers from both the factory, which reports the FOP data, and the exporter, which reports the U.S. sale. Conceivably, the two attach different prefixes to the common numeric code.

We compared record evidence among different companies as well as between respondents' FOP data and sales lists. We agree with respondents' contention that these data allow us to compare sales of specific models with corresponding CV figures. For sales of component parts, we have sufficient data on the record to apply CV for the corresponding part, and we have made the proper adjustments for the final results.

Comment 28

CMC argues that the Department assigned the antidumping margin calculated for CMC incorrectly to a company identified as ''China National Machinery & Equipment Import & Export Corporation'' (CMEC). CMC notes that, in all documentation it submitted, the company referred to itself as CMC. CMC also contends that the administrative record shows that the 0.13-percent margin the Department calculated in the preliminary results was based on the sales and cost data CMC submitted and that, in its verification report and analysis memorandum in reference to this respondent, the Department identified the company as CMC. Therefore, for the final results, CMC requests the Department correct its error.

Department's Position

We agree with CMC. We incorrectly identified this respondent in the *Preliminary Results* due to a clerical error. We verified data CMC submitted during this review. The 0.13-percent preliminary margin we calculated pertained to sales by CMC. For these final results of review, the final margin for CMC is 0.00 percent and the non-cooperative BIA rate assigned to CMEC and all other non-responding companies is 25.56 percent.

Comment 29

Guizhou Machinery *et al.* note that, for the preliminary results, the Department assigned to non-responsive companies a margin of 57.86 percent. Respondents contend that such a margin is incorrect because it does not conform to the Department's two-tiered BIA formula as articulated in the *Preliminary Results*. Because the Department calculated a higher rate for Wafangdian, respondents contend, the Department effectively assigned a lower rate to non-responsive companies than it assigned to cooperative respondents, undermining the purpose of the two-tiered policy. Guizhou Machinery et al. request that, for the final results, the Department assign to any uncooperative respondents the highest margin calculated for any respondent in this review or any prior segment of the proceeding.

Department's Position

As a result of changes to our calculations, Wafangdian's rate is 1.28 percent. As noted in our response to Comment 28, above, the uncooperative BIA rate is 25.56 percent, which is the highest rate ever determined in this proceeding.

Comment 30

Premier contends that the Department based its dumping margin inappropriately on cooperative BIA for the period of review. Premier also states that the specific rate the Department assigned to Premier was 75.87 percent, while the Department assigned 57.86 percent to uncooperative respondents. Premier claims that, although the Department stated it was applying ''cooperative BIA'' to Premier, the practical effect of the preliminary results is to treat Premier as an uncooperative respondent. Premier notes that the Department stated two reasons for resorting to BIA: (1) Premier's inability to provide FOP data, and (2) errors in Premier's sales data. Premier claims that the verification errors were minor and contends that the Department itself did not consider these reasons supportive of an uncooperative finding.

Premier states that it was unable to provide certain FOP information to the Department because such information resides with unrelated suppliers that compete with Premier. Respondent asserts that the Department's application of BIA under these circumstances constitutes an abuse of discretion since it amounts to penalizing a company for failing to provide information it does not have. Premier notes that in the 1989–90 review the Department did not disregard the entire response, which lacked factors data, and instead applied cooperative BIA only to those U.S. sales for which there was no identical foreign-market match.

Premier states that, while the verification report notes certain discrepancies in Premier's data, the report does not state that the discrepancies were so significant to warrant complete rejection of Premier's data. Premier adds that some of the issues the Department cited as reasons for BIA were the result of Premier's inability to provide data related to its suppliers, *e.g.*, that it was unable to identify the producers of the bearings it sold to the United States. For the same reasons related to its inability to provide FOP data, Premier claims that it should not be penalized. Premier states that it often does not deal with the factory but, rather, with a PRC trading company. Under these circumstances, Premier argues, the Department's decision to treat Premier as if it were an ''uncooperative'' respondent is unwarranted. Premier claims that it responded to every questionnaire and provided the requested information that was available to it.

Premier states that, in numerous cases, the courts have held that the Department cannot penalize a company for failing to provide information it does not have, citing *Olympic Adhesives* v. *United States,* 899 F.2d 1565 (Fed. Cir. 1990) (*Olympic Adhesives*), and *Allied-Signal Aerospace Company* v. *United States,* 996 F.2d 1185 (Fed. Cir. 1993) (*Allied-Signal*). Premier notes that in Allied-Signal (page cite omitted) the court reversed the Department's application of a punitive BIA to a respondent who had ''supplied as much of the information as it could.'' While Premier acknowledges that the issue before the court in *Allied-Signal* was the Department's characterization of a respondent as uncooperative, Premier argues that the court's criticism of the Department's decision to apply punitive BIA is applicable to the circumstances in this review, in which Premier cooperated to the extent that it could. Premier contends that subsequent court decisions have followed the *Olympic Adhesives* rationale, ruling that the Department cannot apply adverse BIA when deficiencies in a respondent's data are due to factors outside its control (citing *Usinor Sacilor* v. *United States,* 872 F. Supp. 1000 (CIT 1994) (*Usinor Sacilor*), *Zenith* v. *United States,* Slip Op. 94–146 (September 19, 1994), and *Hyster* v. *United States,* 848 F. Supp. 178, 188 (CIT 1994)).

Premier asserts further that the Department's BIA policy is not binding in all cases and that the Department has retreated from its policy when the facts warranted doing so. Premier argues that the Department has recognized that there are situations in which strict application of its BIA policy leads to results which are inconsistent with the purpose of the policy, *i.e.,* to treat cooperative respondents less harshly than uncooperative respondents. Premier notes that the Department has modified its standard two-tiered approach in the past where strict application of this methodology would result in aberrational margins (citing *Certain Steel Products from Mexico,* 58 FR 37352 (July 9, 1993), and *Professional Electric Cutting Tools and Professional Electric Sanding Grinding Tools from Japan,* 58 FR 30144 (May 26, 1993)). Premier notes that, in *Manifattura Emmepi S.p.A.* v. *United States,* Slip Op. 93–183 (September 15, 1993), the court upheld the Department's decision to apply BIA based on the highest calculated rate in the immediately preceding review, when following its traditional two-tiered BIA approach would have resulted in a *de minimis* margin. Instead, Premier notes that the Department selected an alternative rate which was ''adverse enough.'' Premier claims that selecting a rate for a cooperative respondent that is the same as that for an uncooperative one will not serve the Department's BIA policy, as it would discourage cooperation.

Premier suggests that, in this case, the Department could reasonably use alternatives to its two-tiered methodology. Premier proposes that, consistent with the Department's preference to consider a respondent's own prior rates when selecting BIA for a ''cooperative'' respondent, the Department could apply, as BIA, the highest rate calculated for Premier in any prior segment of the proceeding, 0.97 percent from the 1987–88 and 1988–89 reviews, as well as the rate from the LTFV investigation. Premier suggests, alternatively, that the Department could select a rate which distinguishes properly between uncooperative and cooperative respondents, such that the BIA margin selected for ''cooperative'' respondents should not be the same as that for ''uncooperative'' respondents.

Chin Jun states that the Department's application of punitive BIA to some of its sales is contrary to legal precedent. Chin Jun claims that, in accordance with section 773(e)(2) of the Act, the Department may use an adverse inference if it finds that a party has failed to cooperate by not acting to the best of its ability to comply with a request for information. Chin Jun argues that it has cooperated to the best of its ability and, despite its cooperation, the Department has drawn an adverse inference and applied punitive BIA. Chin Jun claims that, while the Department's preliminary results did not state that the BIA rate imposed against Chin Jun was punitive, it clearly was. Chin Jun states that the court reaffirmed that, '' in order for the agency's application of the best information rule to be properly characterized as ''punitive,'' the agency would have had to reject low margin information in favor of high margin information that was demonstrably less probative of current conditions,'' citing *Allied-Signal* (page cite omitted). Chin Jun claims that this is precisely the case here, in which the Department rejected low-margin information available in favor of high-margin BIA.

Chin Jun notes that, while the Department has discretion as to the choice of BIA, this discretion must be exercised reasonably (citing *Holmes Products Corp.* v. *United States,* 795 F. Supp. 1205, 1207 (CIT 1992)) (*Holmes Products*). Respondent contends that the Department is not permitted to take an overly sweeping view of the authority it is granted under section 773(e)(2), citing *Olympic Adhesives.*

Chin Jun also claims that the regulations allow the Department to consider the degree of a particular respondent's cooperation in the administrative review as a factor in determining what constitutes the best information available. Chin Jun insists that it did not refuse to provide information nor did it significantly impede the review, but that it was simply unable to obtain certain FOP information from all of its unrelated suppliers. Chin Jun states that the court has ruled that, when deficiencies are beyond a respondent's control, the application of punitive BIA is improper, citing *Usinor Sacilor.*

Chin Jun claims that, in *Holmes Products,* the Department improperly rejected the use of weighted-average information from the respondent and applied an adverse BIA rate. The court required the Department to use certain data supplied by the respondent, as that respondent had substantially complied with the Department's request and could not control the conduct of an uncooperative affiliate. Chin Jun adds that the court pointed out that use of averaged data for substantially complying parties has been approved and applied in other contexts.

Chin Jun claims that its circumstances are even more compelling than those found in *Usinor Sacilor* and in *Holmes Products.* Chin Jun states that, in this case, the alleged lack of FMV data was a result of unrelated third parties'' failure to provide a response to the factors questionnaires. Chin Jun asserts that, in *Usinor Sacilor* and *Holmes Products,* the courts held that the Department cannot punish a respondent when a related, yet uncooperative, affiliate did not supply requested information and argues that it is even more inexcusable for the Department to punish Chin Jun when unrelated, uncooperative parties failed to provide certain information.

Chin Jun states that it is important to view the Department's actions in the context of generally accepted litigation parameters such as those set forth in the Federal Rules of Civil Procedure. Chin Jun claims that Federal Rule of Civil Procedure 45 governing subpoenas only directs production of ''designated books, documents, or tangible things in the possession, custody or control of that person.'' While the Department may lack ''subpoena power'' in an antidumping duty review, Chin Jun argues, it is unreasonable for the Department to interpret its statutory

authority as extending beyond the bounds of authority granted by the Federal Rules of Civil Procedure. Chin Jun asserts that the Department is attempting to do what the courts cannot—punish parties for not providing information which is beyond their ''possession, custody or control.'' Therefore, Chin Jun reasons, the Department should not apply punitive BIA but should opt for a reasonable method to determine BIA.

Chin Jun states that, for certain of its transactions, as BIA, the Department based FMV on the highest dumping margin found in the entire review. Chin Jun asserts that the law is well settled, as set out in its previous arguments, that the Department cannot apply an adverse BIA rate against Chin Jun because it cooperated to the best of its ability. Consistent with cited case precedence, Chin Jun states that the Department should apply a less-adverse BIA when there is a gap in the data or when the missing data are beyond the control of the respondent.

Chin Jun suggests several options. Chin Jun recommends that the Department (1) apply a weighted-average margin based on all calculated rates for the other companies, (2) calculate margins for those Chin Jun sales using FMV based on data supplied by other respondents, or (3) use the weighted-average margin calculated on Chin Jun's sales for which FMV data were available. Chin Jun states that these alternatives are in accordance with case-law precedent and that the Department must employ a methodology that is reasonable, neutral, and non-adverse.

Petitioner responds that the BIA rate the Department applied to Premier was not punitive but was, in fact, a cooperative rate under the Department's two-tiered methodology. Petitioner also contends that the deficiencies in Premier's response extend beyond a lack of supplier data and include significant errors in Premier's U.S. sales database. Petitioner argues that, in the event that cooperative and non-cooperative BIA rates are different for the final results, the Department should apply a punitive, non-cooperative BIA rate to Premier based on the deficiencies within Premier's own submitted data.

Petitioner claims that, whereas Chin Jun characterizes as ''punitive'' the use of other respondents' margins in the period as BIA, this is an option in the non-punitive approach to BIA.

Petitioner agrees that changes are necessary in applying BIA in the final results but, contrary to Chin Jun's suggestions, Petitioner argues that the Department should apply, as partial BIA, the highest margin of any individual transaction. Given a failure to respond to the questionnaire or the submission of an unusable response, Petitioner asserts that the Department should assume that the dumping margin for all relevant transactions is at least as high as the highest dumping margin on any other transaction. To do otherwise, Petitioner claims, would eliminate or reduce the incentive to comply with the agency's requests. Petitioner states that if the highest transaction margin is not applied as BIA, respondents are encouraged to selectively withhold relevant data, transaction-by-transaction, whenever doing so could cause the Department to select a lower ''best information'' margin. Thus, Petitioner states, only when Chin Jun's margin on any individual transaction is the highest margin for any company should Chin Jun's own margins be used as BIA.

Department's Position

We are using a total BIA rate for Premier due to multiple failures on its part to supply information, including the failure to provide, at verification, certain information which was within Premier's control. In addition to its failure to provide factors information on a transaction-specific basis, Premier was unable to identify its suppliers accurately or provide the quantities of merchandise supplied to the company during the period of review. *See Memorandum from Analysts to File: Verification Report for Premier Bearing and Equipment, Ltd.* (October 31, 1995). Premier did not supply information necessary to connect its transaction-specific U.S. sales reporting with the appropriate FOP data necessary to establish FMV. However, we consider Premier to be a cooperative respondent in this review. We note that Premier provided timely responses to our initial and supplemental questionnaires and participated in a complete verification of all data that it submitted in this review. Therefore, we applied to all U.S. sales, as cooperative total BIA, the highest calculated rate in this review period.

The *Allied-Signal* case Premier cites does not support its claim that the Department's choice of a BIA rate for Premier is improperly adverse. The *Allied-Signal* court noted in its opinion that the critical difference between first-tier (uncooperative) and second-tier (cooperative) BIA treatment lay in the range of LTFV margins subject to consideration for BIA purposes in the determination underlying the version of the two-tiered approach upheld in that case (*see* 996 F.2d at 1191). *Allied-Signal* clearly permits a second-tier margin to be based on the highest margin for any respondent in the current review, even if a first-tier margin is also based on the same value.

As indicated in our response to Comment 29, the fact that non-responsive firms received a lower margin than Premier in the *Preliminary Results* was due to a clerical error. Non-responsive firms have not received a lower margin than the second-tier margin we have assigned to Premier in these final results.

Chin Jun provided most of the information we requested but failed to provide FOP information with respect to certain models. We did not have publicly available FOP data which we could use for the models for which Chin Jun failed to supply such data. We do not accept Chin Jun's argument that, for these models, we should use factors data from a different PRC-based producer, as such data constitute business proprietary information. Further, using data from another producer might encourage respondents to withhold data on less-efficiently produced models in the expectation that the missing data would be provided based on the experience of more efficient producers of the same models. Therefore, we have determined that the it is appropriate to use BIA to establish the dumping margins for the U.S. sales affected by the lack of FOP data.

Under section 776(c) of the Act, we have the authority to use BIA ''whenever a party or any other person refuses or is unable to produce information requested. * * *'' Therefore, the Department can use BIA not only when a party ''refuses'' but also when a party is ''unable'' to provide information.

Under our BIA methodology, there are two general types of BIA, *i.e.*, ''total BIA'' and ''partial BIA.'' We use ''total BIA'' for a respondent whose reporting or verification failure is so extensive as to make its entire response unreliable; in this situation, we determine the respondent's entire dumping margin on the basis of BIA. We use partial BIA, as we have here for Chin Jun, when a party's responses are deficient in limited respects yet they are still reliable in most other respects. In a ''total BIA'' situation, the choice of a particular BIA rate is dependent on whether we consider the respondent to have been ''cooperative'' or ''uncooperative'' during the review. In a ''partial BIA'' situation, in contrast, we regard the respondent as being cooperative and the flaws are not so significant or extensive that the response as a whole is unusable.

Instead, the level of partial BIA depends on the size and nature of the deficiency and the degree to which the deficiency affects the rest of the response.

Regardless of the particular type of BIA we use, we do not apply a neutral figure as BIA, except where there is an inadvertent gap in the record or where a minor or insignificant adjustment is involved. None of these situations applies to Chin Jun in this case. BIA is intended to be adverse, even in a ''partial BIA'' situation, because one purpose of the BIA provision of the statute is to induce respondents to provide timely, complete and accurate information. Chin Jun's claim that we may use an adverse inference only if we have found that a party ''has failed to cooperate by not acting to the best of its ability to comply with a request for information'' (citing section 773(e)(2)) does not apply to this review because this review is being conducted under the Act as it stood on December 31, 1994, which did not contain this provision. Chin Jun's recourse to *Allied-Signal* is likewise misplaced. Although the Department's choice of BIA rejects the low-margin information Chin Jun proposes over higher-margin BIA, Chin Jun has not shown that the higher-margin information is ''demonstrably less probative of current conditions,'' as required by *Allied-Signal.* Because Chin Jun did not provide FOP information which would allow us to calculate margins for certain models, there are no data on record showing the actual rates for these models to be less than 25.56 percent, which is the highest rate determined in this review. Therefore, as BIA, we have applied this rate to those U.S. sales affected by the missing FOP information.

Comment 31

Chin Jun states that, for the preliminary results, the dumping margins and sales value for Wafangdian and Jilin are aberrational. Chin Jun notes that the number of sales that these two companies had compared to the total sales that the Department reviewed for this administrative review is small and that the highest rate calculated for any other exporter in the preliminary results for this review is 12.06 percent while Wafangdian received a rate of 75.87 percent and Jilin received a rate of 60.91 percent. Moreover, Chin Jun presumes that it is probable that all companies, except Wafangdian and Jilin, will have final antidumping rates of less than 12 percent. As such, Chin Jun contends that Wafangdian's and Jilin's dumping margins are aberrational in all respects and should not be used as the basis for BIA for any of Chin Jun's transactions.

Department's Position

As a result of corrections and changes noted elsewhere, we have recalculated respondents' margins for these final results. The highest rate for this review period is 25.56 percent. As we explained in our response to Comment 30, this is an appropriate cooperative-BIA rate for those U.S. sales for which Chin Jun was unable to supply factors data.

Comment 32

Chin Jun claims that the Department applied BIA to certain sales of models for which it had provided FOP data. Therefore, Chin Jun argues, the Department should not use BIA to establish FMV for these models.

Department's Position

We agree with Chin Jun. As discussed in our response to Comment 26, we have corrected clerical errors in the identifying model numbers. This allows us to compare sales data for the models in question with the corresponding factors data.

Comment 33

Chin Jun notes that the Department used a profit rate of 10.85 percent based on information contained in the SKF report. Chin Jun points out that SKF India is related to SKF Sweden and, therefore, the transfer prices and other related-party transactions between parent and subsidiary could radically affect profit margins. Thus, Chin Jun argues, the Department should use the statutory minimum of eight percent to establish a surrogate value for profit.

Petitioner responds that it is not clear what Chin Jun's comments regarding SKF India's relationship to SKF Sweden are supposed to mean nor what results would obtain if the claim were true. In any event, Petitioner asserts, Chin Jun did not provide any evidence that related-party transactions occurred or, if they did, that they affected SKF India's profits or other results in any way. Petitioner argues that the Department should use SKF India's actual profit in the final results, recalculated to reflect the changes to overhead and SG&A as asserted in Comment 2

Department's Position

We agree with Petitioner. While calculating the profit ratio using the data provided in the SKF report, we noted that SKF India is related to SKF Sweden. Chin Jun did not provide any information to support its statement that the transactions between SKF India and its Swedish parent could radically affect profit margins. Therefore, for the final results, we have applied the calculated profit ratio based on the SKF India's Annual Report as the surrogate value for profit.

Comment 34

Transcom Inc. (Transcom) and L&S Bearing Company (L&S), domestic importers of subject merchandise, argue that the Department's decision to apply what they consider to be punitive BIA appraisement and deposit rates to companies that were never part of the review is unlawful. Transcom and L&S state that, for this review, there were various companies from which they purchased subject merchandise, none of which received a questionnaire or was named in the notice of initiation of review. Transcom states that entries from each of the unnamed companies were subject to estimated antidumping duty deposits at the ''all others'' rate in effect at the time of entry and argues that the Department is precluded as a matter of law from either assessing final antidumping duties on the unreviewed companies at any rate other than that at which estimated antidumping duty deposits were made or imposing the new BIA-based deposit rate on shipments from unreviewed companies.

In particular, Transcom says that it purchased bearings from Gold Hill International Trading and Services Company (Gold Hill), a Hong Kong-based company. Transcom contends that Gold Hill did not request a review, was not named in the notice of initiation for this review, and did not receive a questionnaire or any other request for information or participation in this review. Transcom claims that the Department appears to have imposed punitive assessment and deposit rates on Gold Hill by including Gold Hill's exports under the BIA rates for ''all other'' PRC exporters and argues that the Department is precluded as a matter of law from either assessing final antidumping duties on the unreviewed companies at any rate other than that at which estimated antidumping duty deposits were made or imposing the new BIA deposit rate on the unreviewed companies.

Transcom and L&S, citing section 751(a) of the Act, state that the Department is directed to determine the amount of antidumping duties to be imposed pursuant to periodic reviews. They add that, in accordance with 19 CFR 353.22(e), unreviewed companies are subject to automatic assessment of antidumping duties and a deposit of estimated duties at the rate previously established. Transcom and L&S note

that the CIT has concluded that, in situations where a company's entries are not reviewed, the prior cash deposit rate from the LTFV investigation becomes the assessment rate, ''which must in turn become the new cash deposit rate for that company'' (citing *Federal Mogul Corp.* v. *United States,* 822 F. Supp. 782, 787–88 (CIT 1993) (*Federal Mogul II*)). Transcom and L&S claim that the CIT has affirmed this rationale in other, more recent, decisions as well, concluding that the Department's use of a new ''all other'' rate calculated during a particular administrative review as the new cash deposit rate for unreviewed companies which have previously received the ''all other'' rate is not in accordance with law (citing *Federal Mogul Corp.* v. *United States,* 862 F. Supp. 384 (CIT 1994), and *UCF America, Inc.* v. *United States,* 870 F. Supp. 1120, 1127–28 (CIT 1994) (*UCF America*)).

Based on these CIT decisions, Transcom says that an exporter that is not under review would have no reason to anticipate that antidumping duties assessed on its merchandise would vary from the amount deposited. Transcom notes that *Federal Mogul II* (at 788) states that parties rely on the cash deposit rates in making their decision whether to request an administrative review of certain merchandise. In view of the Department's regulations, Transcom claims that the absence of any notice from the Department that unnamed companies faced the possibility of increased antidumping duty liability is fundamentally prejudicial to the unnamed companies. Transcom states that previous attempts by the Department to impose the BIA rate on an exporter neither named in the review request nor in the notice of initiation have been overturned, citing *Sigma Corp.* v. *United States,* 841 F. Supp. 1255 (CIT 1993) (*Sigma Corp. I*). In that case, Transcom contends, the CIT held that the Department was required to provide the company in question adequate notice to defend its interests and, because it failed to do so, ordered that the merchandise exported by that company was to be liquidated at the entered deposit rate.

Transcom argues that the Department's statement that all exporters of subject merchandise are ''conditionally covered by this review'' (*Initiation of Antidumping Duty Administrative Reviews and Request for Revocation in Part* (*Initiation Notice*), 59 FR 43537, 43539 (August 24, 1994)) is inadequate in that it fails to explain under what ''conditions'' exporters are covered and whether such ''conditions'' were met. If the statement is meant to include unconditionally all unnamed exporters, Transcom asserts that it is contrary to the regulatory requirement at 19 CFR 353.22(a)(1) that the review cover ''specified individual producers or resellers covered by an order.'' Because Gold Hill was never served notice that it was subject, conditionally or otherwise, to review, Transcom claims that the Department is precluded from applying a punitive rate to the company's exports.

Transcom contends that, in accordance with section 776 of the Act, the Department must have requested and been unable to obtain information before applying punitive BIA. Transcom claims that the Department may not resort to BIA ''because of an alleged failure to provide further explanation when that additional explanation was never requested'' (quoting *Olympic Adhesives* at 1574 and citing *Mitsui & Co., Ltd.* v. *United States,* 18 CIT 185 (March 11, 1994), and *Usinor*).

Transcom states that, if the Department assigns the unreviewed exporters the ''all other'' BIA rate, the Department should not apply this rate to exports of TRBs by Gold Hill, a private trading company located in Hong Kong. Transcom contends that there is no basis for assessing it with the punitive Chinese ''all other'' rate on the premise that it failed to demonstrate independence from the central Chinese government; as a Hong Kong company, it necessarily cannot be subject to such control.

L&S requests that the Department liquidate the company's imports which came from companies that were not specifically reviewed at the entered rate rather than the punitive ''PRC-wide'' rate. L&S states that the prospective deposit rate for these unreviewed companies should be 2.96 percent—the ''all others'' rate in the initial investigation.

Petitioner notes that the *Preliminary Results* state at 49576 that, ''for other non-PRC exporters of subject merchandise from the PRC, the cash deposit rate will be the one applicable to the PRC supplier of that exporter.'' Petitioner claims that this situation clearly includes Gold Hill. Petitioner also states that it is its intention that all exporters are covered by this review and points out that the Department's notice of initiation at 43539 specified that all ''other exporters . . . are conditionally covered.'' Therefore, Petitioner argues, Gold Hill and all other suppliers of Transcom not entitled to a separate rate should be expressly listed in the final results as among those to which the ''PRC rate'' applies.

Department's Position

We disagree with Transcom and L&S. It is our policy to treat all exporters of subject merchandise in NME countries as a single government-controlled enterprise and assign that enterprise a single rate, except for those exporters which demonstrate an absence of government control, both in law and in fact, with respect to exports. We discussed our guidelines concerning the de jure and de facto separate-rates analyses, as well as the company-specific separate-rates determinations, in the *Preliminary Results* at 49572–49573. We have determined that companies in the government-controlled enterprise failed to respond to our requests for information and, accordingly, we have established the rate applicable to such companies (the PRC rate) using uncooperative BIA. As discussed below, the Act mandates application of BIA for such companies because they were properly included in the review and did not respond to the Department's requests for information.

Pursuant to our NME policy, all PRC exporters or producers that have not demonstrated that they are separate from PRC government control are presumed to belong to a single, state-controlled entity (the ''NME entity''), for which we must calculate a single rate (the ''PRC rate'). The CIT has upheld our presumption of a single, state-controlled entity in NME cases. *See UCF America, Inc.* v. *United States,* 870 F. Supp. 1120, 1126 (CIT 1994), *Sigma Corp I,* and *Tianjin Machinery Import & Export Corp. v. United States,* 806 F. Supp. 1008, 1013–15 (CIT 1992). Section 353.22(a) of our regulations allows interested parties to request an administrative review of an antidumping duty order once a year during the anniversary month. This regulation states specifically that interested parties must list the ''specified individual producers'' to be covered by the review (see 19 CFR 353.22(a) (1994)). In the context of NME cases, we interpret this regulation to mean that, if at least one named producer or exporter does not qualify for a separate rate, all exporters that are part of the NME entity are part of the review. On the other hand, if all named producers or exporters are entitled to separate rates, the NME entity is not represented in the review and, therefore, the NME rate remains unchanged (*accord Federal-Mogul II* at 788 (''(i)n a situation where a company's entries are unreviewed, the prior cash deposit rate from the LTFV investigation becomes the assessment rate, which must in turn

become the new cash deposit rate for that company'')).

In these reviews, numerous companies named in the notice of initiation did not respond to our questionnaires. On July 26, 1994, we sent a letter to the PRC embassy in Washington and to the Ministry of Foreign Trade and Economic Cooperation (MOFTEC) in Beijing, requesting the identification of TRB producers and manufacturer, as well as information on the production of TRBs in the PRC and the sale of TRBs to the United States. MOFTEC informed us that the China Chamber of Commerce for Machinery and Electronics Products Import & Export (CCCME) was responsible for coordinating the TRBs case. MOFTEC also said it forwarded our letter and questionnaire to the CCCME. On August 31, 1994 we sent a copy of our letter and the questionnaire directly to the CCCME, asking that the questionnaire be transmitted to all companies in the PRC that produced TRBs for export to the United States and to all companies that exported TRBs to the United States during the POR.

Because we did not receive information concerning many of the companies named in the notice of initiation, we have presumed that these companies are under government control. In accordance with our NME policy, therefore, the government-controlled enterprise, which is comprised of all exporters of subject merchandise that have not demonstrated they are separate from PRC control, is part of this review and we must assign a ''PRC rate'' to that enterprise. As we did not receive responses from these exporters, we have based the PRC rate on BIA, pursuant to section 776(c) of the Act. This rate will form the basis of assessment for this review as well as the cash deposit rate for future entries.

We acknowledge a recent CIT decision cited by Transcom and by L&S, *UCF America Inc. v. United States,* Slip Op. 96–42 (CIT Feb. 27, 1996), in which the Court affirmed the Department's remand results for reinstatement of the relevant cash deposit rate but expressed disagreement with the PRC-rate methodology which formed the underlying rationale for reinstatement. The Court raised various concerns with the Department's application of a PRC rate.

The Court suggested that the Department lacks authority for applying a PRC rate in lieu of an ''all others'' rate. However, despite the concerns expressed by the Court, it is the Department's view that it has the authority to use the PRC rate in lieu of an ''all others'' rate. *See Heavy Forged Hand Tools, Finished or Unfinished, With or Without Handles, from the People's Republic of China; Preliminary Results of Antidumping Duty Administrative Review,* 61 FR 15218, 15221 (April 5, 1996).

The PRC rate is consistent with the statute and regulations. Section 751(a) requires the Department to determine individual dumping margins for each known exporter or producer. As discussed above, in NME cases, all producers and exporters which have not demonstrated their independence are deemed to comprise a single exporter. Thus, we assign the PRC rate to the NME entity just as we assign an individual rate to a single exporter or producer, or group of related exporters or producers, operating in a market economy. Because the PRC rate is the equivalent of a company-specific rate, it changes only when we review the NME entity. As noted above, all exporters or producers will either qualify for a separate company-specific rate or will be part of the NME enterprise and receive the PRC rate. Consequently, whenever the NME enterprise has been investigated or reviewed, calculation of an ''all others'' rate for PRC exporters is unnecessary.

Thus, contrary to the argument by Transcom and L&S, the Department's automatic-assessment regulation (19 CFR 353.22(e)) does not apply to this review except in the case of companies that demonstrate that they are separate from PRC government control and are not part of this review, as discussed below.

We also disagree with the assertion by Transcom and L&S that companies not named in the initiation notices did not have an opportunity to defend their interests by demonstrating their independence from the PRC entity. Any company that believes it is entitled to a separate rate may place evidence on the record supporting its claim. The company referenced by Transcom and L&S made no such showing, despite our efforts to transmit the questionnaire to all PRC companies that produce TRBs for export to the United States.

Furthermore, Transcom's argument that the BIA-based PRC-wide rate cannot be applied to exports by Gold Hill because Gold Hill is a Hong Kong company rather than a PRC company are also unfounded. Because Gold Hill's Chinese suppliers did not respond to the Department's questionnaire, we were unable to determine, with respect to sales by Gold Hill, whether Gold Hill or the Chinese suppliers were the first sellers in the chain of distribution to know that the merchandise they sold was destined for the United States. *See Yue Pak, Ltd.* v. *United States,* Slip Op. 96–65, at 6 (CIT April 18, 1996)(citing section 773(f)). When resellers choose to use uncooperative suppliers that are under a dumping order, they must bear the consequences. *See Yue Pak* at 16. Otherwise, uncooperative PRC producers would be free to hide behind and continue exporting through low-rate Hong Kong exporters.

Comment 35

Petitioner opposes revocation of the order with respect to Shanghai, claiming: (1) That it is unlikely the final results in the three reviews at issue would demonstrate consecutive periods of *de minimis* margins for Shanghai; (2) under the other circumstances of this case, it is likely that those persons will in future sell subject merchandise at less than FMV; and (3) Shanghai's three years of no dumping would be too remote in time to serve as a basis for revocation.

Petitioner claims that the preliminary *de minimis* margin for Shanghai was based on results that contain serious and obvious errors. Petitioner contends that as a result of corrections and changes made due to such errors, which have been noted elsewhere, the final results will likely yield increased dumping margins.

Petitioner also argues that, although a joint-venture company with a producer in a market-economy country, Shanghai is still mostly owned by the PRC-based partner and, thus, all of the people of the PRC. Therefore, Petitioner asserts, it would be irrational to ignore Shanghai's relationship to other producers and exporters for purposes of revocation. Petitioner notes that, in those instances in which the Department has revoked orders in NME cases, it has always done so *in toto*, citing *Titanium Sponge From Georgia, Revocation of the Antidumping Finding,* 60 FR 57219 (November 14, 1995), and *Ceiling Fans From the People's Republic of China: Final Results of Changed Circumstances Review and Revocation of Antidumping Duty Order,* 60 FR 14420 (March 17, 1995). Petitioner argues that the Department has never revoked an order applicable to an NME country with respect to an individual company previously found to have dumped merchandise in the United States.

Furthermore, Petitioner claims, the Department cannot reasonably predict that Shanghai is unlikely to make sales at less than FMV in the future. Because of recent legislative changes under the Uruguay Round Agreements, Petitioner argues, ESP adjustments (discussed in Comment 14 above) will be mandated in

reviews subsequent to this review. Petitioner asserts that, even if the Department holds to the position taken in the preliminary results and makes no such adjustment in this review, mandatory adjustments in subsequent reviews are likely to result in higher margins.

Finally, Petitioner insists that congressional intent is that the Department should always use the most up-to-date information available (citing *Freeport Minerals*, 776 F.2d at 1032, *Al Tech Specialty Steel Corp.* v. *United States*, 745 F.2d 632, 640, and H.R. Rep. No. 317, 96th Cong., 1st Sess. 77 (1979)). Given that the three reviews in question are behind schedule, Petitioner argues that a decision on revocation should not be made until after the final results of the 1994–95 review are known and have been verified.

Shanghai replies that the Department has, pursuant to its regulations, the discretion to revoke the order with respect to producers in NME countries and that Petitioner is asking the Department to ignore the plain language of 19 CFR 353.25(a)(2)(i)–(iii). Shanghai adds that nothing in the Department's regulations authorizes the exclusion of NME producers from the scope of the revocation procedures.

Shanghai argues that all available evidence establishes that sales at less than FMV are not likely in the future, asserting that, instead, there is a clear pattern of sales at not less than FMV. Shanghai points out that it has submitted written certification of its agreement to immediate reinstatement in the future if the Department concludes that Shanghai is engaged in sales at less than FMV. Shanghai also refutes Petitioner's argument that the nature of its ''relationship'' to all other PRC producers and exporters makes revocation of the order with respect to Shanghai irrational. Shanghai states that, where Petitioner assumes central planning and collaboration, the Department has found none, hence, its granting of separate rates to Shanghai and others.

Finally, Shanghai argues, if the Department determines to revoke the order with respect to Shanghai, the decision will be based on the results of the three most recent reviews. Shanghai states that there is no more timely information on which to base this decision than the current and the two preceding reviews.

Department's Position

We agree with Shanghai. The regulations do not distinguish between market-economy companies'' and NME companies'' eligibility for revocation. We have determined that Shanghai is entitled to a rate separate from other PRC producers and exporters. Further, Shanghai has complied with sections 353.25(b) and 353.25(a)(2)(iii) of the Department's regulations.

Finally, although the three reviews in question have been delayed, it was not due to any fault on the part of Shanghai. Additionally, these reviews do represent the most up-to-date information on which to base this decision.

Final Results of Review

As a result of our analysis of the comments we received, we determine the following weighted-average margins to exist:

Manufacturer/exporter	Margin (percent)
Premier Bearing and Equipment, Limited [1]	25.56
Guizhou Machinery Import and Export Corporation	1.22
Henan Machinery and Equipment Import and Export Corp	0.16
Luoyang Bearing Factory	0.00
Shanghai General Bearing Company, Ltd	0.04
Jilin Machinery Import and Export Corporation	25.56
Chin Jun Industrial Ltd	4.28
Wafangdian Bearing Factory	1.28
Liaoning Machinery Import and Export Corp	4.01
China National Machinery Import and Export Corp	0.00
China Nat'l Automotive Industry Import and Export Corp	0.46
Tianshui Hailin Import and Export Corp	0.00
Zhejiang Machinery Import and Export Corp	4.32
PRC Rate [2]	25.56

[1] As cooperative BIA, we assigned the higher of 1) the highest rate ever applicable to that company in the investigation or any previous review; or 2) the highest calculated margin for any respondent that supplied an adequate response in this review.

[2] Parties that were named in the initiation but are not listed above did not respond to the questionnaire or did not respond to the supplemental questionnaire; therefore, as uncooperative BIA, we assigned the highest rate calculated in the investigation or in this or any other review of sales of subject merchandise from the PRC. This does not constitute a separate-rate finding for the firms that received the PRC rate.

We determine that, for the period June 1, 1993 through May 31, 1994, Shanghai had a weighted-average antidumping duty margin of 0.04 percent. We further determine that Shanghai has sold subject merchandise at not less than FMV for three consecutive review periods, including this review period, and Shanghai has made the appropriate certification. Therefore, the Department is revoking the order with respect to subject merchandise produced and exported by Shanghai in accordance with section 751(c) of the Act and 19 CFR 353.25.

This revocation applies to all entries of subject merchandise entered, or withdrawn from warehouse, for consumption on or after June 1, 1994. The Department will order the suspension of liquidation ended for all such entries and will instruct the Customs Service to release any cash deposit or bonds. The Department will further instruct the Customs Service to refund, with interest, any cash deposits on post-June 1, 1994 Shanghai entries. In addition, the Department will terminate the review covering subject merchandise with respect to Shanghai's sales during the period June 1, 1994 through May 31, 1995, which was initiated August 16, 1995 (60 FR 42500). The Department will also terminate the review covering subject merchandise with respect to Shanghai's sales during the period June 1, 1995 through May 31, 1996 which was initiated August 8, 1996 (61 FR 41373).

The Department shall determine, and the Customs Service shall assess, antidumping duties on all appropriate entries. Individual differences between USP and FMV may vary from the percentages stated above. The Department will issue appraisement instructions directly to the Customs Service.

Furthermore, the following cash deposit requirements will be effective upon publication of these final results for all shipments of the subject merchandise entered, or withdrawn from warehouse, for consumption on or after the publication date, as provided for by section 751(a)(1) of the Act: (1) for the companies named above that have separate rates and were reviewed (Premier, Guizhou Machinery, Henan, Jilin, Luoyang, Liaoning, Chin Jun, Tianshui, Zhejiang, CMC, China National Automotive Industry Import and Export Guizhou, and Wafangdian), the cash deposit rates will be the rates for these firms established in these final results of review; (2) for Xiangfan International Trade Corporation, which we determine to be entitled to a separate rate, the rate will continue be that which currently applies (8.83 percent); (3) for all remaining PRC exporters, all of which were found not to be entitled to separate rates, the cash deposit will be 25.56 percent; and (4) for other non-PRC exporters of subject merchandise from the PRC, the cash deposit rate will be the rate applicable to the PRC supplier of that exporter. These deposit requirements shall remain in effect until publication of the final results of the next administrative review.

This notice 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 APOs of their responsibility concerning disposition of proprietary information disclosed under APO in accordance with 19 CFR 353.34(d). Timely written notification of the 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, revocation, and notice are in accordance with section 751(a)(1) of the Act (19 U.S.C. 1675(a)(1)) and 19 CFR 353.22 and 353.25.

Dated: February 3, 1997.

Robert S. LaRussa,

Acting Assistant Secretary for Import Administration.

[FR Doc. 97–3356 Filed 2–10–97; 8:45 am]

BILLING CODE 3510–DS–P

Centers for Disease Control and Prevention, et al.; Notice of Consolidated Decision on Applications for Duty-Free Entry of Scientific Instruments

This is a decision consolidated pursuant to Section 6(c) of the Educational, Scientific, and Cultural Materials Importation Act of 1966 (Pub. L. 89–651, 80 Stat. 897; 15 CFR part 301). Related records can be viewed between 8:30 a.m. and 5:00 p.m. in Room 4211, U.S. Department of Commerce, 14th and Constitution Avenue, N.W., Washington, D.C.

Comments: None received. *Decision:* Approved. No instrument of equivalent scientific value to the foreign instruments described below, for such purposes as each is intended to be used, is being manufactured in the United States.

Docket Number: 96–114. *Applicant:* Centers for Disease Control and Prevention, Atlanta, GA 30341–3724. *Instrument:* ICP Mass Spectrometer, Model MAT ELEMENT. *Manufacturer:* Finnigan MAT, Germany. *Intended Use:* See notice at 61 FR 59417, November 22, 1996. *Reasons*: The foreign instrument provides a magnetic sector mass analyzer with sensitivity to detect trace amounts (to parts per quadrillion) of radionuclides in liquid samples. Advice received from: National Institutes of Health, November 25, 1996.

Docket Number: 96–115. *Applicant:* Horn Point Environmental Laboratory, Cambridge, MD 21613. *Instrument:* Fluorometer. *Manufacturer:* Heinz Walz, GmbH, *Germany*. *Intended Use:* See notice at 61 FR 59417, November 22, 1996. *Reasons:* The foreign instrument provides: (1) an actinic intensity of up to 5000 W/m^2 and (2) detection of chloroplast or algal suspensions to 1 mg chlorophyll per liter. Advice received from: National Institutes of Health, November 25, 1996.

Docket Number: 96–118. *Applicant:* The Pennsylvania State University, University Park, PA 16802. *Instrument:* Accessories for CCD Microscope. *Manufacturer:* Linkam Scientific Instruments, Ltd., United Kingdom. *Intended Use:* See notice at 61 FR 66018, December 16, 1996. *Reasons:* The foreign instrument provides: (1) automatic control of temperature with a range of −196°C to 600°C and (2) computer-generated sample imaging with video text overlay on data images for sample identification and recording of operating parameters. Advice received from: U.S. Geological Survey, January 8, 1997.

The National Institutes of Health and the U.S. Geological Survey advise that (1) the capabilities of each of the foreign instruments described above are pertinent to each applicant's intended purpose and (2) they know of no domestic instrument or apparatus of equivalent scientific value for the intended use of each instrument.

We know of no other instrument or apparatus being manufactured in the United States which is of equivalent scientific value to any of the foreign instruments.

Frank W. Creel,

Director, Statutory Import Programs Staff.

[FR Doc. 97–3358 Filed 2–10–97; 8:45 am]

BILLING CODE 3510–DS–P

Applications for Duty-Free Entry of Scientific Instruments

Pursuant to Section 6(c) of the Educational, Scientific and Cultural Materials Importation Act of 1966 (Pub. L. 89–651; 80 Stat. 897; 15 CFR part 301), we invite comments on the question of whether instruments of equivalent scientific value, for the purposes for which the instruments shown below are intended to be used, are being manufactured in the United States.

Comments must comply with 15 CFR 301.5(a)(3) and (4) of the regulations and be filed within 20 days with the Statutory Import Programs Staff, U.S. Department of Commerce, Washington, D.C. 20230. Applications may be examined between 8:30 A.M. and 5:00 P.M. in Room 4211, U.S. Department of Commerce, 14th Street and Constitution Avenue, N.W., Washington, D.C.

Docket Number: 96–144. *Applicant:* Massachusetts Institute of Technology, Department of Chemistry, 77 Massachusetts Avenue, Building 18, Room 591, Cambridge, MA 02139. *Instrument:* Dual Mixing Stopped-Flow System, Model SF–61. *Manufacturer:* Hi-Tech Scientific, United Kingdom. *Intended Use:* The article is intended to be used to conduct pre-steady-state kinetic studies of the reaction mechanisms of multicomponent enzymes and inorganic model compounds under controlled conditions of temperature, pH ionic strength, solvent composition and oxygen tension. *Application accepted by Commissioner of Customs:* December 27, 1996.

Docket Number: 96–145. *Applicant:* Georgia Institute of Technology, Georgia Tech Research Institute, 225 North Avenue, Atlanta, GA 30322–0834. *Instrument:* Ion-Assisted Deposition System, Model APS 1104. *Manufacturer:* Leybold AG. *Intended Use:* The instrument will be used in studies of luminescent materials (SrS:Ce,F; SiON; Al_2O_3; Indium tin oxide; ZnS:Mn) that will be deposited as very thin films on substrate materials. The main thrust of the research will be development of the ion assisted deposition technique to deposit the above materials in crystalline form at relatively low substrate temperatures (200–500°C). In addition, the instrument will be used for educational purposes in graduate level special topic courses in thin film disposition science offered in the Electrical Engineering, Physics and Material Science and Engineering Schools. Application accepted by Commissioner of Customs: December 27, 1996.

Docket Number: 96–146. *Applicant:* University of California, San Diego, Scripps Institute of Oceanography, 7835 Trade Street, San Diego, CA 92121. *Instrument:* (2) Directional Waverider Buoys. *Manufacturer:* Datawell, BV, The Netherlands. *Intended Use:* The instrument will be deployed across the continental shelf to monitor and verify wave evolution modeling efforts. Application accepted by Commissioner of Customs: December 30, 1996.

Docket Number: 96–147. *Applicant:* U.S. Geological Survey, Box 25046, MS

977, Denver Federal Center, Denver, CO 80225. *Instrument:* Mass Spectrometer, Model Optima. *Manufacturer:* Micromass, United Kingdom. *Intended Use:* The instrument will be used to study the stable isotope variations that resulted during the formation and history of rocks, minerals and gases from a variety of geologic sites and contexts. Application accepted by Commissioner of Customs: December 30, 1996.

Docket Number: 96–148. *Applicant:* Woods Hole Oceanographic Institution, Bell House, MS 39, 221 Oyster Pond Road, Woods Hole, MA 02543–1531. *Instrument:* Mass Spectrometer, Model MAT ELEMENT. *Manufacturer:* Finnigan MAT, Germany. *Intended Use:* The instrument will be used for elemental and isotopic analyses of seawater, sediments, microfossils, plankton, corals and rocks. Applications will range from the study of natural and artificial radionuclides in the environment, the marine chemistry of trace metals, ecotoxicology, petrology of basaltic rocks, paleoceanographic studies, climate change studies, etc. In addition, the instrument will be used to instruct students in its use. Application accepted by Commissioner of Customs: December 31, 1996.

Docket Number: 96–149. *Applicant:* University of Vermont, Department of Physical Therapy, 305 Rowell Building, Burlington, VT 05405–0068. *Instrument:* Motion Analysis System and Telemg System, Model Elite Plus. *Manufacturer:* Bioengineering Technology & Systems, Italy. *Intended Use:* The instrument will be used for human movement studies focusing on human gait, posture and balance and upper extremity movement. These studies are aimed at quantifying and understanding normal and disordered human movement from neurological, physiologic, biomechanical and behavioral perspectives. *Application accepted by Commissioner of Customs:* December 31, 1996.

Frank W. Creel,

Director, Statutory Import Programs Staff.

[FR Doc. 97–3360 Filed 2–10–97; 8:45 am]

BILLING CODE 3510–DS–P

University of Wyoming; Notice of Decision on Application for Duty-Free Entry of Scientific Instrument

This decision is made pursuant to Section 6(c) of the Educational, Scientific, and Cultural Materials Importation Act of 1966 (Pub. L. 89–651, 80 Stat. 897; 15 CFR part 301). Related records can be viewed between 8:30 a.m. and 5:00 p.m. in Room 4211, U.S. Department of Commerce, 14th and Constitution Avenue, N.W., Washington, D.C.

Docket Number: 96–117. *Applicant:* University of Wyoming, Laramie, WY 82071–3006. *Instrument:* Electron Microprobe, Model JXA–8900/5CH. Manufacturer: JEOL Ltd., Japan. Intended Use: See notice at 61 FR 66017, December 16, 1996.

Comments: None received. *Decision:* Approved. No instrument of equivalent scientific value to the foreign instrument, for such purposes as it is intended to be used, is being manufactured in the United States. *Reasons:* The foreign instrument provides high accuracy elemental analysis of surface microareas with a scanning image magnification of × 40 to 300 000 (WD: 11 mm) and a secondary electron image resolution to 6 nm. The National Institute of Standards and Technology advises that (1) these capabilities are pertinent to the applicant's intended purpose and (2) it knows of no domestic instrument or apparatus of equivalent scientific value to the foreign instrument for the applicant's intended use.

We know of no other instrument or apparatus of equivalent scientific value to the foreign instrument which is being manufactured in the United States.

Frank W. Creel,

Director, Statutory Import Programs Staff.

[FR Doc. 97–3359 Filed 2–10–97; 8:45 am]

BILLING CODE 3510–DS–P

National Oceanic and Atmospheric Administration

Environmental Protection Agency

Coastal Nonpoint Pollution Control Program: Proposed Findings Documents, Environmental Assessments, and Findings of No Significant Impact

AGENCY: National Oceanic and Atmospheric Administration, Department of Commerce, and Environmental Protection Agency.

ACTION: Notice of Availability of Proposed Findings Documents, Environmental Assessments, and Findings of No Significant Impact on Approval of Coastal Nonpoint Pollution Control Programs for New Hampshire, Mississippi, Alabama and Oregon.

SUMMARY: Notice is hereby given of the availability of the Proposed Findings Documents, Environmental Assessments (EA's), and Findings of No Significant Impact for New Hampshire, Mississippi, Alabama and Oregon. Coastal states and territories were required to submit their coastal nonpoint programs to the National Oceanic and Atmospheric Administration (NOAA) and the U.S. Environmental Protection Agency (EPA) for approval in July 1995. The Findings documents were prepared by NOAA and EPA to provide the rationale for the agencies' decision to approve each state and territory coastal nonpoint pollution control program. Section 6217 of the Coastal Zone Act Reauthorization Amendments (CZARA), 16 U.S.C. section 1455b, requires states and territories with coastal zone management programs that have received approval under section 306 of the Coastal Zone Management Act to develop and implement coastal nonpoint pollution control programs. The EA's were prepared by NOAA, pursuant to the National Environmental Policy Act (NEPA), 42 U.S.C. sections 4321 *et seq.*, to assess the environmental impacts associated with the approval of the coastal nonpoint pollution control programs submitted to NOAA and EPA by New Hampshire, Mississippi, Alabama and Oregon.

NOAA and EPA have proposed to approve, with conditions, the coastal nonpoint pollution control programs submitted by New Hampshire, Mississippi, Alabama and Oregon. The requirements of 40 CFR Parts 1500–1508 (Council of Environmental Quality (CEQ) regulations to implement the National Environmental Policy Act) apply to the preparation of the Environmental Assessments. Specifically, 40 CFR section 1506.6 requires agencies to provide public notice of the availability of environmental documents. This notice is part of NOAA's action to comply with this requirement.

Copies of the Proposed Findings Documents, Environmental Assessments, and Findings of No Significant Impact may be obtained upon request from: Joseph P. Flanagan, Coastal Programs Division (N/ORM3), Office of Ocean and Coastal Resource Management, NOS, NOAA, 1305 East-West Highway, Silver Spring, Maryland, 20910, tel. (301) 713–3121, x201.

DATES: Individuals or organizations wishing to submit comments on the proposed Findings or Environmental Assessments should do so by March 12, 1997.

ADDRESSES: Comments should be made to: Joseph A. Uravitch, Coastal Programs Division (N/ORM3), Office of Ocean and Coastal Resource Management, NOS, NOAA, 1305 East-West Highway, Silver Spring, Maryland, 20910, tel. (301) 713–3155, x195.

(Federal Domestic Assistance Catalog 11.419 Coast Zone Management Program Administration)

Dated: February 6, 1997.

David L. Evans,

Acting Deputy Assistant, Administrator for Ocean Services and Coastal Zone Management, National Oceanic and Atmospheric Administration.

Robert H. Wayland, III,

Director, Office of Wetlands, Oceans and Watersheds, Environmental Protection Agency.

[FR Doc. 97–3397 Filed 2–10–97; 8:45 am]

BILLING CODE 3510–12–M

[I.D. 020497B]

Gulf of Mexico Fishery Management Council; Public Meeting

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

ACTION: Notice of public meeting.

SUMMARY: The Gulf of Mexico Fishery Management Council (Council) will convene a public meeting of the Standing and Special Reef Fish Scientific and Statistical Committee (SSC).

DATES: The meeting will be held on March 3, 1997, from 9:00 a.m. to 4:00 p.m.

ADDRESSES: The meeting will be held at the Holiday Inn Crown Plaza, 333 Poydras Street, New Orleans, LA; telephone 504–525–9444.

Council address: Gulf of Mexico Fishery Management Council, 3018 U.S. Highway 301 North, Suite 1000, Tampa, FL 33619.

FOR FURTHER INFORMATION CONTACT: Wayne E. Swingle, Executive Director, Gulf of Mexico Fishery Management Council; telephone: 813–228–2815.

SUPPLEMENTARY INFORMATION: The Reef Fish SSC will review additional analyses of shrimp trawl bycatch of red snapper prepared by NMFS. These analyses may include revisions to the data base and to the methodology based on recommendations developed at the Reef Fish Stock Assessment Panel (RFSAP) meeting held February 12–14, 1997.

The SSC will also consider recommendations, if any, of the RFSAP for phasing in over a 3-year period levels of total allowable catch, bag limits, and quotas for vermilion snapper in the Gulf of Mexico. The SSC will develop their recommendations to the Council on these issues.

Special Accommodations

This meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Anne Alford at the Council (see **ADDRESSES**) by February 24, 1997.

Dated: February 5, 1997.

Bruce Morehead,

Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 97–3259 Filed 2–10–97; 8:45 am]

BILLING CODE 3510–22–F

Patent and Trademark Office

[Docket No. 970129014–7014–01]

RIN 0651–XX09

Interim Guidelines for the Examination of Claims Directed to Species of Chemical Compositions Based Upon a Single Prior Art Reference

AGENCY: Patent and Trademark Office, Commerce.

ACTION: Notice.

SUMMARY: The Patent and Trademark Office (PTO) requests comments from any interested member of the public on interim guidelines to be used by office personnel in their review of patent applications which contain claims directed to a species or subgenus of chemical compositions for compliance with 35 U.S.C. 103 based upon a single prior art reference which discloses a genus embracing the claimed species or subgenus but does not expressly describe the particular claimed species or subgenus.

DATES: The interim guidelines are effective February 11, 1997.

Written comments on the interim guidelines will be accepted by the PTO until April 14, 1997.

ADDRESSES: Written comments should be addressed to the attention of Linda Moncys Isacson, Office of the Solicitor, P.O. Box 15667, Arlington, Virginia 22215 or to Linda S. Therkorn, Box Comments, Assistant Commissioner for Patents, Washington, DC. 20231, or by facsimile transmission to (703) 305–9373 or by electronic mail to baird-comments@uspto.gov.

Written comments will be made available for public inspection at the Patent Search Room, Crystal Plaza 3, 2021 South Clark Place, Arlington, VA. In addition, comments provided in machine-readable format will be available through the PTO's Website at http://www.uspto.gov.

FOR FURTHER INFORMATION CONTACT: Linda Moncys Isacson, Office of the Solicitor, P.O. Box 15667, Arlington, Virginia 22215 or Linda S. Therkorn, Box Comments, Assistant Commissioner for Patents, Washington, DC. 20231, or by facsimile transmission to (703) 305–9373 or by electronic mail to baird-comments@uspto.gov.

SUPPLEMENTARY INFORMATION: The Commissioner of Patents and Trademarks issued a Notice in the Official Gazette (O.G.) on April 17, 1995 (1174 O.G. 68), withdrawing the Office's March 22, 1994 O.G. Notice (1161 O.G. 314). Both notices were entitled ''In re Baird.'' Pursuant to the April 17, 1995 O.G. Notice, the following interim examination guidelines are being published for public comment. The purpose of these guidelines is to assist PTO personnel in the examination of applications which contain claims directed to a species or subgenus of chemical compositions for compliance with 35 U.S.C. 103 based upon a single prior art reference which discloses a genus embracing the claimed species or subgenus but does not expressly describe the particular claimed species or subgenus. Thereof, these interim guidelines will be referred to as ''Genus-Species Guidelines.''

It has been determined that these interim guidelines are not a significant rule for purposes of Executive Order 12866. Because these guidelines govern internal practices, they are exempt from notice and comment rulemaking under 5 U.S.C. 553(b)(A).

Members of the public may present written comments on these guidelines. Written comments should include the following information:

—Name and affiliation of the individual responding;

—An indication of whether the comments offered represent views of the respondent's organization or are the respondent's personal views; and

—If applicable, information on the respondent's organization, including the type of organization (e.g., business, trade group, university, nonprofit organization).

The PTO is particularly interested in comments relating to the accuracy of the emphasized prior art teachings, and comments identifying any additional teachings that should be emphasized in determining whether a prima facie case of obviousness exists in the types of cases covered by these interim guidelines. The PTO is also interested in comments relating to the effect these guidelines may have on future application submissions.

Dated: February 5, 1997.

Bruce A. Lehman,

Assistant Secretary of Commerce and Commissioner of Patents and Trademarks.

I. Interim Guidelines for the Examination of Claims Directed to Species of Chemical Compositions Based Upon a Single Prior Art Reference

These ''Genus-Species Guidelines'' are to assist Office personnel in the examination of applications which contain claims to species or a subgenus of chemical compositions for compliance with 35 U.S.C. 103 based upon a single prior art reference which discloses a genus encompassing the claimed species or subgenus but does not expressly disclose the particular claimed species or subgenus. Office personnel should attempt to find additional prior art to show that the differences between the prior art primary reference and the claimed invention as a whole would have been obvious. Where such additional prior art is not found, Office personnel should follow these guidelines to determine whether a single reference 35 U.S.C. 103 rejection would be appropriate. The guidelines are based on the Office's current understanding of the law and are believed to be fully consistent with binding precedent of the Supreme Court, the Federal Circuit, and the Federal Circuit's predecessor courts.

The analysis of the guidelines begins at the point during examination after a single prior art reference is found disclosing a genus encompassing the claimed species or subgenus. Before reaching this point, Office personnel should follow normal examination procedures. Accordingly, Office personnel should first analyze the claims as a whole in light of and consistent with the written description, considering all claim limitations.[1] Next, Office personnel should conduct a thorough search of the prior art and identify all relevant references.[2] If the most relevant prior art consists of a single prior art reference disclosing a genus encompassing the claimed species or subgenus, Office personnel should follow the guidelines set forth herein.

These guidelines do not constitute substantive rulemaking and hence do not have the force and effect of law. Rather, they are to assist Office personnel in analyzing claimed subject matter for compliance with substantive law. Thus, rejections must be based upon the substantive law, and it is these rejections which are appealable, not any failure by Office personnel to follow these guidelines.

Office personnel are to rely on these guidelines in the event of any inconsistent treatment of issues between these guidelines and any earlier provided guidance from the Office.

II. Determine Whether the Claimed Species or Subgenus Would Have Been Obvious to One of Ordinary Skill in the Pertinent Art at the Time the Invention Was Made

The patentability of a claim to a specific compound or subgenus embraced by a prior art genus should be analyzed no differently than any other claim for purposes of 35 U.S.C. 103.[3] A determination of patentability under 35 U.S.C. 103 should be made upon the facts of the particular case in view of the totality of the circumstances.[4] Use of per se rules by Office personnel is improper for determining whether claimed subject matter would have been obvious under 35 U.S.C. 103.[5] The fact that a claimed species or subgenus is encompassed by a prior art genus is not sufficient by itself to establish a prima facie case of obviousness.[6]

A proper obviousness analysis involves a three-step process. First, Office personnel should establish a prima facie case of unpatentability considering the factors set out by the Supreme Court in Graham v. John Deere.[7] If a prima facie case is established, the burden shifts to applicant to come forward with rebuttal evidence or argument to overcome the prima facie case.[8]

Finally, Office personnel should evaluate the totality of the facts and all of the evidence to determine whether they still support a conclusion that the claimed invention would have been obvious to one of ordinary skill in the art at the time the invention was made.[9]

A. Establishing a Prima Facie Case of Obviousness

To establish a prima facie case of obviousness in a genus-species chemical composition situation, as in any other 35 U.S.C. 103 case, it is essential that Office personnel find some motivation or suggestion to make the claimed invention in light of the prior art teachings.[10] In order to find such motivation or suggestion there should be a reasonable likelihood that the claimed invention would have the properties disclosed by the prior art teachings.[11] These disclosed findings should be made with a complete understanding of the first three ''Graham factors.'' [12] Thus, Office personnel should (1) determine the ''scope and content of the prior art''; (2) ascertain the ''differences between the prior art and the claims at issue''; and (3) determine ''the level of ordinary skill in the pertinent art.'' [13]

1. Determine the Scope and Content of the Prior Art

As an initial matter, Office personnel should determine the scope and content of the relevant prior art. Each reference must qualify as prior art under 35 U.S.C. 102,[14] and should be in the field of applicant's endeavor, or be reasonably pertinent to the particular problem with which the inventor was concerned.[15]

In the case of a prior art reference disclosing a genus, Office personnel should make findings as to (1) the structure of the disclosed prior art genus and that of any expressly described species or subgenus within the genus; (2) any physical or chemical properties and utilities disclosed for the genus, as well as any suggested limitations on the usefulness of the genus, and any problems alleged to be addressed by the genus; (3) the predictability of the technology; and (4) the number of species encompassed by the genus taking into consideration all of the variables possible.

2. Ascertain the Differences Between the Prior Art Genus and the Claimed Species or Subgenus

Once a relevant prior art genus is identified, Office personnel should compare it to the claimed species or subgenus to determine the differences. Through this comparison, the closest disclosed species or subgenus in the prior art reference should be identified and compared to that claimed. Office personnel should make explicit findings on the similarities and differences between the closest prior art reference and the claimed species or subgenus including findings relating to similarity of structure, chemical properties and utilities.[16]

3. Determine the Level of Skill in the Art

Office personnel should evaluate the prior art from the standpoint of the hypothetical person having ordinary skill in the art at the time the claimed invention was made.[17] In most cases, the only facts of record pertaining to the level of skill in the art will be found within the prior art reference. However, any additional evidence presented by applicant should be evaluated.

4. Determine Whether One of Ordinary Skill in the Art Would Have Been Motivated To Select the Claimed Species or Subgenus

In light of the findings made relating to the three Graham factors, Office personnel should determine whether one of ordinary skill in the relevant art would have been motivated to make the claimed invention as a hole, i.e., to select the claimed species or subgenus from the disclosed prior art genus.[18] To address this key issue, Office personnel should consider all relevant prior art teachings, focusing on the following, where present.

a. Consider the Size of the Genus. Consider the size of the prior art genus, bearing in mind that size alone cannot support an obviousness rejection.[19] There is no absolute correlation between the size of the prior art genus and a conclusion of obviousness.[20] Thus, the mere fact that a prior art genus contains a small number of members does not create a per se rule of obviousness. Some motivation to select the claimed species or subgenus must be taught by the prior art.[21] However, a genus may be so small that it would anticipate the claimed species or subgenus. For example, it has been held that a prior art genus containing only 20 compounds inherently anticipated a claimed species within the genus because ''one skilled in (the) art would * * * envisage each member'' of the genus.[22]

b. Consider the Express Teachings. If the prior art reference expressly teaches a particular reason to select the claimed species or subgenus, Office personnel should point out the express disclosure which would have motivated one of ordinary skill in the art to select the claimed invention.[23]

c. Consider the Teachings of Structural Similarity. Consider any teachings of a ''typical,'' ''preferred,'' or ''optimum'' species or subgenus within the disclosed genus. If such a species or subgenus is structurally similar to that claimed, its disclosure may motivate one of ordinary skill in the art to choose the claimed species or subgenus from the genus,[24] based on the reasonable expectation that structurally similar species usually have similar properties.[25] The utility of such properties will normally provide some motivation to make the claimed species or subgenus.[26]

In making an obviousness determination, Office personnel should consider the number of variables which must be selected or modified, and the nature and significance of the differences between the prior art and the claimed invention.[27] The closer the physical and chemical similarities between the claimed species or subgenus and any exemplary species or subgenus disclosed in the prior art, the greater the expectation that the claimed subject matter will function in an equivalent manner to the genus.[28]

Similarly, consider any teaching or suggestion in the reference of a preferred species or subgenus that is significantly different in structure from the claimed species or subgenus. Such a teaching may weigh against selecting the claimed species or subgenus and thus against a determination of obviousness.[29] For example, teachings of preferred species of a complex nature within a disclosed genus may motivate an artisan of ordinary skill to make similar complex species and thus teach away from making simple species within the genus.[30] Concepts used to analyze the structural similarity of chemical compounds in other types of chemical cases are equally useful in analyzing genus-species cases.[31] Generally, some teaching of a structural similarity will be necessary to suggest selection of the claimed species or subgenus[32]

d. Consider the Teachings of Similar Properties or Uses. Consider the properties and utilities of the structurally similar prior art species or subgenus. It is the properties and utilities that provide real world motivation for a person of ordinary skill to make species structurally similar to those in the prior art.[33] Conversely, lack of any known useful properties weighs against a finding of motivation to make or select a species or subgenus.[34] However, the prior art need not disclose a newly discovered property in order for there to be a prima facie case of obviousness.[35] If the claimed invention and the structurally similar prior art species share a useful property, that will generally be sufficient to motivate an artisan of ordinary skill to make the claimed species.[36] For example, based on a finding that a tri-orthoester and a tetra-orthoester behave similarly in certain chemical reactions, it has been held that one of ordinary skill in the relevant art would have been motivated to select either structure.[37] In fact, similar properties may normally be presumed when compounds are very close in structure.[38] Thus, evidence of similar properties weighs in favor of a conclusion that the claimed invention would have been obvious.[39]

e. Consider the Predictability of the Technology. Consider the predictability of the technology.[40] If the technology is unpredictable, it is less likely that structurally similar species will render a claimed species obvious because it may not be reasonable to infer that they would share similar properties.[41] However, obviousness does not require absolute predictability, only a reasonable expectation of success, i.e., a reasonable expectation of obtaining similar properties.[42]

f. Consider Any Other Teaching to Support the Selection of the Species or Subgenus. The categories of relevant teachings enumerated above are those most frequently encountered in a genus-species case, but they are not exclusive. Office personnel should consider the totality of the evidence in each case. In unusual cases, there may be other relevant teachings sufficient to support the selection of the species or subgenus and, therefore, a conclusion of obviousness.

5. Make Express Fact-Findings and Determine Whether They Support A Prima Facie Case of Obviousness

Based on the evidence as a whole,[43] Office personnel should make express fact-findings relating to the Graham factors, focusing primarily on the prior art teachings discussed above. The fact-findings should specifically articulate what teachings or suggestions in the prior art would have motivated one of ordinary skill in the art to select the claimed species or subgenus.[4] Thereafter, it should be determined whether these findings, considered as a whole, support a prima facie case that the claimed invention would have been obvious to one of ordinary skill in the relevant art at the time the invention was made.

B. Determining Whether Rebuttal Evidence Is Sufficient To Overcome the Prima Facie Case of Obviousness

If a prima facie case of obviousness is established, the burden shifts to the applicant to come forward with arguments and/or evidence to rebut the prima facie case.[45] Rebuttal evidence and arguments can be presented in the specification,[46] by counsel,[47] or by way of an affidavit or declaration under 37 CFR 1.132.[48] However, arguments of counsel cannot take the place of factually supported objective evidence.[49]

Office personnel should consider all rebuttal arguments and evidence presented by applicants.[50] Rebuttal evidence may include evidence of ''secondary consideration,'' such as ''commercial success, long felt but unsolved needs, (and) failure of others,'' [51] evidence that the claimed invention yields unexpectedly improved properties or properties not present in the prior art,[52] or evidence that the claimed invention was copied

by others.[53] It may also include evidence of the state of the art, the level of skill in the art, and the beliefs of those skilled in the art.[54]

Consideration of rebuttal evidence and arguments requires Office personnel to weigh the proffered evidence and arguments. Office personnel should avoid giving evidence no weight, except in rare circumstances.[55] However, to be entitled to substantial weight the applicant should establish a nexus between the rebuttal evidence and the claimed invention,[56] i.e., objective evidence of nonobviousness must be attributable to the claimed invention.[57] Additionally, the evidence must be reasonably commensurate in scope with the claimed invention.[58] However, an exemplary showing may be sufficient to establish a reasonable correlation between the showing and the entire scope of the claim, when viewed by a skilled artisan.[59] On the other hand, evidence of an unexpected property may not be sufficient regardless of the scope of the showing.[60] Accordingly, each case should be evaluated individually based on the totality of the circumstances.

Office personnel should not evaluate rebuttal evidence for its ''knockdown'' value against the prima facie cases [61] or summarily dismiss it as not compelling or insufficient. If the evidence is deemed insufficient to rebut the prima facie case of obviousness, Office personnel should specifically set forth the facts and reasoning that justify this conclusion.

III. Reconsider All Evidence and Clearly Communicate Findings and Conclusions

A determination under 35 U.S.C. 103 should rest on *all* the evidence and should not be influenced by any earlier conclusion.[62] Thus, once the applicant has presented rebuttal evidence, Office personnel should reconsider any initial obviousness determination in view of the entire record.[63] All the proposed rejections and their bases should be reviewed to confirm their correctness. Only then should any rejection be imposed in an Office action. The Office action should clearly communicate the Office's findings and conclusions, articulating how the conclusions are supported by the findings.

Where applicable, the findings should clearly articulate which portions of the reference support any rejection. Explicit findings on motivation or suggestion to select the claimed invention should also be articulated in order to support a 35 U.S.C. 103 ground of rejection.[64] Conclusory statements of similarity or motivation, without any articulated rationale or evidentiary support, do not constitute sufficient factual findings.

VI. Footnotes

1. When evaluating the scope of a claim, every limitation in the claim must be considered. E.g., In re Ochiai, 71 F.3d 1565, 1572, 37 USPQ2d 1127, 1133 (Fed. Cir. 1995). However, the claimed invention may not be dissected into discrete elements to be analyzed in isolation, but must be considered as a whole. E.g., *W.L. Gore & Assoc., Inc.* v. *Garlock, Inc.*, 721 F.2d 1540, 1548, 220 USPQ 303, 309 (Fed. Cir. 1983), cert. denied, 469 U.S. 851 (1984); *Jones* v. *Hardy*, 727 F.2d 1524, 1530, 220 USPQ 1021, 1026 (Fed. Cir. 1983) (''treating the advantage as the invention disregards the statutory requirement that the invention be viewed 'as a whole' '').

2. Both claimed and unclaimed aspects of the invention should be searched if there is a reasonable expectation that the unclaimed aspects may be later claimed.

3. ''The section 103 requirement of unobviousness is no different in chemical cases than with respect to other categories of patentable inventions.'' In re Papesch, 315 F.2d 381, 385, 137 USPQ 43, 47 (CCPA 1963).

4. E.g., In re Dillon, 919 F.2d 688, 692–93, 16 USPQ2d 1897, 1901 (Fed. Cir. 1990) (in banc), cert. denied, 500 U.S. 904 (1991).

5. E.g., In re Brouwer, 77 F.3d 422, 425, 37 USPQ2d 1663, 1666 (Fed. Cir. 1996); In re Ochiai, 71 F.3d 1565, 1572, 37 USPQ2d 1127, 1133 (Fed. Cir. 1995); In re Baird, 16 F.3d 380, 382, 29 USPQ2d 1550, 1552 (Fed. Cir. 1994).

6. In re Baird, 16 F.3d 380, 382, 29 USPQ2d 1550, 1552 (Fed. Cir. 1994) (''The fact that a claimed compound may be encompassed by a disclosed generic formula does not by itself render that compound obvious.''); In re Jones, 958 F.2d 347, 350, 21 USPQ2d 1941, 1943 (Fed. Cir. 1992) (Federal Circuit has ''decline[d] to extract from Merck (& Co. v. Biocraft Laboratories Inc., 874 F.2d 804, 10 USPQ2d 1843 (Fed. Cir. 1989)) the rule that * * * regardless of how broad, a disclosure of a chemical genus renders obvious any species that happens to fall within it.''). See also In re Deuel, 51 F.3d 1552, 1559, 34 USPQ2d 1210, 1215 (Fed. Cir. 1995).

7. E.g., In re Bell, 991 F.2d 781, 783, 26 USPQ2d 1529, 1531 (Fed. Cir. 1993) (''The PTO bears the burden of establishing a case of prima facie obviousness.''); In re Rijckaert, 9 F.3d 1531, 1532, 28 USPQ2d 1955, 1956 (Fed. Cir. 1993); In re Oetiker, 977 F.2d 1443, 1445, 24 USPQ2d 1443, 1444 (Fed. Cir. 1992).

Graham v. John Deere Co., 383 U.S. 1, 17–18 (1966), requires that to make out a case of obviousness, one must: (1) Determine the scope and contents of the prior art; (2) ascertain the differences between the prior art and the claims in issue; (3) determine the level of skill in the pertinent art; and (4) evaluate any evidence of secondary considerations.

8. E.g., Bell, 991 F.2d at 783–84, 26 USPQ2d at 1531; Rijckaert, 9 F.3d at 1532, 28 USPQ2d at 1956; Oetiker, 977 F.2d at 1445, 24 USPQ2d at 1444.

9. Id.

10. E.g., In re Brouwer, 77 F.3d 422, 425, 37 USPQ2d 1663, 1666 (Fed. Cir. 1996) (''[T]he mere possibility that one of the esters or the active methylene group-containing compounds * * * could be modified or replaced such that its use would lead to the specific sulfoalkylated resin recited in claim 8 does not make the process recited in claim 8 obvious 'unless the prior art suggested the desirability of [such a] modification' or replacement.'') (quoting In re Gordon, 733 F.2d 900, 902, 221 USPQ 1125, 1127 (Fed. Cir. 1984); In re Vaeck, 947 F.2d 488, 493, 20 USPQ2d 1438, 1442 (Fed. Cir. 1991) (''[A] proper analysis under section 103 requires, inter alia, consideration of * * * whether the prior art would have suggested to those of ordinary skill in the art that they should make the claimed composition or device, or carry out the claimed process.'').

11. The prior art disclosure may be express, implicit, or inherent. Regardless of the type of disclosure, the prior art must provide some motivation to one of ordinary skill in the art to make the claimed invention in order to support a conclusion of obviousness. E.g., Vaeck, 947 F.2d at 493, 20 USPQ2d at 1442 (A proper obviousness analysis requires consideration of ''whether the prior art would also have revealed that in so making or carrying out (the claimed invention), those of ordinary skill would have a reasonable expectation of success.''); In re Dow Chemical Co., 837 F.2d 469, 473, 5 USPQ2d 1529, 1531 (Fed. Cir. 1988) (''The consistent criterion for determination of obviousness is whether the prior art would have suggested to one of ordinary skill in the art that this process should be carried out and would have a reasonable likelihood of success, viewed in the light of the prior art.''); Hodosh v. Block Drug Co., 786 F.2d 1136, 1143 n. 5, 229 USPQ 182, 187 n. 5 (Fed. Cir.), cert. denied, 479 U.S. 827 (1986).

12. When evidence of secondary considerations such as unexpected results is initially before the Office, for example, in the specification, that evidence should be considered in deciding whether there is a prima facie case of obviousness. The determination as to whether a prima facie exists should be made on the full record before the Office at the time of the determination.

13. Graham v. John Deere, 383 U.S. 1, 17, 148 USPQ 459, 467 (1966). Accord, e.g., In re Paulsen, 30 F.3d 1475, 1482, 31 USPQ2d 1671, 1676 (Fed. Cir. 1994).

14. E.g., Panduit Corp. v. Dennison Mfg. Co., 810 F.2d 1561, 1568, 1 USPQ2d 1593, 1597 (Fed. Cir.) (''Before answering Graham's 'content' inquiry, it must be known whether a patent or publication is in the prior art under 35 U.S.C. § 102.''), cert. denied, 481 U.S. 1052 (1987).

15. In re Oetiker, 977 F.2d 1443, 1447, 24 USPQ2d 1443, 1445 (Fed. Cir. 1992). Accord, e.g., In re Clay, 966 F.2d 656, 658–59, 23 USPQ2d 1058, 1060 (Fed. Cir. 1992).

16. In Stratoflex, Inc. v. Aeroquip Corp., 713 F.2d 1530, 1537, 218 USPQ 871, 877 (Fed. Cir. 1983), the Court noted that ''the question under 35 U.S.C. 103 is not whether the differences [between the claimed invention and the prior art] would have been obvious'' but ''whether the claimed invention

as a whole would have been obvious.'' (emphasis in original).

17. See, Ryko Manufacturing Co. v. Nu-Star Inc., 950 F.2d 714, 718, 21 USPQ2d 1053, 1057 (Fed. Cir. 1991) (''The importance of resolving the level of ordinary skill in the art lies in the necessity of maintaining objectivity in the obviousness inquiry.''); Uniroyal Inc. v. Rudkin-Wiley Corp., 837 F.2d 1044, 1050, 5 USPQ2D 1434, 1438 (Fed. Cir.), cert. denied, 488 U.S. 825 (1988) (evidence must be viewed from position of ordinary skill, not of an expert).

18. E.g., Ochiai, 71 F.3d at 1569–70, 37 USPQ2d at 1131; Deuel, 51 F.3d at 1557, 34 USPQ2d at 1214 (''[A] prima facie case of unpatentability requires that the teachings of the prior art suggest the claimed compounds to a person of ordinary skill in the art.'' (emphasis in original)); Jones, 958 F.2d at 351, 21 USPQ2d at 1943–44 (Fed. Cir. 1992); Dillon, 919 F.2d at 692, 16 USPQ2d at 1901; In re Lalu, 747 F.2d 703, 705, 223 USPQ 1257, 1258 (Fed. Cir. 1984) (''The prior art must provide one of ordinary skill in the art the motivation to make the proposed molecular modifications needed to arrive at the claimed compound.''). See also In re Kemps, 97 F.3d 1427, 1430, 40 USPQ2d 1309, 1311 (Fed. Cir. 1996) (discussing motivation to combine).

19. See, e.g., Baird, 16 F.3d at 383, 29 USPQ2d at 1552 (observing that ''it is not the mere number of compounds in this limited class which is significant here but, rather, the total circumstances involved'').

20. Id.

21. See, e.g., Deuel, 51 F.3d at 1558–59, 34 USPQ2d at 1215 (''No particular one of these DNAs can be obvious unless there is something in the prior art to lead to the particular DNA and indicate that it should be prepared.''); Baird, 16 F.3d at 382–83, 29 USPQ2d at 1552; Bell, 991 F.2d at 784, 26 USPQ2d at 1531 (''Absent anything in the cited prior art suggesting which of the 10^{36} possible sequences suggested by Rinderknecht corresponds to the IGF gene, the PTO has not met its burden of establishing that the prior art would have suggested the claimed sequences.'').

22. In re Petering, 301 F.2d 676, 681, 133 USPQ 275, 280 (CCPA 1962) (emphasis in original). Accord In re Schaumann, 572 F.2d 312, 316, 197 USPQ 5, 9 (CCPA 1978) (prior art genus encompassing claimed species which disclosed preference for lower alkyl secondary amines and properties possessed by the claimed compound constituted description of claimed compound for purposes of 35 U.S.C. 102(b)). C.f., In re Ruschig, 343 F.2d 965, 974, 145 USPQ 274, 282 (CCPA 1965) (Rejection of claimed compound in light of prior art genus based on Petering is not appropriate where the prior art does not disclose a small recognizable class of compounds with common properties.).

23. An express teaching may be based on a statement in the prior art reference such as an art recognized equivalence. For example, see Merck & Co. v. Biocraft Labs., 874 F.2d 804, 807, 10 USPQ2d 1843, 1846 (Fed. Cir.), cert. denied, 493 U.S. 975 (1989) (holding claims directed to diuretic compositions comprising a specific mixture of amiloride and hydrochlorothiazide were obvious over a prior art reference expressly teaching that amiloride was a pyrazinoylguanidine which could be co-administered with potassium excreting diuretic agents, including hydrochlorothiazide which was a named example, to produce a diuretic with desirable sodium and potassium eliminating properties). See also, In re Kemps, 97 F.3d 1427, 1430, 40 USPQ2d 1309, 1312 (Fed. Cir. 1996) (holding there is sufficient motivation to combine teachings of prior art to achieve claimed invention where one reference specifically refers to the other).

24. E.g., Dillon, 919 F.2d at 696, 16 USPQ2d at 1904. See also Deuel, 51 F.3d at 1558, 34 USPQ2d at 1214 (''Structural relationships may provide the requisite motivation or suggestion to modify known compounds to obtain new compounds. For example, a prior art compound may suggest its homologs because homologs often have similar properties and therefore chemists of ordinary skill would ordinarily contemplate making them to try to obtain compounds with improved properties.'').

25. E.g., Dillion, 919 F.2d at 693, 16 USPQ2d at 1901.

26. See id.

27. E.g., In re Jones, 958 F.2d 347, 350, 21 USPQ2d 1941, 1943 (Fed. Cir. 1992) (reversing obviousness rejection of novel dicamba salt with acyclic structure over broad prior art genus encompassing claimed salt, where disclosed examples of genus were dissimilar in structure, lacking an ether linkage or being cyclic); In re Susi, 440 F.2d 442, 445, 169 USPQ 423, 425 (CCPA 1971) (the difference from the particularly preferred subgenus of the prior art was a hydroxyl group, a difference conceded by applicant ''to be of little importance.'').

In the area of biotechnology, an exemplified species may differ from a claimed species by a conservative substitution (''the replacement in a protein of one amino acid by another, chemically similar, amino acid * * * (which) is generally expected to lead to either no change or only a small change in the properties of the protein.'' *Dictionary of Biochemistry and Molecular Biology* 97 (John Wiley & Sons, 2d ed. 1989)). The effect of a conservative substitution on protein function depends on the nature of the substitution and its location in the chain. Although at some locations a conservative substitution may be benign, in some proteins only one amino acid is allowed at a given position. For example, the gain or loss of even one methyl group can destabilize the structure if close packing is required in the interior of domains. James Darnell et al., *Molecular Cell Biology* 51 (2d ed. 1990).

28. E.g., Dillion, 919 F.2d at 696, 16 USPQ2d at 1904 (and cases cited therein). C.f. Baird, 16 F.3d at 382–83, 29 USPQ2d at 1552 (disclosure of dissimilar species can provide teaching away).

29. Baird, 16 F.3d at 382–83, 29 USPQ2d at 1552 (reversing obviousness rejection of species in view of large size of genus and disclosed ''optimum'' species which differed greatly from and were more complex than the claimed species); Jones, 958 F.2d at 350, 21 USPQ2d at 1943 (reversing obviousness rejection of novel dicamba salt with acyclic structure over broad prior art genus encompassing claimed salt, where disclosed examples of genus were dissimilar in structure, lacking an ether linkage or being cyclic).

30. Baird, 16 F.3d at 382, 29 USPQ2d at 1552. See also Jones, 958 F.2d at 350, 21 USPQ2d at 1943 (disclosed salts of genus held not sufficiently similar in structure to render claimed species prima facie obvious).

31. For example, a claimed tetra-orthoester fuel composition was held to be obvious in light of a prior art tri-orthoester fuel composition based on their structural and chemical similarity and similar use as fuel additives. Dillion, 919 F.2d at 692–93, 16 USPQ2d at 1900–02.

Likewise, claims to amitriptyline used as an antidepressant were held obvious in light of the structural similarity to imipramine, a known antidepressant prior art compound, where both compounds were tricyclic dibenzo compounds and differed structurally only in the replacement of the unsaturated carbon atom in the center ring of amitriptyline with a nitrogen atom in imipramine. In re Merck & Co., 800 F.2d 1091, 1096–97, 231 USPQ 375, 378–79 (Fed. Cir. 1986).

Similarly, a claimed protein compound having an amino acid sequence including Met-Phe-Pro-Leu-$(Asp)_4$-Lys-Y was held to be obvious in light of structural similarities to the prior art. One reference provided motivation to create fusion proteins in the forms X-$(Asp)_4$-Lys-Y. Other references taught positioning Met at the start of the amino acid sequence and that the sequences Phe-Pro-Ile or Leu-Pro-Leu could serve as X in the basic formula. The known structural similarity of Ile and Leu meant that appellants merely substituted one element known in the art for a known equivalent. Thus, the substitution was held to be obvious. In re Mayne, No. 95–1522, slip op. at 6–8 (Fed. Cir. Jan. 17, 1997).

Other structural similarities have been found to support a prima facie case of obviousness. E.g., In re May, 574 F.2d 1082, 1093–95, 197 USPQ 601, 610–11 (CCPA 1978) (stereoisomers); In re Wilder, 563 F.2d 457, 460, 195 USPQ 426, 429 (CCPA 1977) (adjacent homologs and structural isomers); In re Hoch, 428 F.2d 1341, 1344, 166 USPQ 406, 409 (CCPA 1970) (acid and ethyl ester); In re Druey, 319 F.2d 237, 240, 138 USPQ 39, 41 (CCPA 1963) (omission of methyl group from pyrazole ring).

32. Id.

33. Dillion, 919 F.2d at 697, 16 USPQ2d at 1905; In re Stemniski, 444 F.2d 581, 586, 170 USPQ 343, 348 (CCPA 1971).

34. In re Albrecht, 514 F.2d 1389, 1392, 1395–96, 185 USPQ 585, 587, 590 (CCPA 1975) (The prior art compound so irritated the skin that it could not be regarded as useful for the disclosed anesthetic purpose, and therefore a person skilled in the art would not have been motivated to make related compounds.); Stemniski, 444 F.2d at 586, 170 USPQ at 348 (close structural similarity alone is not sufficient to create a prima facie case of obviousness when the reference compounds lack utility, and thus there is no motivation to make related compounds.).

35. Dillion, 919 F.2d at 697, 16 USPQ2d at 1904–05 (and cases cited therein).

36. E.g., id.

37. Id. at 692, 16 USPQ2d at 1900–01.

38. Dillion, 919 F.2d at 693, 696, 16 USPQ2d at 1901, 1904. See also In re Grabiak, 769 F.2d 729, 731, 226 USPQ 870, 871 (Fed. Cir. 1985) (''When chemical compounds have 'very close' structural similarities and similar utilities, without more a prima facie case may be made.'').

39. Dillion, 919 F.2d at 697–98, 16 USPQ2d at 1905; In re Wilder, 563 F.2d 457, 461, 195 USPQ 426, 430 (CCPA 1977); In re Linter, 458 F.2d 1013, 1016, 173 USPQ 560, 562 (CCPA 1972).

40. See, e.g., Dillion, 919 F.2d at 692–97, 16 USPQ2d at 1901–05; In re Grabiak, 769 F.2d 729, 732–33, 226 USPQ 870, 872 (Fed. Cir. 1985).

41. See e.g., In re May, 574 F.2d 1082, 1094, 197 USPQ 601, 611 (CCPA 1978) (prima facie obviousness of claimed analgesic compound based on structurally similar prior art isomer was rebutted with evidence demonstrating that analgesia and addiction properties could not be reliably predicted on the basis of chemical structure); In re Schechter, 205 F.2d 185, 191, 98 USPQ 144, 150 (CCPA 1953) (unpredictability in the insecticide field, with homologs, isomers and analogs of known effective insecticides having proven ineffective as insecticides, was considered as a factor weighing against a conclusion of obviousness of the claimed compounds).

42. See, e.g., In re O'Farrell, 853 F.2d 894, 903, 7 USPQ2d 1673, 1681 (Fed. Cir. 1988).

43. In re Bell, 991 F.2d 781, 784, 26 USPQ2d 1529, 1531 (Fed. Cir. 1993); In re Kulling, 897 F.2d 1147, 1149, 14 USPQ2d 1056, 1057 (Fed. Cir. 1990).

44. Kulling, 897 F.2d at 1149, 14 USPQ2d at 1058; Panduit Corp. v. Dennison Mfg. Co., 810 F.2d 1561, 1579 n.42, 1 USQP2d 1593, 1606 n.42 (Fed. Cir.), cert. denied, 481 U.S. 1052 (1987).

45. E.g., Dillon, 919 F.2d at 692, 16 USPQ2d at 1901.

46. In re Soni, 54 F. 3d 746, 750, 34 USPQ2d 1684, 1687 (Fed. Cir. 1995).

47. In re Chu, 66 F.3d 292, 299, 36 USPQ2d 1089, 1094–95 (Fed. Cir. 1995).

48. E.g., Soni, 54 F.3d at 750, 34 USPQ2d 1687; In re Piasecki, 745 F.2d 1468, 1474, 223, USPQ 785, 789–90 (Fed. Cir. 1984).

49. E.G., In re Huang, 100 F.3d 135, 139–40, 40 USPQ2d 1685, 1689 (Fed. Cir. 1996); In re De Blauwe, 736 F.2d 699, 705, 222 USPQ 191, 196 (Fed. Cir. 1984).

50. E.G., In re Soni, 54 F.3d 746, 750, 34 USPQ2d 1684, 1687 (Fed. Cir. 1995) (error not to consider evidence presented in the specification). C.F., In re Alton, 76 F.3d 1168, 37 UPSPQ2d 1578 (Fed. Cir. 1996) (error not to consider factual evidence submitted to counter a section 112 rejection); In re Beattie, 974 F.2d 1309, 1313, 24 USPQ2d 1040, 1042–43 (Fed. Cir. 1992) (Office personnel should consider declarations from those skilled in the art praising the claimed invention and opining that the art teaches away from the intention.); Piasecki, 745 F.2d at 1472, 223 USPQ at 788 (''(Rebuttal evidence) may relate to any of the Graham factors including the so-called secondary considerations.'').

51. Graham v. John Deere Co., 383 U.S. at 17, 148 USPQ at 467. See also, e.g., In re Piasecki, 745 F.2d at 1468, 1473, 223 USPQ 785, 788 (Fed. Cir. 1984) (commercial success).

52. Rebuttal evidence may consist of a showing that the claimed compound possesses unexpected properties. Dillon, 919 F.2d at 692–93, 16 USPQ2d at 1901. A showing of unexpected results must be based on evidence, not argument or speculation. In re Mayne, No. 95–1522, slip op. at 9–10 (Fed. Cir. Jan. 17, 1997) (conclusory statements that claimed compound posses unusually low immune response or unexpected biological activity that is unsupported by comparative data held insufficient to overcome prima facie case of obviousness).

53. E.G., In re GPAC, 57 F.3d 1573, 1580, 35 USPQ2d 1116, 1121 (Fed. Cir. 1995); Hybritech Inc. v. Monoclonal Antibodies, 802 F.2d 1367, 1380, 231 USPQ 81, 90 (Fed. Cir. 1986), cert. denied, 480 U.S. 947 (1987).

54. E.G., In re Oelrich, 579 F.2d 86, 91–92, 198 USPQ 210, 214 (CCPA 1978) (Expert opinions regarding the level of skill in the art were probative of the nonobviousness of the claimed invention.); Piasecki, 745 F.2d at 1471, 1473–74, 223 USPQ at 790 (Evidence of non-technological nature is pertinent to the conclusion of obviousness. The declarations of those skilled in the art regarding the need for the invention and its reception by the art were improperly discounted by the Board); Beattie, 974 F.2d at 1313, 24 USPQ2d at 1042–43 (Seven declarations provided by music teachers opining that the art teaches away from the claimed invention must be considered, but were not probative because they did not contain facts and did not deal with the specific prior art that was the subject of the rejection.).

55. Id. See also In re Alton, 76 F.3d 1168, 1174–75, 37 USPQ2d 1578, 1582–83 (Fed. Cir. 1996).

56. The Federal Circuit has acknowledged that applicant bears the burden of establishing nexus, stating:

In the *ex parte* process of examining a patent application, however, the PTO lacks the means or resources to gather evidence which supports or refutes the applicant's assertion that the sales constitute commercial success. *C.f. Ex parte Remark*, 15 USPQ2d 1498, 1503 ([BPAI] 1990) (evidentiary routine of shifting burdens in civil proceedings inappropriate in *ex parte* prosecution proceedings because examiner has no available means for adducing evidence). Consequently, the PTO must rely upon the applicant to provide hard evidence of commercial success.

In re Huang, 100 F.3d 135, 139–40, 40 USPQ2d 1685, 1689 (Fed. Cir. 1996). See also GPAC, 57 F.3d at 1580, 35 USPQ2d at 1121; In re Paulsen, 30 F.3d 1475, 1482, 31 USPQ2d 1671, 1676 (Fed. Cir. 1994).

57. E.G., Paulsen, 30 F.3d at 1482, 31 USPQ2d at 1676. (Evidence of commercial success of articles not covered by the claims subject to the 35 U.S.C. 103 rejection was not probative of nonobviousness).

58. E.g., In re Kulling, 897 F.2d 1147, 1149, 14 USPQ2d 1056, 1058 (Fed. Cir. 1990); In re Grasselli, 713 F.2d 731, 743, 218 USPQ 769, 777 (Fed. Cir. 1983). In re Soni, 54 F.3d 746, 34 USPQ2d 1684 (Fed. Cir. 1995) does not change this analysis. In Soni, the Court declined to consider the Office's argument that the evidence of non-obviousness was not commensurate in scope with the claim because it had not been raised by the Examiner. 54 F.3d at 751, 34 USPQ2d at 1688.

When considering whether proffered evidence is commensurate in scope with the claimed invention, Office personnel should not require the applicant to show unexpected results over the entire range of properties possessed by a chemical compound or composition. E.g., In re Chupp, 816 F.2d 643, 646, 2 USPQ2d 1437, 1439 (Fed. Cir. 1987). Evidence that the compound or composition possesses superior and unexpected properties in one of a spectrum of common properties can be sufficient to rebut a prima facie case of obviousness. Id.

For example, a showing of unexpected results for a single member of a claimed subgenus, or a narrow portion of a claimed range would be sufficient to rebut a prima facie case of obviousness if a skilled artisan ''could ascertain a trend in the exemplified data that would allow him to reasonably extend the probative value thereof.'' In re Clemens, 622 F.2d 1029, 1036, 206 USPQ 289, 296 (CCPA 1980) (Evidence of the unobviousness of a broad range can be proven by a narrower range when one skilled in the art could ascertain a trend that would allow him to reasonably extend the probative value thereof.). But see, Grasselli, 713 F.2d at 743, 218 USPQ at 778 (evidence of superior properties for sodium containing composition insufficient to establish the non-obviousness of broad claims for a catalyst with ''an alkali metal'' where it was well known in the catalyst art that different alkali metals were not interchangeable and applicant had shown unexpected results only for sodium-containing materials); In re Greenfield, 571 F.2d 1185, 1189, 197 USPQ 227, 230 (CCPA 1978) (evidence of superior properties in one species insufficient to establish the nonobviousness of a subgenus containing hundreds of compounds); In re Lindner, 457 F.2d 506, 508, 173 USPQ 356, 358 (CCPA 1972) (one test not sufficient where there was no adequate basis for concluding the other claimed compounds would behave the same way).

59. E.g., Chupp, 816 F.2d at 646, 2 USPQ2d at 1439; Clemens, 622 F.2d at 1036, 206 USPQ at 296.

60. Where the claims are not limited to a particular use, and where the prior art provides other motivation to select a particular species or subgenus, a showing of a new use may not be sufficient to confer patentability. See Dillon, 919 F.2d at 692, 16 USPQ2d at 1900–01.

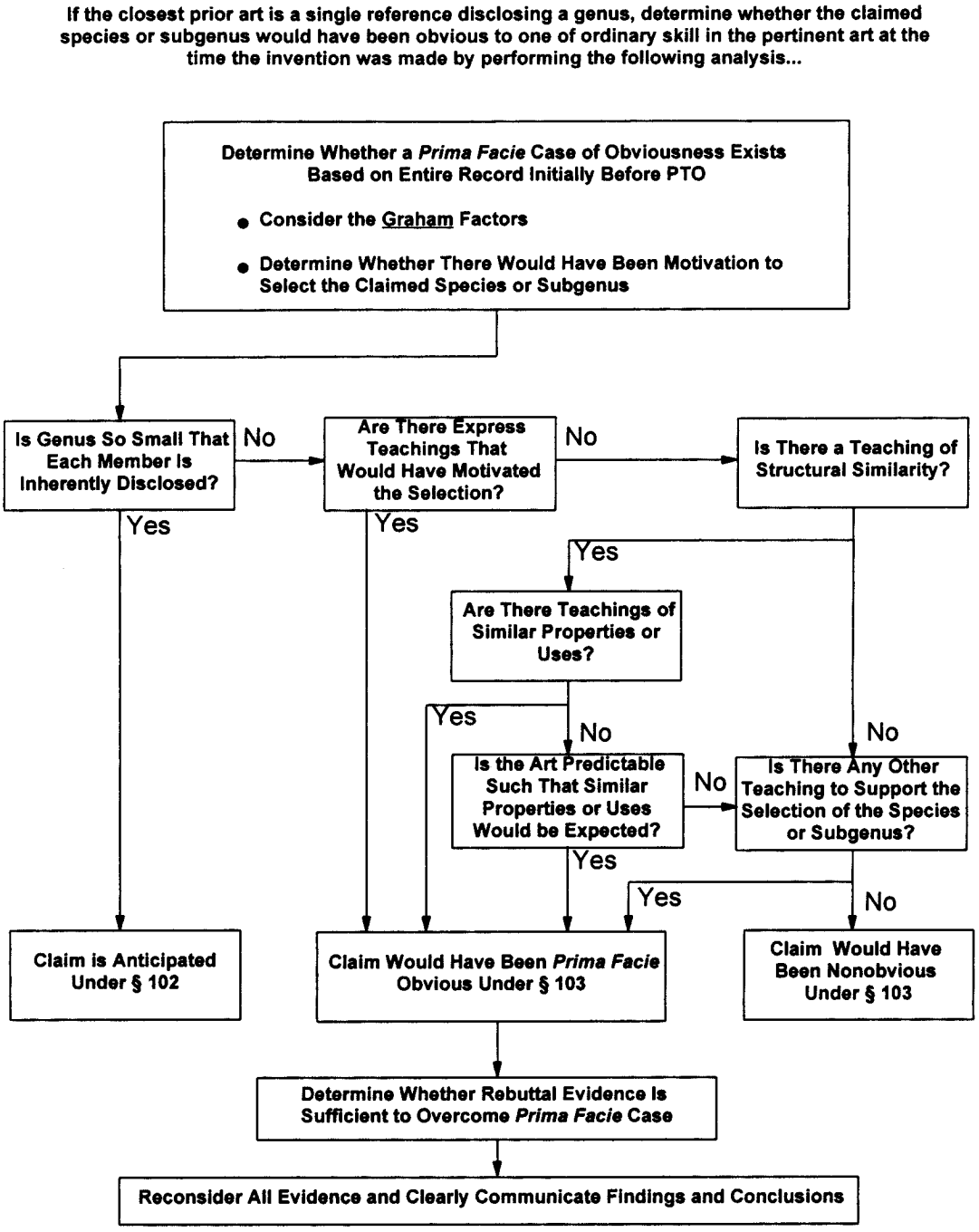
61. Piasecki, 745 F.2d at 1473, 223 USPQ at 788.

62. E.g., Piasecki, 745 F.2d at 1472–73, 223 USPQ at 788; In re Eli Lilly & Co., 902 F.2d 943, 945, 14 USPQ2d 1741, 1743 (Fed. Cir. 1990).

63. E.g., Piasecki, 745 F.2d at 1472, 223 USPQ at 788; Eli Lilly, 902 F.2d at 945, 14 USPQ2d at 1743.

64. Dillon, 919 F.2d at 693, 16 USPQ2d at 1901; In re Mills, 916 F.2d 680, 683, 16 USPQ2d 1430, 1433 (Fed. Cir. 1990).

BILLING CODE 3510–16–M



[FR Doc. 97–3362 Filed 2–10–97; 8:45 am]
BILLING CODE 3510–16–C

COMMODITY FUTURES TRADING COMMISSION

Applications of the Chicago Board of Trade as a Contract Market in Long Term Inflation-Indexed U.S. Treasury Note Futures and Options Contracts

AGENCY: Commodity Futures Trading Commission.

ACTION: Notice of availability of the terms and conditions of proposed commodity futures and option contracts.

SUMMARY: The Chicago Board of Trade (CBT or Exchange) has applied for designation as a contract market in long term inflation-indexed U.S. Treasury note futures and option contracts. The Director of the Division of Economic Analysis (Division) of the Commission, acting pursuant to the authority delegated by Commission Regulation 140.96, has determined that publication of the proposals for comment is in the public interest, will assist the Commission in considering the views of interested persons, and is consistent with the purposes of the Commodity Exchange Act.

DATES: Comments must be received on or before March 13, 1997.

ADDRESSES: Interested persons should submit their views and comments to Jean A. Webb, Secretary, Commodity Futures Trading Commission, Three Lafayette Centre, 21st Street NW, Washington, DC 20581. In addition, comments may be sent by facsimile

transmission to facsimile number (202) 418–5521, or by electronic mail to secretary@cftc.gov. Reference should be made to the CBT long term inflation-indexed U.S. Treasury note futures and options.

FOR FURTHER INFORMATION CONTACT: Please contact Stephen Sherrod of the Division of Economic Analysis, Commodity Futures Trading Commission, Three Lafayette Centre, 21st Street NW, Washington, DC 20581, telephone 202–418–5277. Facsimile number: (202) 418–5527. Electronic mail: ssherrod@cftc.gov

SUPPLEMENTARY INFORMATION: Copies of the terms and conditions will be available for inspection at the Office of the Secretariat, Commodity Futures Trading Commission, Three Lafayette Centre, 21st Street NW, Washington, D.C. 20581. Copies of the terms and conditions can be obtained through the Office of the Secretariat by mail at the above address or by phone at (202) 418–5100.

Other materials submitted by the CBT in support of the applications for contract market designation may be available upon request pursuant to the Freedom of Information Act (5 U.S.C. 552) and the Commission's regulations thereunder (17 C.F.R. Part 145 (1987)), except to the extent they are entitled to confidential treatment as set forth in 17 C.F.R. 145.5 and 145.9. Requests for copies of such materials should be made to the FOI, Privacy and Sunshine Act Compliance Staff of the Office of the Secretariat at the Commission's headquarters in accordance with 17 C.F.R. 145.7 and 145.8.

Any person interested in submitting written data, views, or arguments on the proposed terms and conditions, or with respect to other materials submitted by the CBT, should send such comments to Jean A. Webb, Secretary, Commodity Futures Trading Commission, Three Lafayette Centre, 21st Street NW, Washington, DC 20581 by the specified date.

Issued in Washington, DC, on February 5, 1997.

Blake Imel,

Acting Director.

[FR Doc. 97–3396 Filed 2–10–97; 8:45 am]

BILLING CODE 6351–01–P

Sunshine Act Meeting

AGENCY HOLDING THE MEETING: Commodity Futures Trading Commission.

TIME AND DATE: 10:30 a.m., Wednesday, February 26, 1997.

PLACE: 1155 21st St., N.W., Washington, D.C. 9th Fl. Conference Room.

STATUS: Closed.

MATTERS TO BE CONSIDERED: Enforcement Matters.

CONTACT PERSON FOR MORE INFORMATION: Jean A. Webb, 202–418–5100.

Jean A. Webb,

Secretary of the Commission.

[FR Doc. 97–3486 Filed 2–7–97; 11:58 am]

BILLING CODE 6351–01–M

Sunshine Act Meeting

AGENCY HOLDING THE MEETING: Commodity Futures Trading Commission.

TIME AND DATE: 10: 30 a.m., Wednesday, February 12, 1997.

PLACE: 1155 21st St., N.W., Washington, D.C. 9th Fl. Conference Room.

STATUS: Closed.

MATTERS TO BE CONSIDERED: Rule enforcement review.

CONTACT PERSON FOR MORE INFORMATION: Jean A. Webb, 202–418–5100.

Jean A. Webb,

Secretary of the Commission.

[FR Doc. 97–3487 Filed 2–7–97; 11:58 am]

BILLING CODE 6351–01–M

Sunshine Act Meeting

AGENCY: HOLDING THE MEETING: Commodity Futures Trading Commission.

TIME AND DATE: 10:00 a.m., Thursday, February 27, 1997.

PLACE: 1155 21st St., N.W., Washington, D.C. Lobby Level Hearing Room.

STATUS: Open.

MATTERS TO BE CONSIDERED:

Final Rulemaking concerning contract Market Rule Review Procedures

Revised procedures for Commission review and approval of applications for Contract Market Designation and of Exchange Rules relating to Contract terms and conditions-final rules

Application by the Coffee, Sugar and Cocoa Exchange for contract market designation in Basic Formula Price Milk futures and the options, including a report on issues involving the National Cheese Exchange

Update on Commission activities

CONTACT PERSON FOR FURTHER INFORMATION: Jean A. Webb, 202–418–5100.

Jean A. Webb,

Secretary of the Commission.

[FR Doc. 97–3488 Filed 2–7–97; 11:58 am]

BILLING CODE 6351–01–M

DEPARTMENT OF DEFENSE

Office of the Secretary

Continued Health Care Benefit Program (CHCBP) Premium Rate Change

AGENCY: Office of the Secretary, DOD.

ACTION: Notice.

SUMMARY: Premium rates for the Department of Defense's temporary, transitional health care coverage offered via the Continued Health Care Benefit Program (CHCBP) were initially established in the Fall of 1994. Rates have not been adjusted since then. A revision to the rates is necessary in order for the rates to keep pace with the increase in expenses incurred in operating the program. Publication of the new rates will allow the Department to change the premium and will also provide interested beneficiaries with the cost information necessary to make informed enrollment decisions. Therefore, effective May 1, 1997, CHCBP quarterly premiums will be increased to the following levels: Individual—$993; Family—$1,996. CHCBP premiums will continue to be reviewed annually by the Office of the Assistant Secretary of Defense and announcement of any further revisions will be published accordingly.

FOR FURTHER INFORMATION CONTACT: Mr. Gunther J. Zimmerman, Office of the Assistant Secretary of Defense (Health Affairs), (703) 695–3331.

ADDRESSES: TRICARE Support Office (TSO)/Office of the Civilian Health and Medical Program of the Uniformed Services (OCHAMPUS), Program Development Branch; Aurora, Colorado 80045–6900.

SUPPLEMENTARY INFORMATION: On September 30, 1994, a final rule regarding benefits and operational issued associated with implementation of the Continued Health Care Benefit Program was published (59 FR 49817).

The CHCBP was established by Congress in section 4408 of the National Defense Authorization Act for Fiscal Year 1993, Public Law 102–484, which amended title 10, United States Code, by adding section 1078a. The law directed the implementation of a program of temporary continued health benefits coverage for certain former beneficiaries of the Department of Defense, comparable to the health benefits provided for former civilian employees of the Federal government.

The statute directed that the benefits offered by the CHCBP be comparable to those offered to ''similarly situated'' former civilian employees of the Federal

government. As is the case for those employees, the costs are borne by the beneficiary who pays the entire premium charge. Additionally, the Department of Defense is permitted to charge up to an additional ten percent of the premium to cover administrative expenses. The referenced final rule indicated that the Department would annually review the premium rates and adjust these rates as necessary.

The CHCBP became effective October 1, 1994. Premiums for the CHCBP are determined by enrollment category. The CHCBP features two enrollment categories, which are individual and family. Initial quarterly premium rates were established at Individual—$410; and Family $891.

Initial CHCBP rates were based on the 1994 Mail Handlers Standard rates. The Office of Personnel Management (OPM) quarterly premium rates for Mail Handlers Standard increased in 1996 and $622 and $1,390 for Family coverage. However, the Department elected not to increase initial CHCBP fiscal year 1995 premium rates for fiscal year 1996 to allow for a full year of operational data to be collected to enable a thorough utilization review to be conducted. Operational experience during fiscal years 1995 and 1996 revealed that the initial premiums have not been sufficient to cover expenses incurred in paying CHCBP claims. As such, the Department has had to supplement premium funds with Defense Health Program funding to cover CHCBP expenses in fiscal year 1995 and 1996. Therefore, the Department proposes to raise the premiums for the CHCBP in fiscal year 1997 to the Blue Cross/Blue Shield—High Option Level (maximum level allowable under enacting legislation) to keep pace with the costs incurred and to reflect the similar increase in FEHBP plans.

Dated: February 5, 1997.

L.M. Bynum,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 97–3243 Filed 2–10–97; 8:45 am]

BILLING CODE 5000–04–M

Corps of Engineers; Department of the Army

Intent To Prepare a Draft Environmental Impact Statement (DEIS) for Long-Term Dredged Material Management at Grand Haven Harbor, Michigan

AGENCY: U.S. Army Corps of Engineers, DOD.

ACTION: Notice of Intent.

SUMMARY: The U.S. Army Corps of Engineers, Detroit District, is evaluating the environmental impacts of long-term dredged material management alternatives for Grand Haven Harbor, Michigan. The Federal navigation project at Grand Haven includes an entrance protected by parallel piers and revetments at the mouth of the Grand River, a deep draft channel extending upstream to Spring Lake, a deep-draft turning basin, and a shallow-draft river channel extending 14.5 miles further upstream. A study has been undertaken to identify a suitable disposal plan for dredged material to be removed over the next 20 years, to maintain the deep-draft channel. The deep-draft portion of the project consists of approximately 2½ miles of channel, 300 feet wide, with depths varying from 23 feet at the entrance to 21 feet in the remainder of the channel. Shoaled material dredged from the outer harbor portion of the navigation channel (Harbor entrance), consisting primarily of sand, has routinely been placed along adjacent shoreline reaches. Silty sand dredged from the inner deep-draft harbor was placed at the Harbor Island Disposal Facility which is now filled. A Long-Term Dredged Material Management Plan is being developed for the harbor, a Draft Environmental Impact Statement (EIS) is being prepared to evaluate dredged material disposal alternatives proposed as part of this plan. Disposal alternatives under consideration include open-water placement, upland placement, and beneficial use of the material. The no Federal action alternative, which would allow the navigation channel to shoal in, will also be evaluated.

FOR FURTHER INFORMATION CONTACT: Questions about the proposed EIS and dredged material management plan development can be directed to Mr. Les E. Weigum, Chief, Environmental Analysis Branch; Engineering & Planning Division; U.S. Army Engineer District, Detroit; P.O. Box 1027; Detroit, Michigan 48231–1027. Telephone: 313–226–6752.

SUPPLEMENTARY INFORMATION: Grand Haven Harbor is located at the mouth of the Grand River, on the eastern shore of Lake Michigan, in Ottawa County, Michigan, approximately 30 miles northwest of Grand Rapids. The tri-cities of Grand Haven, Spring Lake and Ferrysburg cluster around the mouth of the Grand River. Project authority for Grand Haven Harbors is from the River and Harbor Act of 1866 and subsequent acts.

Dredged material management for Grand Haven Harbor historically has consisted of two strategies: The outer harbor material, which is primarily sand, has been used to nourish adjacent eroding beaches. Maintenance dredging of this outer harbor, which includes the entrance canal from Lake Michigan through the breakwaters, is projected to require management of 600,000 cubic yards of dredged material over the next 20 years. It is proposed that this material continue to be beneficially used for nourishment of eroding beaches in the harbor vicinity.

The inner harbor material, which is sand with some silt, has historically been placed at the Harbor Island disposal facility located adjacent to the Harbor. Operation practices extended the life of the Harbor Island facility but the facility is not at maximum capacity and is being developed for recreational use. Maintenance dredging of this inner harbor portion is projected to require management of 400,000 cubic yards of dredged material over the next 20 years.

The U.S. Army Corps of Engineers, Detroit District, is currently evaluating the environmental impacts of long-term dredged material management alternatives for dredged material from the harbor. An Environmental Impact Statement will be prepared as a component of a 20-year Dredged Material Management Plan being developed for Grand Haven Harbor.

Management alternatives for material removed form the inner harbor to be evaluated in the EIS include: placement in open water of Lake Michigan, upland placement, and beneficial use of material. The no Federal action alternative will also be considered. The final 20-year management plan for dredged material may consist of a combination of alternatives and beneficial use applications.

The site identified for open water placement of material from the inner harbor is located approximately one mile off shore. The site is an area of Lake Michigan bottomland, approximately ½-mile by ½-mile, located about ¾ miles southwest, @ 225° azimuth from the harbor south pier light. The site has sufficient water depth to prevent significant disturbance of the dredged material by wind and storm induced wave action in the lake. Dredged material would be transported directly from the dredging operation to the open water site by floating plant, hydraulic pipeline, or other similar methods. The suitability of the dredged material for open-water placement has been determined in accordance with the Great Lakes Dredged Material Testing and Evaluation Manual (U.S.

Environmental Protection Agency and U.S. Army Corps of Engineers 1995), which presents testing and evaluation guidance for proposed discharges of dredged material into the waters of the United States within the Great Lakes Basin.

Specific upland disposal sites have not yet been identified for material placement but would include at least one upland disposal site within close vicinity to the channel, as well as upland areas to be used for off loading or dewatering facilities, for temporary placement of material for re-use scenarios.

Beneficial use applications to be explored include, the reconstruction of an eroded island in the Grand River, use of the material for cover or as needed in a landfill operation, use of material in composting/soil mixing, for construction fill, and other land applications.

The final 20 year Dredged Material Management Plan for removal of dredged material from Grand Haven Harbor will include the continued practice of placement of material from the outer harbor to nourish eroding nearby beaches. The plan for 400,000 cubic yards of material to be removed over 20 years from the inner harbor is likely to include a combination of dredged material disposal alternatives. These disposal alternatives will be dependent on a number of factors including, the suitability of the material, the re-use market, economics, and overall environmental acceptability.

Significant issues to be analyzed in the EIS include potential impacts on wetlands, water quality, fish and wildlife habitat, and cultural resources. Social impacts, including impacts upon recreation, aesthetics, and the local economy, will also be considered.

The proposed dredged material management plan alternatives will be reviewed for compliance with the Fish and Wildlife Act of 1956; the Fish and Wildlife Coordination Act of 1958; the National Historic Preservation Act of 1966; the National Environmental Policy Act (NEPA) of 1969; the Clean Air Act of 1970; the Coastal Zone Management Act of 1972; the Endangered Species Act of 1973; the Water Resources Development Act of 1976; the Clean Water Act of 1977; Executive Order 11593, Protection and Enhancement of the Cultural Environment, May 1971; Executive Order 11988, Flood Plain Management, May 1977; Executive Order 11990, Wetland Protection, May 1977; and Corps of Engineers, Dept. of the Army, 33 CFR Part 230, Environmental Quality: Policy and Procedure for Implementing NEPA.

The proposed dredged material management plan will be coordinated with the U.S. Fish and Wildlife Service, the U.S. Environmental Protection Agency, the Michigan Department of Environmental Quality, the Michigan Department of Natural Resources, Michigan State Historic Preservation Office, local and regional Indian tribes, as well as other interested individuals and organizations.

All are invited to participate in the proposed project scoping and review, including Federal, State, and local agencies, Indian tribes, organizations and individuals. Questions, concerns, and comments may be directed to the address given above. It is anticipated that the Draft Environmental Impact Statement would be made available in late 1998 for a 45-day public review period. If necessary, a public meeting would be held in the Grand Haven Harbor vicinity following release of the Draft EIS.

Dated: January 28, 1997.

W. Scott Parker,

Acting District Engineer.

[FR Doc. 97–3305 Filed 2–10–97; 8:45 am]

BILLING CODE 3710–GA–M

Department of the Navy

Community Redevelopment Authority and Available Surplus Buildings and Land at Military Installations Designated for Closure: Naval Reserve Center, Perth Amboy, New Jersey

SUMMARY: This Notice provides information regarding the redevelopment authority that has been established to plan the reuse of the Naval Reserve Center, Perth Amboy, New Jersey, the surplus property that is located at that base closure site, and the timely election by the redevelopment authority to proceed under new procedures set forth in the Base Closure Community Redevelopment and Homeless Assistance Act of 1994.

ADDRESSES: For further general information, contact John J. Kane, Deputy Division Director, Dept. of Navy, Real Estate Operations, Naval Facilities Engineering Command, 200 Stovall Street, Alexandria, VA 22332–2300, telephone (703) 325–0474, or Marian E. Digiamarino, Special Assistant for Real Estate, Base Closure Team, Northern Division, Naval Facilities Engineering Command, Lester, PA 19113–2090, telephone (610) 595–0762. For more detailed information regarding particular properties identified in this Notice (i.e. acreage, floorplan, sanitary facilities, exact street address, etc.), contact Ron Kohri, Activity Manager, Base Closure Team, Northern Division, Naval Facilities Engineering Command, Lester, PA 19113–2090, telephone (610) 595–0519.

SUPPLEMENTARY INFORMATION: In 1993, the Naval Reserve Center, Perth Amboy, New Jersey, was designated for closure pursuant to the Defense Base Closure and Realignment Act of 1990, Public Law 101–510, as amended. Pursuant to this designation, the land and facilities at this installation are declared surplus to the federal government and available for use by (a) non-Federal public agencies pursuant to various statutes which authorize conveyance of property for public projects, and (b) homeless provider groups.

Election to Proceed Under New Statutory Procedures

Subsequently, the Base Closure Community Redevelopment and Homeless Assistance Act of 1994 (Pub. L. 103–421) was signed into law. Section 2 of this statute gives the redevelopment authority at base closure sites the option of proceeding under new procedures with regard to the manner in which the redevelopment plan for the base is formulated and how requests are made for future use of the property by homeless assistance providers. On December 23, 1994, the Governor of New Jersey submitted a timely request to proceed under the new procedures. Accordingly, this notice fulfills the Federal Register publication requirement of Section 2(e)(3) of the Base Closure Community Redevelopment and Homeless Assistance Act of 1994.

Also, pursuant to Section 2905(b)(7)(B) of the Defense Base Closure and Realignment Act of 1990, as amended by the Base Closure Community Redevelopment and Homeless Assistance Act of 1994, the following information regarding the redevelopment authority for and surplus property at the Naval Reserve Center, Perth Amboy, NJ is published in the Federal Register.

Redevelopment Authority

The redevelopment authority for the Naval Reserve Center, Perth Amboy, New Jersey, for purposes of implementing the provisions of the Defense Base Closure and Realignment Act of 1990, as amended, is the City of Perth Amboy, acting by and through its Mayor, Joseph Vas. For further information contact the Office of the Mayor, City of Perth Amboy, City Hall, Perth Amboy, New Jersey 08861, telephone number is (908) 826–0290.

Surplus Property Descriptions

The following is a listing of the land and facilities at the Naval Reserve Center, Perth Amboy that are surplus to the federal government.

Land

Approximately 2.43 acres of improved and unimproved fee simple land and approximately 0.05 acre in easements at the U.S. Naval Reserve Center, in the City of Perth Amboy, Middlesex County, New Jersey. In general, all areas are presently available. The station closed on July 1, 1994.

Buildings

The following is a summary of the facilities located on the above described land which are presently available. Property numbers are available on request.

—Administrative/training facilities; (1 structure); Comments: Approx. 29,400 square feet.
—Garage facilities (1 structure); Comments: Approx. 667 square feet.
—Paved areas; Comments: Approx. 3,060 square yards. Parking area, roads and sidewalks.
—General purpose/berthing wharf (1 structure); Comments: Approx. 3,582 square feet.
—Utility facilities; Comments: Measuring systems vary. Sanitary sewer, water distribution line, (potable), electrical distribution line and storm sewer

Expressions of Interest

Pursuant to Section 2905(b)(7)(C) of the Defense Base Closure and Realignment Act of 1990, as amended by the Base Closure Community Redevelopment and Homeless Assistance Act of 1994, State and local governments, representatives of the homeless, and other interested parties located in the vicinity of the Naval Reserve Center, Perth Amboy, shall submit to said redevelopment authority (City of Perth Amboy) a notice of interest, of such governments, representatives and parties in the above described surplus property, or any portion thereof. A notice of interest shall describe the need of the government, representative, or party concerned for the desired surplus property. Pursuant to Section 2905(b)(7)(C) and (D), the redevelopment authority shall assist interested parties in evaluating the surplus property for the intended use and publish in a newspaper of general circulation in Perth Amboy, New Jersey the date by which expressions of interest must be submitted.

Dated: February 5, 1997.

D.E. Koenig, Jr.,

LCDR, JAGC, USNR, Federal Register Liaison Officer.

[FR Doc. 97–3344 Filed 2–10–97; 8:45 am]

BILLING CODE 3810–FF–P

Notice of Announcement of Public Hearing and Notice of Availability of the Draft Environmental Impact Statement (DEIS) for Military Training in the Marianas, Territory of Guam and Commonwealth of the Northern Mariana Islands

SUMMARY: The U.S. Pacific Command (USCINCPAC) is announcing the public hearing and availability of the above referenced DEIS. The DEIS has been distributed to various federal, territorial, and commonwealth agencies, elected officials, individuals and organizations in the community, public libraries, and the media. A limited number of single copies is available at the address listed at the end of this notice.

The DEIS evaluates alternatives for training by Navy, Army, Air Force, Marine Corps, National Guard, and Army Reserve forces on Guam, Rota, Tinian, and Farallon de Medinilla. The DEIS describes a large number of training activities already occurring on these islands and a small number of newly proposed activities or newly proposed locations for training. The three alternatives are: (1) No Action, consisting of all ongoing training activities and all locations in which such training have occurred; (2) Augmented Set of Training Activities, consisting of all requested new training activities and locations, in addition to ongoing activities; and (3) Mitigated Set of Training Activities (the preferred alternative), which consists of ongoing and new training activities modified to avoid significant impacts on the environment. Therefore, no significant impacts are expected to result from the preferred alternative.

Introduction of forces existing and proposed training include: aircraft landing at airfields, paradrops of personnel and cargo, helicopter insertion/extraction, and amphibious assaults. Combat training include: Field maneuvers (tactical operations, command post exercises, road and cross-country movement, seizing an airfield, military working dogs), aviation support to ground troops (close air support, field carrier landing practice, confined area landings, cargo delivery, heliborne water buckets for fire-fighting, medical evacuations, search and rescue, night vision goggle training, and various types of parachute operation), and ordnance training at specific locations (air-to-surface gunnery, naval gunnery, live fire at firing ranges and shooting houses, demolition training at established demolition pits and underwater, and pyrotechnics used during field maneuvers). Combat service support training includes: bivouacs and associated support functions, construction battalion exercises, and logistics support (shipping, staging, inspecting, and maintaining equipment and cargo), forward area refueling).

The proposed action includes: Construction of several facilities (a sniper range and breaching house in the NAVACTS Ordnance Annex; extension of an existing firing range at NAVACTS Waterfront Annex; a small base support camp, firing range, mortar range, and breaching house on Tinian; and installation of various targets on FDM).

The training areas on Guam are military sites (Andersen Air Force Base, NAVACTS Guam Waterfront Annex and Ordnance Annex, Naval Computer and Telecommunications Area Master Station Finegayan and Barrigada), the Ylig and Talofofo Rivers, and a non-military paradrop zone in Dandan. Training areas on Rota consist of the airport, a small area within West Harbor, and a land area at the high school. Training on Tinian occurs within the Military Lease Area, with limited activities in San Jose Harbor. The entire island of Farallon de Medinilla is used as a live fire range.

The public hearings will be conducted by the Navy on behalf of the U.S. Pacific Command. Government agencies and interested parties are invited and urged to be present or represented at the hearings. Oral statements will be heard and transcribed by a stenographer. To assure accuracy of the record, statements may also be submitted in writing. Both oral and written statements will become part of the public record on this study, with equal weight given to each.

In the interest of available time, speakers will be asked to limit their comments to five minutes. If longer statements are to be presented, they should be summarized at the public hearing and submitted in writing either at the hearing or mailed to the address listed at the end of this announcement. All written statements must be postmarked by April 1, 1997 to be incorporated in the official record.

DATES: Public hearings to inform the public of the DEIS findings and to solicit comments will be held at the following times and locations in the northern Mariana islands and Guam:

- Monday, March 3, 1997, 2:00 PM & 7:00 PM at Community Roundhouse, Rota.
- Tuesday, March 4, 1997, 2:00 PM & 7:00 PM at KBC Bldg., 2nd Floor, Conference Room, Tinian.
- Wednesday, March 5, 1997, 2:00 PM & 7:00 PM at Garapan Central Park Roundhouse, Saipan.
- Thursday, March 6, 1997, 2:00 PM & 7:00 PM at 155 Hesler Street., Public Hearing Room, Agana, Guam.

ADDRESSES: Request for single copies of the DEIS and submittal of written comments for inclusion into the official record should be forwarded to Mr. Fred Minato (Code 231FM), Pacific Division, Naval Facilities Engineering Command, Pearl Harbor, Hawaii 96860–7300.

FOR FURTHER INFORMATION CONTACT: Mr. Fred Minato (Code 231FM), by voice telephone (808) 471–9338 or facsimile transmission (808) 474–5909.

SUPPLEMENTARY INFORMATION: Pursuant to Section 102(2)(c) of the National Environmental Policy Act (NEPA) of 1969, as implemented by the Council on Environmental Quality regulations (40 CFR Parts 1500–1508), the U.S. Pacific Command has prepared and filed with the U.S. Environmental Protection Agency the above referenced DEIS.

Dated: February 5, 1997.

D. E. Koenig, Jr.,

LCDR, JAGC, USN, Federal Register Liaison Officer.

[FR Doc. 97–3345 Filed 2–10–97; 8:45 am]

BILLING CODE 3810–FF–P

Notice of Public Meeting for Submarine Solid Waste Management Related to Compliance With the Special Area Requirements of Regulations 5 of Annex V to the MARPOL Convention Pursuant to the National Defense Authorization Act of 1994

SUMMARY: The Department of the Navy is announcing the preparation of a plan for the compliance of all submersibles owned or operated by the Navy with the requirements of Regulation 5 of Annex V to the MARPOL Convention. The National Defense Authorization Act for Fiscal Year 1994 (DAA 94) directed the Navy to allow the public to participate in preparing the plan and to review and comment on the plan before it is submitted. In order to obtain and consider public comments in the development of the Navy's plan for compliance with the DAA 94 requirements, the Navy will host public meeting.

DATES: The meeting will take place on March 11, 1997, at 7:00 p.m.

ADDRESSES: The meeting will be held in the Crystal Gateway Marriott, 1700 Jefferson Davis Highway, Arlington, Virginia 22202.

FOR FURTHER INFORMATION CONTACT: For further information on the public meeting or to submit comments, contact Mr. David Cartwright NAVSEA 92TE, Assistant for Submarine Environmental and Occupational Safety Affairs, Department of the Navy, Naval Sea Systems Command, 2531 Jefferson Davis Highway, Arlington, VA 22242–5160 [(703) 602–8096 (Ext. 475)]. The meeting will be conducted in English and will include oral presentations and visual displays. The meeting will be recorded by a court recorder. Members of the public who need additional assistance to participate should contact Mr. Cartwright as soon as possible to make arrangements.

Written comments related to the public meeting will be considered in the Submarine addendum to the Report to Congress if received by Mr. Cartwright no later than March 25, 1997. Oral or written comments will also be considered if presented at the public meeting to be held on March 11, 1997.

SUPPLEMENTARY INFORMATION: Section 1003 of the National Defense Authorization Act for Fiscal Year 1994 Public Law 103–160, 107 Stat. 1745 (DAA–94), requires a Report to Congress on a plan for compliance with special area provisions of Regulation 5 of Annex V to the Convention. The Navy submitted a Report to Congress on U.S. Navy Ship Solid Waste Management Plan for MARPOL Annex V Special Areas in November 1996. In preparation for that Report to Congress, the Navy solicited public comments beginning with the meeting announcement in the Federal Register of July 21, 1994 (59 FR 37223). In addition, the final Environmental Impact Statement on Disposal of U.S. Navy Shipboard Solid Waste was released in August 1996.

The Report to Congress of November 1996 stated that the Navy was evaluating several options for submarines, and upon completion of the efforts would determine the most appropriate solid waste management strategy. Thus, a Submarine Addendum to the Report to Congress on U.S. Navy Ship Solid Waste Management Plan for MARPOL Annex V Special Areas is being prepared to address the U.S. Navy Submarine Solid Waste Management Plan. Public comments directed specifically toward the development of a submarine solid waste management plan are requested.

Submarines are designed to operate undetected beneath the water surface for extended periods. They have very limited storage space and distinctive requirements for weight, acoustical control, and atmosphere criteria.

Historically, waste source reduction efforts have been employed to minimize the amount of plastic material and cardboard brought on board. Most plastic material, cardboard, and paper that is used for wrapping and protecting supplies is removed and retained at dockside prior to loading supplies on a submarine. Plastic disposable items are being replaced with non-plastic items where possible. Additional initiatives being undertaken include the investigation of reusable meat containers, the review of procurement databases to identify items for improved packaging, development of a computer program identifying alternatives to aluminum and other metal cans, and the development of guidelines for supply personnel stressing pollution prevention awareness.

The particular solid waste challenges unique to submarines are being addressed in three principal studies: (1) The impact and fate and effect in the marine environment of discharging compacted, negatively buoyant non-plastic solid waste; (2) the impact on submarine operations and crew quality of life of storing solid waste on board; and (3) the use of a pulper for pulping paper and cardboard and a shredder for shredding metal cans and glass.

In addition to the above studies, an Environmental Assessment, pursuant to the National Environmental Policy Act and Executive Order 12114, is being developed to assess the environmental impacts of alternatives for the management of solid wastes.

As indicated above, comments are welcome at the public meeting and will be considered in the preparation of a draft Addendum Report if received not later than March 25, 1997. The draft Addendum Report, which will document the Navy's solid waste management plan for submarines, will be available for public comment in about three months. The Navy plans to finalize the Addendum Report and submit it to Congress by September, 1997.

Dated: February 6, 1997.

D.E. Koenig,

LCDR, JAGC, USN, Federal Register Liaison Officer.

[FR Doc. 97–3342 Filed 2–10–97; 8:45 am]

BILLING CODE 3810–FF–M

DEPARTMENT OF ENERGY

Office of Energy Research

Energy Research Financial Assistance Program Notice 97–06; Integrated Assessment of Global Climate Change Research Program

AGENCY: U.S. Department of Energy.

ACTION: Notice inviting research grant applications.

SUMMARY: The Office of Health and Environmental Research (OHER) of the Office of Energy Research (ER), U.S. Department of Energy (DOE), hereby announces its interest in receiving applications for the Integrated Assessment of Global Climate Change research grants Program. This notice is a follow on to three previous notices published in the Federal Register (Notice 93–4 published December 9, 1992, entitled Economics of Global Change Research Program; Notice 95–12 published December 29, 1994, entitled Global Change Assessment Research Program; and Notice 96–06 published January 30, 1996, entitled Global Change Integrated Assessment Research). The program has a more narrowly defined scope this year to emphasize specific topics in support of integrated assessment. The research program supports the Department's Global Change Research Program, the U.S. Global Change Research Program and the Administration's goals to understand and mitigate the rise in greenhouse gases.

DATES: Applicants are encouraged (but not required) to submit a brief preapplication for programmatic review. There is no deadline for the preapplication, but early submission of preapplications is encouraged to allow time for meaningful dialogue. A preapplication should consist of two to three pages of narrative describing the research objectives and methods of accomplishment together with a brief summary of the principal investigator's publication and research background. The deadline for receipt of formal applications is 4:30 p.m., E.S.T., March 27, 1997, to be accepted for merit review and to permit timely consideration for award in fiscal year 1997 or early fiscal year 1998. An original and seven copies of the application must be submitted; however, applicants are requested not to submit multiple applications using more than one delivery or mail service.

ADDRESSES: If submitting a preapplication, referencing Program Notice 97–06, it should be sent E-mail to john.houghton@oer.doe.gov. Formal applications referencing Program Notice 97–06 on the cover page must be forwarded to: U.S. Department of Energy, Office of Energy Research, Grants and Contracts Division, ER–64, 19901 Germantown Road, Germantown, MD 20874–1290, ATTN: Program Notice 97–06. This address must also be used when submitting applications by U.S. Postal Service Express Mail or any other commercial overnight delivery service, or when hand-carried by the applicant.

FOR FURTHER INFORMATION CONTACT: Dr. John Houghton, Environmental Sciences Division, ER–74, Office of Health and Environmental Research, Office of Energy Research, U.S. Department of Energy, 19901 Germantown Road, Germantown, MD 20874–1290, telephone: (301) 903–8288, E-mail: john.houghton@oer.doe.gov, fax: (301) 903–8519.

SUPPLEMENTARY INFORMATION: The determination of energy policy, such as the administration analysis of international protocols for global climate change, is tied to understanding the benefits and costs of potential actions with respect to the control of greenhouse gases and possible climate change. The research described in this notice supports the analysis of those benefits and costs.

This research will be judged in part on its potential to improve and/or support the analytical basis for policy development. The program is narrowly focused and will primarily concentrate support on three specific topics, described below. Applications that involve development of analytical models and computer codes will be judged partly on the basis of proposed tasks to prepare documentation and make the models and codes available to other groups.

Integrated Assessment of Global Climate Change

Integrated assessment of climate change is defined here as the analysis of climate change from the cause, such as greenhouse gas emissions, through impacts, such as changed energy requirements for space conditioning due to temperature changes. Integrated Assessment is sometimes, but not always, implemented as a computer model. A description of Integrated Assessment may be found in Chapter 10: ''Integrated Assessment of Climate Change: An Overview and Comparison of Approaches and Results'', in *Climate Change 1995: Economic and Social Dimensions of Climate Change*, edited by Bruce, James P.; Lee, Hoesung; and Haites, Erik F., Cambridge University Press, 1996.

The following categories are requested research topics:

1. Technology innovation and diffusion. This category has been a primary focus of the Integrated Assessment of Global Climate Change Program since its initiation four years ago.

Potential research projects include such issues as:

- Decomposing the effect of technology innovation and diffusion on carbon emissions into such components as changes in GDP, sectoral mix, capital stock, innovation, and diffusion. Historical records might be used to estimate trends and make projections that vary as a function of price effects and policy options.
- Technology innovation and diffusion is an important part of several aspects of integrated assessment models, such as backstop technologies, adaptation, resource depletion, labor productivity, and substitution parameters for shifting factor shares. Investigations might include studies to help predict changes in these parameters both for a base case and for various policy options, as well as studies to analyze the internal consistency among these aspects.
- The rate and nature of technology diffusion from the US to developing countries. Relevant factors include the prediction of the energy-use path for developing countries, the effects of changes in international trade policies and patterns, and ''carbon leakage''.
- The translation of existing literature on the economics of technology innovation into a representation that could be adapted for IA models.
- Investment or other policies to encourage research and development are options for increasing abatement and improving adaptation. Research in this topic would investigate such subjects as evaluating the effectiveness of alternative modes of implementation, such as direct grants, cooperative research projects, et cetera.

2. Representing impacts in integrated assessments. A major challenge before the integrated assessment modeling community is to improve and expand the range of representations in integrated assessment models of the response of ecosystems, socio-economic systems, and other sectors to potential climate changes. Two criteria for selection will be (1) The degree of collaboration with scientists working on the ecological and socio-economic consequences of climate change, and (2) the utility of the results (output) to the integrated assessment community, such as the ability to represent potential ecological or socio-economic

consequences of climate change in integrated assessment models. Proposed research at a regional or more detailed scale will need an explicit description of the potential of the expected results to be expanded to a national or continental scale for use directly or indirectly by the integrated assessment community. Academic researchers interested in regional-scale impact studies or in developing methods and models for conducting regional-scale assessments of the consequences of climate change may also contact Dr. Jerry Elwood, E-mail address jerry.elwood@oer.doe.gov, for information about applying to DOE's National Institute for Global Environmental Change (NIGEC) research program.

Topics of high importance include:

- For the OECD countries, unmanaged ecosystems (including marine) and energy sectors.
- For the non-OECD countries, energy, water, unmanaged ecosystems (including marine), and sea level rise.

Themes that increase the importance to the integrated assessment community include:

- Explicit analysis and treatment of adaptation.
- Analysis of transient climate changes rather than static climate scenarios.
- Analysis of thresholds.
- Analysis of variability and extremes (including low-probability/high-consequence events).
- The combination of several impact sectors so that cross-sector issues (such as water or land availability) are explicitly considered.

3. Analysis of Environmental Technologies. It is difficult to send the ''proper price signals'' (measures of full environmental impacts) to designers, manufacturers, policy makers, and research managers so that decisions can reflect the full societal impact by the manufacturing process of resource use and byproduct disposal, including greenhouse gases. The following industries represent 80 percent of the energy consumption in the manufacturing sector: chemicals, petroleum refining, forest products, steel, aluminum, glass, and metal casting. We would welcome applications that propose to prepare an integrated assessment framework of these sectors to investigate such issues as life cycle analysis, ''industrial ecology'' and ''sustainability'', the expected improvement in technologies in response to various policy options, and the value of improved technologies. Applicants responding to this specific topic are encouraged to develop working collaborations with appropriate and relevant industries; applications involving industrial collaboration will receive preference over applications of equal scientific merit but lacking such collaboration.

ADMINISTRATIVE INFORMATION: The preparation and submission of grant applications must follow the guidelines given in the *Application Guide for the Office of Energy Research Financial Assistance Program 10 CFR Part 605.*

Information about the development, submission of applications, eligibility, limitations, evaluation, the selection process, and other policies and procedures may be found in 10 CFR Part 605, and in the *Application Guide for the Office of Energy Research Financial Assistance Program*. The Application Guide is available from the U.S. Department of Energy, Office of Energy Research, ER–74, 19901 Germantown Road, Germantown, MD 20874–1290. Telephone requests may be made by calling (301) 903–3338. Electronic access to ER's Financial Assistance Application Guide and forms is possible via the World Wide Web at: http://www.er.doe.gov/production/grants/grants.html. The research description must be 15 pages or less, exclusive of attachments, and must contain an abstract or summary of the proposed research. Attachments include curriculum vitae, a listing of all current and pending federal support, and letters of intent when collaborations are part of the proposed research.

Applications will be subjected to formal merit review (peer review) and will be evaluated against the following evaluation criteria which are listed in descending order of importance codified at 10 CFR 605.10(d):

1. Scientific and/or Technical Merit of the Project;

2. Appropriateness of the Proposed Method or Approach;

3. Competency of Applicant's Personnel and Adequacy of Proposed Resources;

4. Reasonableness and Appropriateness of the Proposed Budget.

The evaluation will include program policy factors such as the relevance of the proposed research to the terms of the announcement and an agency's programmatic needs. Note, external peer reviewers are selected with regard to both their scientific expertise and the absence of conflict-of-interest issues. Non-federal reviewers will often be used, and submission of an application constitutes agreement that this is acceptable to the investigator(s) and the submitting institution.

It is anticipated that up to $1.5 million will be available for multiple awards to be made in FY 1997 and early FY 1998 in the categories described above, contingent on availability of appropriated funds. Applications may request project support up to three years, with out-year support contingent on availability of funds, progress of the research, and programmatic needs. Annual budgets are expected to range from $30,000 to $150,000 total costs.

Although the required original and seven copies of the application must be submitted, researchers are asked to submit an electronic version of their abstract of the proposed research in ASCII format and their E-mail address to Karen Carlson by E-mail at karen.carlson@oer.doe.gov. Additional information on the Integrated Assessment Program is available at the following web site: http://www.er.doe.gov/production/oher/john/iapage.html. For researchers who do not have access to the world wide web, please contact Karen Carlson; Environmental Sciences Division, ER–74; U.S. Department of Energy; 19901 Germantown Road; Germantown, MD 20874–1290; telephone: (301) 903–3338; fax: (301) 903–8519; E-mail: karen.carlson@oer.doe.gov; for hard copies of background material mentioned in this solicitation. Curriculum vitae should be submitted in a form similar to that of NIH or NSF (two to three pages), see for example: http://www.nsf.gov:80/bfa/cpo/gpg/fkit.htm#forms-9.

Related Funding Opportunities

Investigators may wish to obtain information about the following related funding opportunities.

National Science Foundation/Methods and Models for Integrated Assessment

In concert with other USGCRP agencies, NSF sponsors high-quality, fundamental and methodological research in two related categories: (1) Research that advances the development of methodologies and models that will integrate or couple multiple component systems; and (2) research that develops and enhances the scientific components of the integrated approach. NSF encourages participation and collaboration of researchers from all appropriate scientific and engineering disciplines, including the mathematical sciences. In FY 1996, NSF awarded approximately $3.4 million through the special MMIA competition. Funding in FY 1997 is anticipated at approximately the same level, depending on availability of funds. Proposals submitted for this competition must be

received by NSF by February 14, 1997. For more information on this program, please contact; Dr. Keith Crank, Directorate for Mathematical and Physical Sciences, National Science Foundation, 4201 Wilson Blvd., Arlington, VA 22230, telephone: (703) 306–1885, fax: (703) 306–0555, Internet: kcrank@nsf.gov. NSF also supports related research in all fields of science and engineering. Information on NSF environment and global change funding opportunities is available at: http://www.nsf.gov/stratare/egch/.

National Oceanic and Atmospheric Administration

Within the context of its Economics and Human Dimensions of Climate Fluctuations Program, the Office of Global Programs of the National Oceanic and Atmospheric Administration will support research that identifies and analyzes social and economic impacts associated with seasonal, year-to-year, and intradecadal climate variability; improves our understanding of factors that determine human vulnerability to such fluctuations; and identifies options for reducing vulnerability. The program is particularly interested in learning how advanced climate information (e.g., ENSO-based probabilistic climate forecasts), as well as an improved understanding of current coping mechanisms, could be used for reducing vulnerability and providing for more efficient adjustment to these variations. Notice of this program is included in the Program Announcement for NOAA's Climate and Global Change Program, which is published each spring in the Federal Register. The deadline for proposals to be considered in fiscal year 1998 is expected to be in late summer 1997. For further information, contact: Caitlin Simpson; Office of Global Programs; National Oceanic and Atmospheric Administration; 1100 Wayne Ave., Suite 1225; Silver Spring, MD 20910; telephone: (301) 427–2089, ext. 47; Internet: simpson@ogp.noaa.gov.

Environmental Protection Agency

In 1997 the Environmental Protection Agency (EPA) will support research on Consequences of Global Change on Ecosystems by joining the interagency Terrestrial Ecology and Global Change (TECO) Program, administered by the National Science Foundation (NSF). Related requests for applications that are currently advertised on the EPA Home Page include ''Ecosystem Indicators''; ''Ecosystem Restoration''—sponsored jointly with National Aeronautics and Space Administration; and ''Water/Watersheds''—sponsored jointly with the NSF. The EPA offers grants in global climate change through its ''National Center for Environmental Research and Quality Assurance''. Information is available through web site: http://www.epa.gov/ncerqa or hotline 1–800–490–9194. For further information, contact Barbara M. Levinson, EPA (8723), Washington, DC 20460, telephone: (202) 260–5983, fax: (202) 260–4524, E-mail: Levinson.barbara@epamail.epa.gov.

The Catalog of Federal Domestic Assistance Number for this program is 81.049, and the solicitation control number is ERFAP 10 CFR Part 605.

Issued in Washington, DC, on February 3, 1997.

John Rodney Clark,

Associate Director for Resource Management, Office of Energy Research.

[FR Doc. 97–3383 Filed 2–10–97; 8:45 am]

BILLING CODE 6450–01–P

Federal Energy Regulatory Commission

[Docket No. RP97–246–000]

ANR Pipeline Company; Notice of Proposed Changes in FERC Gas Tariff

February 5, 1997.

Take notice that on January 31, 1997, ANR Pipeline Company (ANR) tendered for filing as part of its FERC Gas Tariff, Second Revised Volume No. 1, the following tariff sheets to become effective February 1, 1997:

Nineteenth Revised Sheet No. 8
Twenty-first Revised Sheet No. 9
Twentieth Revised Sheet No. 13
Twenty-first Revised Sheet No. 16
Twenty-fourth Revised Sheet No. 18

ANR states that the above-referenced tariff sheets are being filed to cancel the expired PD surcharges associated with ANR's first and second PD cost recovery filings, and to commence recovery of approximately $2.5 million of additional pricing differential (PD) and carrying costs that have been incurred by ANR during the period September 1, 1996 through November 30, 1996 as a result of the implementation of Order Nos. 636, et seq. ANR proposes a reservation fee surcharge applicable to its Part 284 firm transportation customers to recover ninety percent (90%) of the PD costs, and an adjustment to the maximum base tariff rates applicable to Rate Schedule ITS and overrun service rendered pursuant to Rate Schedule FTS–2, so as to recover the remaining ten percent (10%). ANR has requested that the Commission accept the tendered sheets to become effective February 1, 1997. Due to the expiring surcharges noted above, ANR advises that its PD surcharge will decrease from $0.357 to $0.157 as a result of this filing.

Any person desiring to be heard or to protest this filing should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with Sections 385.214 and 385.211 of the Commission's Rules and Regulations. All such motions or protests must be filed as provided in Section 154.210 of the Commission's regulations. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection in the Public Reference Room.

Lois D. Cashell,

Secretary.

[FR Doc. 97–3298 Filed 2–10–97; 8:45 am]

BILLING CODE 6717–01–M

[Docket No. RP97–245–000]

Colorado Interstate Gas Company; Notice of Proposed Changes in FERC Gas Tariff

February 5, 1997.

Take notice that on January 31, 1997, Colorado Interstate Gas Company (CIG), tendered for filing as part of its FERC Gas Tariff, First Revised Volume No. 1, Third Revised Sheet No. 368.

CIG states that Sheet No. 368 was a tariff sheet authorized by Commission Order issued December 27, 1991 in Docket No. RP92–44–000. The tariff sheet identified customers' buyout-buydown obligation pursuant to Order No. 528.

CIG states the filing is being made to ''clean up'' Sheet No. 368. One Buyer had elected to amortize its payment of its obligation over a 60-month period. The 60-month payment period has terminated and the Buyer has paid its obligation; therefore, the filing reflects all Buyers have now paid their obligation pursuant to the authorization in Docket No. RP92–44–000.

CIG states that copies of the filing have been sent to all parties in Docket No. RP92–44–000. An effective date of March 3, 1997 has been requested.

Any person desiring to be heard or to make any protest with reference to said application should file a motion to intervene or a protest with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426,

in accordance with the requirements of the Commission's Rules of Practice and Procedure (18 CFR 385.214 or 385.211). All such motions or protest must be filed in accordance with Section 154.210 of the Commission's Regulations. Protests filed will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make the protestants parties to the proceedings. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection in the Public Reference Room.

Lois D. Cashell,

Secretary.

[FR Doc. 97–3297 Filed 2–10–97; 8:45 am]

BILLING CODE 6717–01–M

[Docket No. CP97–217–000]

Florida Gas Transmission Company; Notice of Request Under Blanket Authorization

February 5, 1997.

Take notice that on January 30, 1997, Florida Gas Transmission Company (FGT), 1400 Smith Street, Houston, Texas, 77002, filed in the above docket, a request pursuant to Sections 157.205 and 157.212 of the Commission's Regulations under the Natural Gas Act for authorization to construct a new delivery point under FGT's blanket certificate issued in Docket No. CP82–553–000 pursuant to Section 7(c), all as more fully set forth in the request that is on file with the Commission and open to public inspection.

Specifically, FGT proposes to construct a new tee, valve, less than 100 feet of 8-inch connecting lateral and EFM equipment in Pinellas County, Florida, to accommodate gas deliveries to FPC's proposed meter station to receive interruptible gas volumes. FPC has requested FGT to construct a new delivery point in Pinellas County, Florida, to connect to the Bartow-B Meter Station that FPC will construct in Pinellas County, Florida. FGT states that FPC would reimburse it for all construction costs; estimated to be $80,362. FGT proposes to deliver up to 2,600 MMBtu of gas per hour at line pressure. Initial deliveries will be approximately 1,300 MMBtu per hour. FPC proposes to construct, own and operate the meter station and approximately 450 feet of 10-inch; 75 feet of 8-inch; and 150 feet of 6-inch pipe of non-jurisdiction pipeline connecting the meter station to FPC Bartow Plant.

FGT states that the natural gas volumes delivered to this delivery point will be interruptible volumes and therefore will not disadvantage FGT's other existing customers.

Any person or the Commission's staff may, within 45 days after issuance of the instant notice by the Commission, file pursuant to Rule 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.214) a motion to intervene or notice of intervention and pursuant to Section 157.205 of the Regulations under the Natural Gas Act (18 CFR 157.205) a protest to the request.

If no protest is filed within the time allowed therefor, the proposed activity is deemed to be authorized effective on the day after the time allowed for filing a protest. If a protest is filed and not withdrawn within 30 days after the time allowed for filing a protest, the instant request shall be treated as an application for authorization pursuant to Section 7 of the Natural Gas Act.

Lois D. Cashell,

Secretary.

[FR Doc. 97–3290 Filed 2–10–97; 8:45 am]

BILLING CODE 6717–01–M

[Docket No. RP97–244–000]

Mississippi River Transmission Corporation; Notice of Request for Waiver

February 5, 1997.

Take notice that on January 31, 1997, Mississippi River Transmission Corporation (MRT) submitted for filing a request for waiver of the provisions of Section 2.5 of Rate Schedule SCT of MRT's FERC Gas Tariff, Third Revised Volume No. 1.

MRT states that it is requesting the waiver because two of its Rate Schedule SCT customers are seeking to release permanently a portion of their capacity utilizing a pre-arranged release to two Rate Schedule FTS customers but the releasing customers do not want their remaining Rate Schedule SCT capacity converted to Rate Schedule FTS capacity. MRT also requests a waiver of such other provisions of its FERC Gas Tariff, or other Commission regulations, as may be necessary to allow the transactions contemplated in the filing to become effective as proposed.

MRT states that copies of this filing have been mailed to each of MRT's customers and the State Commissions of Arkansas, Illinois, and Missouri.

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, NE., Washington, DC 20426, in accordance with Sections 385.211 and 385.214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). All such motions or protests should be filed on or before February 12, 1997. 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. 97–3296 Filed 2–10–97; 8:45 am]

BILLING CODE 6717–01–M

[Docket No. TM97–7–16–000]

National Fuel Gas Supply Corporation; Notice of Tariff Filing

February 5, 1997.

Take notice that on January 31, 1997, National Fuel Gas Supply Corporation (National) tendered for filing as part of its FERC Gas Tariff, Third Revised Volume No. 1, Eighteenth Revised Sheet No. 5A, with a proposed effective date of February 1, 1996.

National states that pursuant to Article II, Section 2, of the approved settlement at Docket Nos. RP94–367–000, et al., National is required to recalculate the maximum Interruptible Gathering (IG) rate monthly and to charge that rate on the first day of the following month if the result is an IG rate more than 2 cents above or below the IG rate as calculated under Section 1 of Article II. The recalculation produced an IG rate of 15 cents per dth.

National further states that, as required by Article II, Section 4, National is filing a revised tariff sheet within 30 days of the effective date for the revised IG rate.

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, NE., Washington, DC 20426, in accordance with Rules 211 or 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 or 385.214). All such motions or protests must be filed as provided in Section 154.210 of the Commission's Regulations. Protests will be considered by the Commission in determining the appropriate action to be taken but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a motion to intervene. Copies

of this filing are on file with the Commission and are available for public inspection.

Lois D. Cashell,

Secretary.

[FR Doc. 97–3301 Filed 2–10–97; 8:45 am]

BILLING CODE 6717–01–M

[Docket No. ER97–1412–000]

Niobrara Valley Electric Membership Corporation; Notice of Filing

February 5, 1997.

Take notice that on January 28, 1997, Niobrara Valley Electric Membership Corporation (Niobrara) tendered for filing as a rate schedule an executed Agreement with Nebraska Public Power District (NPPD) entitled ''Agreement for Joint Planning and Ownership of Subtransmission Facilities'' dated January 22, 1979, as amended. Niobrara explains that the filing is made pursuant to Ordering Paragraph (F) of the Commission's Order of October 30, 1996 in *Central Electric Cooperative, Inc. et al.,* Docket Nos. OA96–41–000 et al.

The filing states that the Agreement with NPPD is the sole document in Niobrara's possession or control that establishes a basis for the use of its subtransmission facilities. Niobrara states that it has, through agreements with NPPD, turned over responsibility for operational control of its facilities to NPPD, the control area operator. Any charges for the use of Niobrara's facilities are said to be developed by NPPD and are part of the overall rates that NPPD charges for its sale and transmission facilities.

Niobrara's filing indicates that, under the Agreement, each party pays for service on its facilities on the basis of a formula which compares each party's proportion of the total investment to its proportion of the noncoincidental peak load. As of the date of the filing, according to Niobrara, it is deemed the deficient party and makes a monthly payment to NPPD. Niobrara states that it receives no revenues for use of the facilities, directly or indirectly.

Niobrara's filing also notes that it has filed a motion for reconsideration of the Commission's Order determining that it is performing jurisdictional transmission service.

Niobrara seeks a waiver of the requirement for filing supporting data, required to accompany a rate schedule filing, citing its small size and small administrative staff. Noting that the Agreement has been in force for 18 years and is the basis for continued service to its retail customers, Niobrara has also sought a waiver of the notice requirements in the Commission's Regulations and an immediate effective date for the Agreement.

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 February 14, 1997. 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. 97–3291 Filed 2–10–97; 8:45 am]

BILLING CODE 6717–01–M

[Docket No. CP97–208–000]

Northern Natural Gas Company; Notice of Request Under Blanket Authorization

February 5, 1997.

Take notice that on January 27, 1997, Northern Natural Gas Company (Northern), 1111 South 103rd Street, Omaha, Nebraska 68124–1000, filed in Docket No. CP97–208–000 a request pursuant to Sections 157.205, 157.212 and 157.216 of the Commission's Regulations under the Natural Gas Act (18 CFR 157.205, 157.212 and 157.216) for authorization to operate an upgrade to an existing delivery point in Washington County, Minnesota, under Northern's blanket certificate issued in Docket No. CP82–401–000 pursuant to Section 7 of the Natural Gas Act, all as more fully set forth in the request that is on file with the Commission and open to public inspection.

Northern states that due to extreme winter weather conditions and fear of facility failure, the Hasting #1C TBS was upgraded pursuant to the emergency provisions of Part 284 Subpart I of the Commission's Regulations (emergency regulations) to accommodate emergency natural gas deliveries for Minnegasco, a Division of NorAm Energy Corp. (Minnegasco). This upgrading assured the protection of 2,310 residential and commercial customers served by this station. On January 16, 1997, Minnegasco filed its 48-hour report as required by Section 284.270(b) of the Commission's Regulations. The upgrading included the replacement of the existing meter and appurtenant facilities (e.g., meter run and piping) with larger facilities. The facilities constructed under the emergency regulations and costing $32,000 will be paid for by Minnegasco in accordance with Section 284.264(a)(6)(ii) of the Commission's Regulations. Northern states that service is being provided to Minnegasco pursuant to currently effective throughput service agreement(s). Northern's proposed accounting entries will reflect the retirement of the meter and appurtenant facilities associated with the upgrade facilities.

Northern states that the total volumes to be delivered to Minnegasco after the request do not exceed the total volumes authorized prior to the request. Northern states that the proposed activity is not prohibited by its existing tariff and that it has sufficient capacity to accommodate the upgraded facilities without detriment or disadvantage to Northern's other customers.

Any person or the Commission's staff may, within 45 days after issuance of the instant notice by the Commission, file pursuant to Rule 214 of the Commission's Procedural Rules (18 CFR 385.214) a motion to intervene or notice of intervention and pursuant to Section 157.205 of the Regulations under the Natural Gas Act (18 CFR 157.205) a protest to the request. If no protest is filed within the time allowed therefor, the proposed activity shall be deemed to be authorized effective the day after the time allowed for filing a protest. If a protest is filed and not withdrawn within 30 days after the time allowed for filing a protest, the instant request shall be treated as an application for authorization pursuant to Section 7 of the Natural Gas Act.

Lois D. Cashell,

Secretary.

[FR Doc. 97–3288 Filed 2–10–97; 8:45 am]

BILLING CODE 6717–01–M

[Docket No. RP97–247–000]

Northern Natural Gas Company; Notice of Proposed Changes in FERC Gas Tariff

February 5, 1997.

Take notice that on January 31, 1997, Northern Natural Gas Company (Northern), tendered for filing to become part of Northern's FERC Gas Tariff, Fifth Revised Volume No. 1, the following tariff sheets proposed to become effective on April 1, 1997:

Second Revised Sheet No. 257

Second Revised Sheet No. 259
Second Revised Sheet No. 260

Northern is filing to eliminate acceptance of facsimiles in the nomination process under the April 1, 1997 GISB timeline. However, Northern requests authority to waive the proposed tariff provision eliminating facsimile nominations during a four-month implementation period from April 1, 1997 through July 31, 1997, provided the nomination is received by Northern by 10:00 a.m. CCT for transportation that will occur on Northern at 9:00 a.m. CCT on the following gas day.

Northern states that copies of the filing were served upon Northern's customers and interested State Commissions.

Any person desiring to be heard or to protest said filing should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with Sections 385.214 and 385.211 of the Commission's Rules and Regulations. All such petitions or protests must be filed on or before in accordance with Section 154.210 of the Commission's Regulations. Protests will be considered by the Commission in determining the appropriate action to be taken but will not serve to make protestant a party 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 inspection.

Lois D. Cashell,

Secretary.

[FR Doc. 97–3299 Filed 2–10–97; 8:45 am]

BILLING CODE 6717–01–M

[Docket No. RP97–248–000]

Northern Natural Gas Company; Notice of Proposed Changes in FERC Gas Tariff

February 5, 1997.

Take notice that on January 31, 1997, Northern Natural Gas Company (Northern), tendered for filing to become part of Northern's F.E.R.C. Gas Tariff, Fifth Revised Volume No. 1 and original Volume No. 2 the following tariff sheets, proposed to be effective March 1, 1997:

Fifth Revised Volume No. 1

32 Revised Sheet No. 50
32 Revised Sheet No. 51
13 Revised Sheet No. 52
32 Revised Sheet No. 53

Original Volume No. 2

152 Revised Sheet No. 1C
27 Revised Sheet No. 1C.a

In this filing, Northern states that it is seeking to recover costs relating to take-or-pay, pricing or other contract provisions, and buyout, buydown or reformation costs pursuant to the Commission's Order No. 528.

Northern states that copies of the filing were served upon the Company's customers and interested State Commissions.

Any person desiring to be heard or to protest said filing should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C., 20426, in accordance with Section 385.214 and 385.211 of the Commission's Rules and Regulations. All such motions or protests must be filed in accordance with Section 154.210 of the Commission's Regulations. Protests will be considered by the Commission in determining the appropriate action to be taken in this proceeding, but will not serve to make protestant a party 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. 97–3300 Filed 2–10–97; 8:45 am]

BILLING CODE 6717–01–M

[Project No. 1927]

Pacificorp; Notice of Authorization for Continued Project Operation

February 5, 1997.

On January 30, 1995, Pacificorp, licensee for the North Umpqua Project No. 1927, filed an application for a new or subsequent license pursuant to the Federal Power Act (FPA) and the Commission's regulations thereunder. Project No. 1927 is located on the North Umpqua River in Douglas County, Oregon.

The license for Project No. 1927 was issued for a period ending January 29, 1997. Section 15(a)(1) of the FPA, 16 U.S.C. 808(a)(1), requires the Commission, at the expiration of a license term, to issue from year to year an annual license to the then licensee under the terms and conditions of the prior license until a new license is issued, or the project is otherwise disposed of as provided in Section 15 or any other applicable section of the FPA. If the project's prior license waived the applicability of Section 15 of the FPA, then, based on Section 9(b) of the Administrative Procedure Act, 5 U.S.C. 558(c), and as set forth at 18 CFR 16.21(a), if the licensee of such project has filed an application for a subsequent license, the licensee may continue to operate the project in accordance with the terms and conditions of the license after the minor or minor part license expires, until the Commission acts on its application. If the licensee of such a project has not filed an application for a subsequent license, then it may be required, pursuant to 18 CFR 16.21(b), to continue project operations until the Commission issues someone else a license for the project or otherwise orders disposition of the project.

If the project is subject to Section 15 of the FPA, notice is hereby given that an annual license for Project No. 1927 is issued to Pacificorp for a period effective January 30, 1997, through January 29, 1998, or until the issuance of a new license for the project or other disposition under the FPA, whichever comes first. If issuance of a new license (or other disposition) does not take place on or before January 29, 1998, notice is hereby given that, pursuant to 18 CFR 16.18(c), an annual license under Section 15(a)(1) of the FPA is renewed automatically without further order or notice by the Commission, unless the Commission orders otherwise.

If the project is not subject to Section 15 of the FPA, notice is hereby given that Pacificorp is authorized to continue operation of the North Umpqua Project No. 1927 until such time as the Commission acts on its application for subsequent license.

Lois D. Cashell,

Secretary.

[FR Doc. 97–3292 Filed 2–10–97; 8:45 am]

BILLING CODE 6717–01–M

[Docket No. CP94–207–003]

Southern California Gas Company; Notice of Amendment

February 5, 1997.

Take notice that on January 31, 1997, Southern California Gas Company (SoCal), located at 555 West Fifth Street, Los Angeles, California 90013–1011, filed an amendment in Docket No. CP94–207–003, pursuant to Section 3 of the Natural Gas Act (NGA) and Part 153 of the Commission's Regulations under the NGA, seeking to further amend the previously amended Section 3 authorization and the amended Presidential Permit, both issued May 22, 1995, to reflect a change in the location of pipeline and metering facilities it proposes to construct at the international boundary of the United States of America and Mexico.

Specifically, SoCal now seeks to amend the previous authorization in order to site the border-crossing facilities 1.3 miles west of the previously authorized export point. The revised border-crossing facilities would consist of a meter station and 600 feet of 16-inch diameter pipe running from the meter station to the international boundary.[1] According to SoCal, the proposed pipeline facilities will have the capacity to meet the expected demand of 40 MMcf of natural gas per day in the year 2000, although only 10 MMcf of natural gas per day would be exported initially.

SoCal request that such amendments be granted no later than March 1, 1997, to permit the economic, environmental and safety benefits of natural gas to be enjoyed in Mexicali, Mexico and the United States/Mexico border area at the earliest possible date, in order to provide the proposed service by July 15, 1997.0

Any person desiring to be heard or to make any protest with reference to said petition should, on or before February 26, 1997, file with the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, DC 20426, a petition to intervene or protest in accordance with the requirements of the Commission's Rules of Practice and Procedure (18 CFR 385.211 or 385.214) and the Regulations under the NGA (18 CFR 157.10). All protests filed with the Commission will be considered by it in determining the appropriate action to be taken but will not serve to make the protestants parties to the proceeding. Any person wishing to become a party to a proceeding or to participate as a party in any hearing therein must file a petition to intervene in accordance with the Commission's Rules. Any person who has heretofore filed need not filed again.

Lois D. Cashell,

Secretary.

[FR Doc. 97–3286 Filed 2–10–97; 8:45 am]

BILLING CODE 6717–01–M

[Docket No. RP97–243–000]

Southern Natural Gas Company; Notice of GSR Revised Tariff Sheets

February 5, 1997.

Take notice that on January 31, 1997, Southern Natural Gas Company (Southern) tendered for filing as part of its FERC Gas Tariff, Seventh Revised Volume No. 1, the following tariff sheets with the proposed effective date of February 1, 1997:

Tariff Sheets Applicable to Contesting Parties

Twenty First Revised Sheet No. 14
Forty Third Revised Sheet No. 15
Twenty First Revised Sheet No. 16
Forty Third Revised Sheet No. 17
Twenty Eighth Revised Sheet No. 29

Southern submits the revised tariff sheets to its FERC Gas Tariff, Seventh Revised Volume No. 1, to reflect a change in its FT/FT–NN GSR Surcharge, due to the removal of a credit for interim firm transportation provided during December 1996 and an increase in GSR billing units effective February 1, 1997.

Southern states that copies of the filing were served upon all parties listed on the official service list compiled by the Secretary in these proceedings.

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 Sections 385.214 and 385.211 of the Commission's Rules of Practice and Procedure. All such motions or protests must be filed in accordance with Section 154.210 of the Commission's Regulations. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a motion to intervene. Copies of Southern's filing are on file with the Commission and are available for public inspection.

Lois D. Cashell,

Secretary.

[FR Doc. 97–3295 Filed 2–10–97; 8:45 am]

BILLING CODE 6717–01–M

[Docket No. RP96–352–005]

Transwestern Pipeline Company; Notice of Filing

February 5, 1997.

Take notice that on February 3, 1997, Transwestern Pipeline Company (Transwestern) tendered for filing its report concerning the Pilot Program.

Transwestern states that the purpose of this filing is to comply with the Commission's December 31, 1996, which stated that by February 1, 1997, Transwestern must make a filing to propose details concerning the reporting of Pilot Program data.

Transwestern states that copies of the filing were served on its gas utility customers, interested state commissions, and all parties to this proceeding.

Any person desiring to protest said filing should file a protest with the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C., 20426, in accordance with Rule 211 of the Commission's Rules of Practice and Procedure. All such protests should be filed on or before February 12, 1997. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Copies of this filing are on file with the Commission and are available for public inspection.

Lois D. Cashell,

Secretary.

[FR Doc. 97–3294 Filed 2–10–97; 8:45 am]

BILLING CODE 6717–01–M

[Docket No. RP92–122–005]

Trunkline LNG Company; Notice of Annual Reconciliation Report

February 5, 1997.

Take notice that on January 31, 1997 Trunkline LNG Company (TLC) tendered for filing working papers reflecting its third annual reconciliation report.

TLC states that the information is submitted pursuant to Article VIII, Section 4 of the Stipulation and Agreement in the above-captioned proceeding which requires TLC to submit, on an annual basis, a report of the cost and revenues which result from the operation of Rate Schedule PLNG–2 dated June 26, 1987, as amended December 1, 1989.

TLC states that copies of this filing have been served on all participants in the proceeding and applicable state regulatory agencies.

Any person desiring to protest said filing should file a protest with the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426, in accordance with Section 385.211 of the Commission's Rules and Regulations. All such protest must be filed on or before February 12, 1997. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Copies of this filing are on file with the Commission and are available for public inspection in the Public Reference Room.

Lois D. Cashell,

Secretary.

[FR Doc. 97–3293 Filed 2–10–97; 8:45 am]

BILLING CODE 6717–01–M

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[1] The location of the new proposed border crossing is in Section 14, Township 17 South, Range 15 East, Imperial County, California.

[Docket No. CP96–288–001]

Wyoming Interstate Company, Ltd.; Notice of Application

February 5, 1997.

Take notice that on January 30, 1997, Wyoming Interstate Company, Ltd. (WIC), P.O. Box 1087, Colorado Springs, Colorado 80944, filed in Docket No. CP96–288–001 a petition to amend its original certificate application which was the subject of the Preliminary Determination on Non-Environmental Issues issued September 11, 1996, pursuant to Section 7(c) of the Natural Gas Act, as amended, all as more fully set forth in the application on file with the Commission and open to public inspection.

On March 29, 1996, Wyoming Interstate Company, Ltd. (WIC) filed an application in Docket No. CP96–288–000, to construct and operate facilities to increase WIC's system capacity, which included a new compressor station planned to consist of two 1,000 hp compressor reciprocating units (Rawlins Jumper Station). On September 11, 1996, the Commission issued a Preliminary Determination on Non-Environmental Issues and Declaratory Order in this docket.

WIC states that in its original application final selection of compression had not been selected. WIC states that it made a final determination on the selection of the Rawlins units in May 1996, selecting two 1,200 hp units instead of approximately 2,000 hp for this station as in the original application. It is asserted that all other compressors selected were the same as filed in the original application. WIC avers that the selected units are superior based on: (1) lowest bid received, (2) economy of spare parts by matching the units for the Baxter station (3) units that provide nitrogen emission rates as low as any of the units offered, and (4) having the best specific fuel rate of the units offered.

WIC further avers that the subject units would have no material effect on the cost estimate or on the Revenue, Expenses and Income as filed in the original application in Docket No. CP96–288–000.

Any person desiring to be heard or to make any protest with reference to said application should on or before February 12, 1997, file with the Federal Energy Regulatory Commission, Washington, D.C. 20426, a motion to intervene or a protest in accordance with the requirements of the Commission's Rules of Practice and Procedure (18 CFR 385.214 or 385.211) and the Regulations under the Natural Gas Act (18 CFR 157.10). All protests filed with the Commission will be considered by it in determining the appropriate action to be taken but will not serve to make the protestants parties to the proceeding. Any person wishing to become a party to a proceeding or to participate as a party in any hearing therein must file a motion to intervene in accordance with the Commission's Rules.

Take further notice that, pursuant to the authority contained in and subject to the jurisdiction conferred upon the Federal Energy Regulatory Commission by Sections 7 and 15 of the Natural Gas Act and the Commission's Rules of Practice and Procedure, a hearing will be held without further notice before the Commission or its designee on this application if no motion to intervene is filed within the time required herein, if the Commission on its own review of the matter finds that a grant of the certificate is required by the public convenience and necessity. If a motion for leave to intervene is timely filed, or if the Commission on its own motion believes that a formal hearing is required, further notice of such hearing will be duly given.

Under the procedure herein provided for, unless otherwise advised, it will be unnecessary for WIC to appear or be represented at the hearing.

Lois D. Cashell,

Secretary.

[FR Doc. 97–3287 Filed 2–10–97; 8:45 am]

BILLING CODE 6717–01–M

[Docket No. ER97–4–000, et al.]

Florida Power & Light Company, et al.; Electric Rate and Corporate Regulation Filings

February 5, 1997.

Take notice that the following filings have been made with the Commission:

1. Florida Power & Light Company

[Docket No. ER97–4–000]

Take notice that on January 27, 1997, Florida Power & Light Company tendered for filing an amendment in the above-referenced docket.

Comment date: February 19, 1997, in accordance with Standard Paragraph E at the end of this notice.

2. American Ref-Fuel Company of Delaware County, L.P. and Delaware Resource Management, Inc.

[Docket No. EC97–11–000]

Take notice that on January 17, 1997, American Ref-Fuel Company of Delaware County, L.P. (''ARC'') and Delaware Resource Management, Inc. (''DRMI'') (collectively ''Applicants'') submitted for filing with the Federal Energy Regulatory Commission (''Commission'') pursuant to 18 CFR 33, a ''Joint Petition of American Ref-Fuel Company of Delaware County, L.P. and Delaware Resource Management, Inc. for an Order Under Section 203 of the Federal Power Act Approving the Transfer of Jurisdictional Assets.''

Applicants have requested that the Commission by order issued no later than March 1, 1997: (1) Authorize DRMI to dispose of its interest as lessee in certain electric facilities located in the City of Chester, Delaware County, Pennsylvania valued in excess of $50,000 and to assign certain wholesale power sales contracts subject to the jurisdiction of the Commission, and for ARC to acquire each of the same; and (2) grant ARC waivers of certain Commission Regulations.

Comment date: February 24, 1997, in accordance with Standard Paragraph E at the end of this notice.

3. Florida Power & Light Company

[Docket No. ER97–524–000]

Take notice that on January 27, 1997, Florida Power & Light Company tendered for filing an amendment in the above-referenced docket.

Comment date: February 19, 1997, in accordance with Standard Paragraph E at the end of this notice.

4. Florida Power & Light Company

[Docket No. ER97–531–000]

Take notice that on January 27, 1997, Florida Power & Light Company tendered for filing an amendment in the above-referenced docket.

Comment date: February 19, 1997, in accordance with Standard Paragraph E at the end of this notice.

5. Boston Edison Company

[Docket No. ER97–598–000]

Take notice that on January 14, 1997, Boston Edison Company tendered for filing an amendment in the above-referenced docket.

Comment date: February 19, 1997, in accordance with Standard Paragraph E at the end of this notice.

6. Murphy Oil USA

[Docket No. ER97–610–000]

Take notice that on January 23, 1997, Murphy Oil USA tendered for filing an amendment in the above-referenced docket.

Comment date: February 19, 1997, in accordance with Standard Paragraph E at the end of this notice.

7. Portland General Electric Company

[Docket No. ER97–653–000]

Take notice that on January 17, 1997, Portland General Electric Company (PGE) tendered for filing amended Service Agreements for those transmission customers either receiving or planning to receive Short-Term Firm Point-to-Point Transmission Service under PGE's open access transmission service tariff, PGE–8 (OA96–137–000).

Pursuant to 18 CFR 35.11 and the Commission's order issued July 30, 1993 (Docket No. PL93–2–002), PGE respectfully requests the Commission grant a waiver of the notice requirements of 18 CFR 35.3 to allow the amended Page 3 of the previously executed Firm Point-to-Point Service Agreements to become effective as of January 15, 1997.

A copy of this filing was caused to be served upon the entities listed in Attachment 3 to this filing letter.

Comment date: February 19, 1997, in accordance with Standard Paragraph E at the end of this notice.

8. UtiliCorp United, Inc.

[Docket No. ER97–667–000]

Take notice that on January 24, 1997, UtiliCorp United, Inc. tendered for filing an amendment in the above-referenced docket.

Comment date: February 19, 1997, in accordance with Standard Paragraph E at the end of this notice.

9. Cinergy Services, Inc.

[Docket No. ER97–721–000]

Take notice that on January 27, 1997, Cinergy Services, Inc. tendered for filing an amendment in the above-referenced docket.

Comment date: February 19, 1997, in accordance with Standard Paragraph E at the end of this notice.

10. Cinergy Services, Inc.

[Docket No. ER97–722–000]

Take notice that on January 27, 1997, Cinergy Services, Inc. tendered for filing an amendment in the above-referenced docket.

Comment date: February 19, 1997, in accordance with Standard Paragraph E at the end of this notice.

11. Cinergy Services, Inc.

[Docket No. ER97–723–000]

Take notice that on January 27, 1997, Cinergy Services, Inc. tendered for filing an amendment in the above-referenced docket.

Comment date: February 19, 1997, in accordance with Standard Paragraph E at the end of this notice.

12. NIPSCO Energy Services, Inc.

[Docket Nos. ER97–763–000, ER97–764–000 and ER97–768–000]

Take notice that on January 21, 1997, NIPSCO Energy Services, Inc., tendered for filing a Notice of Withdrawal in the above-referenced dockets.

Comment date: February 19, 1997, in accordance with Standard Paragraph E at the end of this notice.

13. Florida Power & Light Company

[Docket No. ER97–815–000]

Take notice that on January 27, 1997, Florida Power & Light Company tendered for filing an amendment in the above-referenced docket.

Comment date: February 19, 1997, in accordance with Standard Paragraph E at the end of this notice.

14. NESI Power Marketing, Inc.

[Docket No. ER97–841–000]

Take notice that on January 28, 1997, NESI Power Marketing, Inc. (NESI PM) filed an amendment in the above-referenced docket.

Copies of the filing were served on Indiana Regulatory Commission and the Indiana Office of Utility Consumer Counselor.

Comment date: February 19, 1997, in accordance with Standard Paragraph E at the end of this notice.

15. Cinergy Services, Inc.

[Docket No. ER97–858–000]

Take notice that on January 23, 1997, Cinergy Services, Inc. tendered for filing an amendment in the above-referenced docket.

Comment date: February 19, 1997, in accordance with Standard Paragraph E at the end of this notice.

16. Cinergy Services, Inc.

[Docket No. ER97–930–000]

Take notice that on January 27, 1997, Cinergy Services, Inc. tendered for filing an amendment in the above-referenced docket.

Comment date: February 19, 1997, in accordance with Standard Paragraph E at the end of this notice.

17. Pennsylvania Power & Light Company

[Docket No. ER97–1026–000]

Take notice that on January 10, 1997, Pennsylvania Power & Light Company tendered for filing an amendment in the above-referenced docket.

Comment date: February 19, 1997, in accordance with Standard Paragraph E at the end of this notice.

18. Boston Edison Company

[Docket No. ER97–1376–000]

Take notice that on January 23, 1997, Boston Edison Company (Boston Edison), tendered for filing a Service Agreement under Original Volume No. 8, FERC Order 888 Tariff (Tariff) for Baltimore Gas & Electric Company (Baltimore). Boston Edison requests that the Service Agreement become effective as of January 1, 1997.

Boston Edison states that it has served a copy of this filing on Baltimore and the Massachusetts Department of Public Utilities.

Comment date: February 19, 1997, in accordance with Standard Paragraph E at the end of this notice.

19. Central Maine Power Company

[Docket No. ER97–1377–000]

Take notice that on January 23, 1997, Central Maine Power Company (CMP), tendered for filing an executed service agreement and a certificate of concurrence for sale of capacity and/or energy entered into with Baltimore Gas and Electric Company. Service will be provided pursuant to CMP's Power Sales Tariff, designated rate schedule CMP—FERC Electric Tariff, Original Volume No. 2, as supplemented.

Comment date: February 19, 1997, in accordance with Standard Paragraph E at the end of this notice.

20. Cinergy Services, Inc.

[Docket No. ER97–1378–000]

Take notice that on January 27, 1997, Cinergy Services, Inc. (Cinergy), tendered for filing a service agreement under Cinergy's Non-Firm Power Sales Standard Tariff (the Tariff) entered into between Cinergy and Louisville Gas and Electric Company.

Cinergy and Louisville Gas and Electric Company are requesting an effective date of January 27, 1997.

Comment date: February 19, 1997, in accordance with Standard Paragraph E at the end of this notice.

21. Kansas City Power & Light Company

[Docket No. ER97–1379–000]

Take notice that on January 27, 1997, Kansas City Power & Light Company (KCPL), tendered for filing a Service Agreement dated January 7, 1997, between KCPL and Wisconsin Electric Power Company (Wisconsin). KCPL proposes an effective date of January 7, 1997, and requests waiver of the Commission's notice requirement. This Agreement provides for the rates and charges for Non-Firm Transmission Service between KCPL and Wisconsin.

In its filing, KCPL states that the rates included in the above-mentioned Service Agreement are KCPL's rates and charges in the compliance filing to FERC Order 888 in Docket No. OA96–4–000.

Comment date: February 19, 1997, in accordance with Standard Paragraph E at the end of this notice.

22. Rochester Gas and Electric Corporation

[Docket No. ER97–1380–000]

Take notice that on January 27, 1997, Rochester Gas and Electric Corporation (RG&E) filed a Service Agreement between RG&E and UtiliCorp United Inc. (Customer). This Service Agreement specifies that the Customer has agreed to the rates, terms and conditions of the RG&E open access transmission tariff filed on July 9, 1996 in Docket No. OA96–141–000.

RG&E requests waiver of the Commission's sixty (60) day notice requirements and an effective date of January 13, 1997 for UtiliCorp United Inc. Service Agreement. RG&E has served copies of the filing on the New York State Public Service Commission and on the Customer.

Comment date: February 19, 1997, in accordance with Standard Paragraph E at the end of this notice.

23. Rochester Gas and Electric Corporation

[Docket No. ER97–1381–000]

Take notice that on January 27, 1997, Rochester Gas and Electric Corporation (RG&E) filed a Service Agreement between RG&E and the Aquila Power Corporation (Customer). This Service Agreement specifies that the Customer has agreed to the rates, terms and conditions of the RG&E open access transmission tariff filed on July 9, 1996 in Docket No. OA96–141–000.

RG&E requests waiver of the Commission's sixty (60) day notice requirements and an effective date of January 13, 1997 for the Aquila Power Corporation Service Agreement. RG&E has served copies of the filing on the New York State Public Service Commission and on the Customer.

Comment date: February 19, 1997, in accordance with Standard Paragraph E at the end of this notice.

24. New York State Electric & Gas Corporation

[Docket No. ER97–1382–000]

Take notice that New York State Electric & Gas Corporation (''NYSEG'') on January 28, 1997, tendered for filing pursuant to § 35.13 of the Federal Energy Regulatory Commission's Rules of Practice and Procedure, 18 CFR 35.13, a supplement (''Supplement'') to Rate Schedule FERC No. 135 (''Rate Schedule''). The Supplement revises a power sales agreement (''Agreement'') between NYSEG and Vermont Public Power Supply Authority (''VPPSA'') to include certain municipalities that may transact under the Agreement.

NYSEG requests that the Supplement be deemed effective as of February 23, 1995, the effective date of the Agreement. To the extent required to give effect to the Supplement, NYSEG requests waiver of the notice requirements pursuant to § 35.11 of the Commission's Regulations, 18 CFR 35.11.

NYSEG served copies of the filing upon the New York State Public Service Commission, VPPSA, the Vermont Public Service Board, Town of Hardwick Electric Department, Village of Ludlow Electric Light Department, Village of Hyde Park Electric Department, Village of Stowe Water & Light Department, Village of Enosburg Falls Electric Light Department, Village of Jacksonville Electric Department, Village of Lyndonville Electric Department, Village of Swanton Village Electric Department, Village of Morrisville Electric Department.

Comment date: February 19, 1997, in accordance with Standard Paragraph E at the end of this notice.

25. Delmarva Power & Light Company

[Docket No. ER97–1383–000]

Take notice that on January 27, 1997, Delmarva Power & Light Company (Delmarva), tendered for filing executed umbrella service agreements with Allegheny Electric Cooperative, Inc., Coastal Electric Services Company, PanEnergy Trading and Market Services, L.L.C., PECO Energy Company, Public Service Electric and Gas Company under Delmarva's market rate sales tariff, FERC Electric Tariff, Original Volume No. 14, filed by Delmarva in Docket No. ER96–2571–000.

Comment date: February 19, 1997, in accordance with Standard Paragraph E at the end of this notice.

26. Potomac Electric Power Company

[Docket No. ER97–1384–000]

Take notice that on January 24, 1997, Potomac Electric Power Company (Pepco), tendered for filing service agreements pursuant to Pepco FERC Electric Tariff, Original Volume No. 4, entered into between Pepco and The Power Company of America, LP, LG&E Power Marketing Inc., and Southern Energy Marketing Inc. An effective date of January 24, 1997 for these service agreements, with waiver of notice, is requested.

Comment date: February 19, 1997, in accordance with Standard Paragraph E at the end of this notice.

27. Central Maine Power Company

[Docket No. ER97–1385–000]

Take notice that on January 27, 1997, Central Maine Power Company (CMP), tendered for filing a service agreement for Non-Firm Point-to-Point Transmission service entered into with Plum Street Energy Marketing, Inc. Service will be provided pursuant to CMP's Open Access Transmission Tariff, designated rate schedule CMP—FERC Electric tariff, Original Volume No. 3, as supplemented.

Comment date: February 19, 1997, in accordance with Standard Paragraph E at the end of this notice.

28. Consumers Energy Company

[Docket No. ER97–1386–000]

Take notice that on January 27, 1997, Consumers Energy Company (Consumers), tendered for filing a Network Integration Transmission Service Agreement and a Network Operating Agreement in unexecuted form with Edison Sault Electric Company. A copy of the filing was served upon Edison Sault Electric Company and the Michigan Public Service Commission.

Comment date: February 19, 1997, in accordance with Standard Paragraph E at the end of this notice.

29. PacifiCorp

[Docket No. ER97–1387–000]

Take notice that on January 27, 1997, PacifiCorp, tendered for filing in accordance with 18 CFR 35 of the Commission's Rules and Regulations, Non-Firm Transmission Service Agreements with Aquila Power Corp., Cinergy Services, Inc., Coral Power, L.L.C., Enron Power Marketing, Inc., Federal Energy Sales, Inc., Pacific Gas & Electric Company, PanEnergy Power Services, Inc., Public Service Company of Colorado, Public Service Company of New Mexico, UtiliCorp United and Western Power Services, Inc. under PacifiCorp's FERC Electric Tariff, Original Volume No. 11.

Copies of this filing were supplied to the Washington Utilities and Transportation Commission and the Public Utility Commission of Oregon.

A copy of this filing may be obtained from PacifiCorp's Regulatory Administration Department's Bulletin Board System through a personal computer by calling (503) 464–6122 (9600 baud, 8 bits, no parity, 1 stop bit).

Comment date: February 19, 1997, in accordance with Standard Paragraph E at the end of this notice.

30. Interstate Power Company

[Docket No. ER97–1388–000]

Take notice that on January 27, 1997, Interstate Power Company (IPW), tendered for filing a Transmission Service Agreement between IPW and Duke/Louis Dreyfus. Under the Transmission Service Agreement, IPW will provide non-firm point-to-point transmission service to Duke/Louis Dreyfus.

Comment date: February 19, 1997, in accordance with Standard Paragraph E at the end of this notice.

31. Interstate Power Company

[Docket No. ER97–1389–000]

Take notice that on January 27, 1997, Interstate Power Company (IPW), tendered for filing a Transmission Service Agreement between IPW and Heartland Energy Services (Heartland). Under the transmission Service Agreement, IPW will provide non-firm point-to-point transmission service to Heartland.

Comment date: February 19, 1997, in accordance with Standard Paragraph E at the end of this notice.

32. Wisconsin Electric Power Company

[Docket No. ER97–1390–000]

Take notice that on January 27, 1997, Wisconsin Electric Power Company (Wisconsin Electric), tendered for filing three firm transmission service agreements (TSAs) applicable for service to Oconto Electric Cooperative (OEC). Wisconsin Electric respectfully requests waiver of the Commission's notice requirements to allow an effective date of May 1, 1996, for the first two agreements, and January 1, 1997 for the third TSA, which covers service in January and February 1997. Wisconsin Electric acknowledges the lateness of its filing respecting the first two TSAs and has calculated the time value of money penalty associated with such tardiness, which will be refunded to its transmission service customer. A calculation of the distribution service charges associated with service at 34.5 Kv is also included with Wisconsin Electric's submittal.

Copies of the filing have been served on OEC, Wisconsin Public Service Corporation, Wisconsin Power and Light Company, and the Public Service Commission of Wisconsin.

Comment date: February 19, 1997, in accordance with Standard Paragraph E at the end of this notice.

33. Illinois Power Company

[Docket No. ER97–1391–000]

Take notice that on January 27, 1997, Illinois power Company (Illinois Power), 500 South 27th Street, Decatur, Illinois 62526, tendered for filing a Power Sales Tariff, Service Agreement under which Southern Indiana Gas & Electric Company will take service under Illinois Power Company's Power Sales Tariff. The agreements are based on the Form of Service Agreement in Illinois Power's tariff.

Illinois Power has requested an effective date of January 15, 1997.

Comment date: February 19, 1997, in accordance with Standard Paragraph E at the end of this notice.

34. Florida Keys Electric Cooperative Association, Inc.

[Docket No. ER97–1392–000]

Take notice that on January 27, 1997, Florida Keys Electric Cooperative Association, Inc. (FKEC), tendered for filing the Long Term Joint Investment Transmission Agreement (''Agreement'') between FKEC and the City Electric System, Key West, Florida (''CES'').

The Agreement provides for either Party to use the unused capacity of the other Party by paying the other Party a non-firm rate. In the Commission's filing in Docket OA96–220–000, FKEC was found to be a public utility under the jurisdiction of the Federal Energy Regulatory Commission and was directed to file this Agreement.

A copy of this filing has been served on CES and the Florida Public Service Commissioner.

Comment date: February 19, 1997, in accordance with Standard Paragraph E at the end of this notice.

35. Duke Power Company

[Docket No. ER97–1393–000]

Take notice that on January 27, 1997, Duke Power Company (Duke), tendered for filing a Transmission Service Agreement (TSA) between Duke, on its own behalf and acting as agent for its wholly-owned subsidiary, Nantahala Power and Light Company, and Federal Energy Sales, Inc. (Federal Energy). Duke states that the TSA sets out the transmission arrangements under which Duke will provide Federal Energy non-firm point-to-point transmission service under its Pro Forma Open Access Transmission Tariff.

Comment date: February 19, 1997, in accordance with Standard Paragraph E at the end of this notice.

36. Non-Replacement Energy Agreement Between PJM Companies and Coral Power, L.L.C.

[Docket No. ER97–1394–000]

Take notice that on January 27, 1997, the Pennsylvania-New Jersey-Maryland (PJM) Interconnection Association filed, on behalf of the signatories to the PJM Agreement, a Non-Replacement Energy Agreement between Coral Power, L.L.C. and Public Service Electric and Gas Company, PECO Energy Company, Pennsylvania Power & Light Company, Baltimore Gas and Electric Company, Pennsylvania Electric Company, Metropolitan Edison Company, Jersey Central Power and Light Company, Potomac Electric Power Company, Atlantic City Electric Company, and Delmarva Power & Light Company. The PJM Companies request an effective date of February 14, 1997.

Comment date: February 19, 1997, in accordance with Standard Paragraph E at the end of this notice.

37. Upper Peninsula Power Company

[Docket No. ER97–1395–000]

Take notice that on January 27, 1997, Upper Peninsula Power Company (UPPCO), tendered for filing a Notice of Cancellation of a Dispatch Agreement dated December 8, 1987 between UPPCO and Wisconsin Electric Power Company. UPPCO stated that it has recently discontinued dispatch operations at its dispatch center in Ishpeming, Michigan, and requests that the Commission waive § 35.3 of its regulations under the Federal Power Act in order to permit the Notice of Cancellation to be made effective as of October 15, 1996.

Comment date: February 19, 1997, in accordance with Standard Paragraph E at the end of this notice.

38. Charles W. Rainger

[Docket No. ID–2355–001]

Take notice that on December 23, 1996, Charles W. Rainger, Applicant tendered for filing an application under Section 305(b) to hold the following positions:

Director, Ohio Edison Company
Director, National City Bank

Comment date: February 19, 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. 97–3337 Filed 2–10–97; 8:45 am]

BILLING CODE 6717–01–P

[Docket No. CP96–517–000]

Algonquin LNG, Inc.; Notice of Availability of the Environmental Assessment for the Proposed ALNG Modifications Project

February 5, 1997.

The staff of the Federal Energy Regulatory Commission (FERC or Commission) has prepared an environmental assessment (EA) on the natural gas pipeline facilities proposed by Algonquin LNG, Inc. (ALNG) in the above-referenced docket.

The EA was prepared to satisfy the requirements of the National Environmental Policy Act. The staff concludes that approval of the proposed project, with appropriate mitigating measures, would not constitute a major Federal action significantly affecting the quality of the human environment.

The EA assesses the potential environmental effects of the proposed modification, construction and operation at an existing liquefied natural gas (LNG) storage facility and the construction and operation of associated pipeline facilities including:

- A liquefaction facility with a capacity of 40,000 million British thermal units per day (MMbtu/d);
- LNG pumps and vaporizers with a capacity of 375,000 MMbtu/d;
- Boil-off gas compressors;
- 0.92 mile of 20-inch-diameter pipeline;
- 0.25 mile of 10.75-inch-diameter pipeline;
- Metering facilities;
- Inspection of the existing 600,000-barrel LNG storage tank, and install new instrumentation; and
- Miscellaneous construction including water/glycol system, feed gas compressors, odorant injection, control systems, and fire protection system additions.

The purpose of the proposed facilities is to provide natural gas liquefaction, LNG storage, LNG trucking, and LNG vaporization services on a firm and interruptible, open access, blanket basis.

Any person wishing to comment on the EA may do so. Written comments mut be received on or before Marcy 7, 1997, reference Docket No. CP96–517–000, and be addressed to: Office of the Secretary, Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, DC 20426.

Comments will be considered by the Commission but will not serve to make the commentor a party to the proceeding. Any person seeking to become a party to the proceeding must file a motion to intervene pursuant to Rule 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.214).

The date for filing timely motions to intervene in this proceeding has passed. Therefore, parties now seeking to file late interventions must show good cause, as required by section 385.214(b)(3), why this time limitation should be waived. Environmental issues have been viewed as good cause for late intervention. You do not need intervenor status to have your comments considered.

The EA has been placed in the public files of the FERC and is available for public inspection at: Federal Energy Regulatory Commission, Public Reference and Files Maintenance Branch, 888 First Street, N.E., Room 2A–1, Washington, DC 20426, (202) 208–1371.

Copies of the EA have been mailed to Federal, state, and local agencies, public interest groups, interested individuals, newspapers, and parties to this proceeding. For a limited number of copies of the EA, contact the Public Reference and Files Maintenance Branch identified above.

Lois D. Cashell,

Secretary.

[FR Doc. 97–3289 Filed 2–10–97; 8:45 am]

BILLING CODE 6717–01–M

Office of Hearings and Appeals

Notice of Cases Filed; Week of December 9 Through December 13, 1996

During the Week of December 9 through December 13, 1996, the appeals, applications, petitions or other requests listed in this Notice were filed with the Office of Hearings and Appeals of the Department of Energy.

Any person who will be aggrieved by the DOE action sought in any of these cases may file written comments on the application within ten days of publication of this Notice or the date of receipt of actual notice, whichever occurs first. All such comments shall be filed with the Office of Hearings and Appeals, Department of Energy, Washington, D.C. 20585–0107.

Dated: February 3, 1997.

George B. Breznay,

Director, Office of Hearings and Appeals.

LIST OF CASES RECEIVED BY THE OFFICE OF HEARINGS AND APPEALS

[Week of December 9 through December 13, 1996]

Date	Name and location of applicant	Case No.	Type of submission
Dec. 9, 1996 ...	Carlos Blanco, Portland, Oregon	VFA–0248	Appeal of an Information Request Denial. If granted: The November 5, 1996 Freedom of Information Request Denial issued by the Bonneville Power Administration would be rescinded, and Carlos Blanco would receive access to certain DOE information.
Dec. 9, 1996 ...	Personnel Security Hearing	VSO–0127	Request for Hearing Under 10 CFR Part 710. If granted: An individual employed by the Department of Energy would receive a hearing under 10 CFR Part 710.
Dec. 10, 1996	Ellisworth-Williams Coop Co. Hardin, Kentucky.	RR272–271	Request for Modification/Rescission in the Crude Oil Refund Proceeding. If Granted: The October 18, 1996 Decision and Order, Case No. RG272–260, issued to Ellisworth-Williams Coop Co. would be modified regarding the firm's Application for Refund submitted in the Crude Oil refund proceeding.

LIST OF CASES RECEIVED BY THE OFFICE OF HEARINGS AND APPEALS—Continued

[Week of December 9 through December 13, 1996]

Date	Name and location of applicant	Case No.	Type of submission
Dec. 12, 1996	Personnel Security Hearing	VSO–0128	Request for Hearing Under 10 CFR Part 710. If granted: An individual employed by the Department of Energy would receive a hearing under 10 CFR Part 710.

[FR Doc. 97–3307 Filed 2–10–97; 8:45 am]

BILLING CODE 6450–01–P

Notice of Cases Filed; Week of December 16 Through December 20, 1996

During the Week of December 16 through December 20, 1996, the appeals, applications, petitions or other requests listed in this Notice were filed with the Office of Hearings and Appeals of the Department of Energy.

Any person who will be aggrieved by the DOE action sought in any of these cases may file written comments on the application within ten days of publication of this Notice or the date of receipt of actual notice, whichever occurs first. All such comments shall be filed with the Office of Hearings and Appeals, Department of Energy, Washington, DC 20585–0107.

Dated: February 3, 1997.

George B. Breznay,

Director, Office of Hearings and Appeals.

LIST OF CASES RECEIVED BY THE OFFICE OF HEARINGS AND APPEALS

[Week of December 16 through December 20, 1996]

Date	Name and location of applicant	Case No.	Type of submission
12/16/96	Gretchen Lee Coles Glen Ellyn, Illinois.	VFA–0251	Appeal of an Information Request Denial. If Granted: The November 7, 1996 Freedom of Information Request Denial issued by Oak Ridge Operations Office would be rescinded, and Gretchen Lee Coles would receive access to certain DOE information.
12/16/96	International Brotherhood of Electrical Workers New Ellenton, South Carolina.	VFA–0250	Appeal of an Information Request Denial. If Granted: The November 8, 1996 Freedom of Information Request Denial issued by Savannah River Operations Office would be rescinded, and the International Brotherhood of Electrical Workers would receive access to certain DOE information.
12/16/96	Marlene Flor Albuquerque, New Mexico.	VFA–0249	Appeal of an Information Request Denial. If Granted: The November 9, 1996 Freedom of Information Request Denial issued by Albuquerque Operations would be rescinded, and Marlene Flor would receive access to certain DOE information.
12/16/96	Personnel Security Review Blue Springs, Missouri.	VSO–0102	Request for Review of Opinion Under 10 C.F.R. Part 710. If Granted: The November 14, 1996 Opinion of the Office of Hearings and Appeals, Case No. VSO–0102, would be reviewed at the request of an individual employed at a contractor of the Department of Energy.
12/17/96	Daniel J. Bruno Washington DC	VFA–0252	Appeal of an Information Request Denial. If Granted: The December 13, 1996 Freedom of Information Request Denial issued by FOIA/Privacy Act Division, Office of the Executive Secretariat would be rescinded, and Daniel J. Bruno would receive access to certain DOE information.
12/18/96	Marlene Flor Albuquerque, New Mexico.	VFA–0253	Appeal of an Information Request Denial. If Granted: The November 22, 1996 Freedom of Information Request Denial issued by the Office of Inspector General would be rescinded, and Marlene Flor would receive access to certain DOE information.
12/19/96	Digital City Communications, Inc. Stockton, CA.	VFA–0254	Appeal of an Information Request Denial. If Granted: The December 6, 1996 Freedom of Information Request Denial issued by the Oakland Operations Office would be rescinded, and Digital City Communications, Inc. would receive access to certain Department of Energy information.

[FR Doc. 97–3308 Filed 2–10–97; 8:45 am]

BILLING CODE 6450–01–P

Notice of Cases Filed; Week of December 23, 1996 Through December 27, 1996

During the Week of December 23 through December 27, 1996, the appeals, applications, petitions or other requests listed in this Notice were filed with the Office of Hearings and Appeals of the Department of Energy.

Any person who will be aggrieved by the DOE action sought in any of these cases may file written comments on the application within ten days of publication of this Notice or the date of receipt of actual notice, whichever occurs first. All such comments shall be filed with the Office of Hearings and Appeals, Department of Energy, Washington, D.C. 20585–0107.

Dated: February 3, 1997.

George B. Breznay,

Director, Office of Hearings and Appeals.

LIST OF CASES RECEIVED BY THE OFFICE OF HEARINGS AND APPEALS

[Week of December 23 through December 27, 1996]

Date	Name and location of applicant	Case No.	Type of submission
12/23/96	Harold Bibeau Troutdale, Oregon	VFA–0255	Appeal of an Information Request Denial. If Granted: The December 4, 1996 Freedom of Information Request Denial issued by the Argonne Group would be rescinded, and Harold Bibeau would receive access to certain DOE information.
12/24/96	Cascade Scientific, Inc. Redmond, Washington.	VFA–0257	Appeal of an Information Request Denial. If Granted: The November 21, 1996 Freedom of Information Request Denial issued by Richland Operations Office would be rescinded, and Cascade Scientific, Inc. would receive access to certain DOE information.
12/24/96	Crooker & Sons, Inc. Santa Barbara, California.	RR272–272	Request for Modification/Rescission in the Crude Oil Refund Proceeding. If Granted: The November 15, 1996 Dismissal, Case No. RG272–918, issued to Crooker & Sons, Inc. would be modified regarding the firm's application for refund submitted in the crude oil refund proceeding.
12/24/96	James R. Hutton, Oak Ridge, Tennessee.	VFA–0256	Appeal of an Information Request Denial. If Granted: The December 6, 1996 Freedom of Information Request Denial issued by Oak Ridge Operations Office would be rescinded, and James R. Hutton would receive access to certain DOE information.
12/24/96	W. Gordon Smith Co. Eden Prairie, Minnesota.	VEE–0037	Exception to the Reporting Requirements. If Granted: W. Gordon Smith Co. would be granted an extension of time in which to file Form EIA–782B Repeller's/Retailer's Monthly Petroleum Product Sales Report.

[FR Doc. 97–3309 Filed 2–10–97; 8:45 am]

BILLING CODE 6450–01–P

Notice of Cases Filed; Week of December 30, 1996 Through January 3, 1997

During the Week of December 30, 1996 through January 3, 1997, the appeals, applications, petitions or other requests listed in this Notice were filed with the Office of Hearings and Appeals of the Department of Energy.

Any person who will be aggrieved by the DOE action sought in any of these cases may file written comments on the application within ten days of publication of this Notice or the date of receipt of actual notice, whichever occurs first. All such comments shall be filed with the Office of Hearings and Appeals, Department of Energy, Washington, DC. 20585–0107.

Dated: February 3, 1997.

George B. Breznay,

Director, Office of Hearings and Appeals.

LIST OF CASES RECEIVED BY THE OFFICE OF HEARINGS AND APPEALS

[Week of December 30, 1996 through January 3, 1997]

Date	Name and Location of applicant	Case No.	Type of submission
1/2/97	Eugene Maples, Alexandria, Virginia.	VFA–0258	Appeal of an Information Request Denial. If Granted: The November 25, 1996, Freedom of Information Request Denial issued by the Assistant Inspector General for Investigations would be rescinded, and Eugene Maples would receive access to certain portions of an investigative report on the fraudulent use of oil overcharge funds in South Carolina.

[FR Doc. 97–3312 Filed 2–10–97; 8:45 am]

BILLING CODE 6450–01–P

Notice of Issuance of Decisions and Orders; Week of December 23 Through December 27, 1996

During the week of December 23 through December 27, 1996, the decisions and orders summarized below were issued with respect to appeals, applications, petitions, or other requests filed with the Office of Hearings and Appeals of the Department of Energy. The following summary also contains a list of submissions that were dismissed by the Office of Hearings and Appeals.

Copies of the full text of these decisions and orders are available in the Public Reference Room of the Office of Hearings and Appeals, Room 1E–234, Forrestal Building, 1000 Independence Avenue, SW, Washington, D.C. 20585–0107, Monday through Friday, between the hours of 1:00 p.m. and 5:00 p.m., except federal holidays. They are also available in *Energy Management: Federal Energy Guidelines,* a commercially published loose leaf reporter system. Some decisions and orders are available on the Office of Hearings and Appeals World Wide Web site at http://www.oha.doe.gov.

Dated: February 3, 1997.

George B. Breznay,

Director, Office of Hearings and Appeals.

Decision List No. 13

Appeals

Michael A. Grosche, 12/23/96, *VFA–0193*

Michael A. Grosche filed an Appeal from a determination issued by the Office of the Inspector General (OIG) of the Department of Energy (DOE) in response to a Request for Information submitted under the Freedom of Information Act. OIG had withheld names and other information from memoranda on the outcome of a closed investigation into alleged misbilling by sub-contractor employees which revealed no pecuniary loss to the

government. In considering the Appeal, the DOE determined that all of the documents were generated for a law enforcement purpose and that under those conditions, review would be under Exemption 7(C). In applying Exemption 7(C), the DOE found that OIG properly withheld the names of persons interviewed and investigated. However, the DOE remanded to the OIG for further consideration the withholding of names of federal employees who did not appear to be persons OIG either investigated or interviewed, but who only seemed to be performing their official functions. The DOE also remanded for further consideration all other withheld material such as subcontract numbers and billing accounts because none of the material appeared on its face to involve any privacy interest, but did appear to address a public interest in whether certain governmental-funded activities were well or poorly managed and how the Federal Acquisition Regulation may have been violated. Accordingly, the Appeal was denied in part, granted in part and remanded to OIG for further consideration.

Glen Milner, 12/23/96, *VFA–0238*

Glen Milner (Appellant) filed an Appeal of two Determinations issued to him by the Department of Energy (DOE) in response to a request under the Freedom of Information Act. In the request, the Appellant asked for all documents, generated from 1985 to the present, concerning the ''White Train'', which carried nuclear weapons until the 1980's. He also requested a fee waiver for costs associated with processing the FOIA request. On appeal, the OHA found that there is no provision in the DOE FOIA regulations permitting a conditional fee waiver, such as that requested by the Appellant. However, the OHA also found that disclosure of some of the information requested by the Appellant would be in the public interest, because it was likely to contribute significantly to government operations and activities. Under these circumstances the OHA determined that a fee waiver was appropriate with respect to the limited number of documents meeting those conditions. Accordingly, the DOE granted the Appeal in part.

Dismissals

The following submissions were dismissed.

Case name	Case No.
James H. Stebbings	VFA–0242
James R. Hutton	VFA–0256
L.N. Asphalt Co., Inc	RG272–981
Marlene Flor	VFA–0253
Merlon Management Corp	RG272–997

[FR Doc. 97–3310 Filed 2–10–97; 8:45 am]

BILLING CODE 6450–01–P

Notice of Issuance of Decisions and Orders; Week of January 13 through January 17, 1997

During the week of January 13 through January 17, 1997, the decisions and orders summarized below were issued with respect to appeals, applications, petitions, or other requests filed with the Office of Hearings and Appeals of the Department of Energy. The following summary also contains a list of submissions that were dismissed by the Office of Hearings and Appeals.

Copies of the full text of these decisions and orders are available in the Public Reference Room of the Office of Hearings and Appeals, Room 1E–234, Forrestal Building, 1000 Independence Avenue, S.W., Washington, D.C. 20585–0107, Monday through Friday, between the hours of 1:00 p.m. and 5:00 p.m., except federal holidays. They are also available in *Energy Management*: *Federal Energy Guidelines*, a commercially published loose leaf reporter system. Some decisions and orders are available on the Office of Hearings and Appeals World Wide Web site at http://www.oha.doe.gov.

Dated: February 3, 1997.

George B. Breznay,

Director, Office of Hearings and Appeals.

Decision List No. 16

Appeals

Digital City Communications, Inc., 1/14/97, *VFA–0254*

Digital City Communications, Inc. (Digital) filed an Appeal of a Determination issued to it by the Department of Energy (DOE) in response to a request under the Freedom of Information Act (FOIA). In the request, the Appellant asked for Network Intrusion Detector software and the accompanying manual. In its Determination, DOE's Oakland Operations Office (Oakland) found that the requested items should be withheld under Exemption 4 of the FOIA. On Appeal, the Office of Hearings and Appeals (OHA) found that the case should be remanded because Oakland had failed to determine whether the software was a ''record'' under the FOIA. OHA further found that Oakland's Exemption 4 determination was inadequate. Therefore, the DOE granted the Appeal and remanded the matter to Oakland for further action.

Gretchen Lee Coles, 1/15/97, *VFA–0251*

Gretchen Lee Coles filed an Appeal from determinations issued by the Oak Ridge Operations Office and the Albuquerque Operations Office indicating that they had been unable to locate records that would reflect whether the federal government had employed Lee H. Coles and whether Mr. Coles had been exposed to radiation. The DOE denied the Appeal because it found that the searches conducted in response to the Appellant's Freedom of Information Act (FOIA) request were reasonable. The DOE found that the FOIA Officers contacted people who would have knowledge of whether relevant documents exist, and that these individuals used appropriate procedures to search for the records requested.

Harold Bibeau, 1/17/97 *VFA–0255*

The Department of Energy denied an Appeal of a determination that no documents responsive to the appellant's request could be located. DOE found that the search conducted was reasonably calculated to uncover material responsive to the request.

I.B.E.W., 1/15/97, *VFA–0250*

The International Brotherhood of Electrical Workers (I.B.E.W.) filed an Appeal from a determination, dated

November 8, 1996, by the Authorizing Official of the Savannah River Operations Office of the Department of Energy. In that determination, the Authorizing Official denied a request for information and fee waiver filed by the I.B.E.W. In considering the Appeal, the DOE denied the request for a fee waiver and remanded the matter to Savannah River for a further search of documents based on a request clarified on appeal.

James L. Hecht, 1/15/97, *VFA–0244*

The Department of Energy (DOE) issued a Decision and Order (D&O) granting a Freedom of Information Act (FOIA) Appeal that was filed by James L. Hecht. In his Appeal, Mr. Hecht challenged the adequacy of the search for responsive documents that was conducted by the DOE's Office of Energy Efficiency and Renewable Energy (EE) in response to Mr. Hecht's FOIA request. In the Decision, the OHA found that the EE interpreted Mr. Hecht's request in an unreasonably narrow manner in order to reduce the scope of that request. The OHA remanded the case to the EE so that the EE could confer with Mr. Hecht in an attempt to reformulate the request so that it would be less burdensome and disruptive to the operations of that Office.

J.B. Truher, 1/15/97, *VFA–0245*

J.B. Truher filed an Appeal from a determination, dated October 23, 1996, by the Deputy Inspector General for Inspections of the Office of Inspector General (Deputy IG) of the Department of Energy (DOE). In that determination, the Deputy IG partially granted a request for information filed by Mr. Truher. In considering the Appeal, the DOE ordered that Deputy IG to release title headings in four documents.

Keci Corporation, 1/14/97, *VFA–0246*

Keci Corporation (Keci) filed an Appeal from a denial by the Department of Energy's (DOE's) Office of Inspector General (OIG) of a Request for Information submitted under the Freedom of Information Act and the Privacy Act. Keci requested information provided to DOE by a named individual regarding alleged irregularities in a DOE procurement, and any other relevant records. In considering the Appeal, the DOE found that OIG properly invoked the Glomar response to protect the individual's privacy rights and neither confirmed nor denied the existence of responsive records. Therefore, the Appeal was denied.

Request for Exception

Kalamazoo Oil Co., 1/16/97 *VEE–0036*

Kalamazoo Oil Co. (Kalamazoo) filed an Application for Exception from the Energy Information Administration (EIA) requirement that it file Form EIA–782B, the ''Resellers'/Retailers'' Monthly Petroleum Product Sales Report.'' In considering the request, the DOE found that the firm was not suffering a gross inequity or serious hardship. Therefore, the DOE denied Kalamazoo's Application for Exception.

Personnel Security Hearing

Personnel Security Hearing, 1/16/97, *VSO–0116*

Under the provisions of 10 C.F.R. Part 710, the Department of Energy (DOE) suspended an individual's access authorization (a ''Q'' level security clearance) pending administrative review, based upon derogatory information received by the DOE which revealed illegal drug use on the part of the individual. More specifically, DOE found that pursuant to a random drug screening performed by the individual's employer, a DOE contractor, a urine specimen provided by the individual tested positive for marijuana. In addition, the individual signed an Acknowledgement of Positive Drug Screen and during a subsequent Personnel Security Interview (PSI) concerning this matter, the individual admitted using marijuana. On this basis, DOE suspended the individual's access authorization under 10 C.F.R. § 710.8(k), finding that the individual ''[t]rafficked in, sold, transferred, possessed, used, or experimented with a drug or other substance listed in the Schedule of Controlled Substance established pursuant to section 202 of the Controlled Substance Act of 1970 (such as marijuana, cocaine, amphetamines, barbiturates, narcotics, etc.) except as prescribed or administered by a physician licensed to dispense drugs in the practice of medicine, or as otherwise authorized by law.'' Following a hearing convened at the request of the individual, the Office of Hearings and Appeals Hearing Officer found in his Opinion that: (i) the individual's marijuana use was an isolated, one-time occurrence, and (ii) the record of the proceeding contained sufficient supporting evidence to accept the individual's assurance that the individual would never use marijuana again. Accordingly, the Hearing Officer concluded in the Opinion that the individual's access authorization should be restored.

Refund Application

Dixie Hauling Co., Inc., 1/16/97, *RF272–97810*

The DOE issued a Decision and Order granting four Applications for Refund in the crude oil refund proceeding. In two of the cases, additional claimants signed applications previously filed in the crude oil proceeding, but did not do so until after the crude oil refund proceeding deadline. These claimants were granted a portion of the refunds because they joined applications which: (1) Were submitted prior to the crude oil refund proceeding deadline; (2) contained accurate information supporting the companies'' rights to refunds; and (3) had yet to be granted by the DOE prior to their amendment by the signatures of the additional claimants.

Refund Applications

The Office of Hearings and Appeals issued the following Decisions and Orders concerning refund applications, which are not summarized. Copies of the full texts of the Decisions and Orders are available in the Public Reference Room of the Office of Hearings and Appeals.

Brader Hauling Service, Inc	RG272–00928	1/16/97
Crude Oil Supple. Refund Dist	RB272–00097	1/16/97
Cruce Oil Supple. Refund Dist	RB272–00098	1/16/97
Gulf Oil Corporation/Cabot Corporation	RF300–16719	1/16/97
Indianapolis Baptist Schools	RF272–95103	1/14/97
Warren Brothers Road Company, et al	RF272–93484	1/16/97

Dismissals

The following submissions were dismissed.

Name	Case No.
A-DEC, Inc	RG272–916
Green Holdings, Inc	RD272–25553

Name	Case No.
Green Holdings, Inc	RF272–25553
Personnel Security Review	VSA–0074
Scappoose Sand & Gravel Co	RG272–984
Wilkins, Kaiser & Olsen, Inc	RG272–983

[FR Doc. 97–3311 Filed 2–10–97; 8:45 am]
BILLING CODE 6450–01–P

FEDERAL COMMUNICATIONS COMMISSION

Notice of Public Information Collections Being Reviewed by the Federal Communications Commission

February 5, 1997.

SUMMARY: The Federal Communications Commission, as part of its continuing effort to reduce paperwork burden invites the general public and other Federal agencies to take this opportunity to comment on the following information collection, as required by the Paperwork Reduction Act of 1995, Public Law 104–13. An agency may not conduct or sponsor a collection of information unless it displays a currently valid control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the Paperwork Reduction Act (PRA) that does not display a valid control number. Comments are requested concerning (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimate; (c) ways to enhance the quality, utility, and clarify of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology.

DATES: Persons wishing to comment on this information collection should submit comments April 14, 1997.

ADDRESSES: Direct all comments to Dorothy Conway, Federal Communications Commission, Room 234, 1919 M St., NW., Washington, DC 20554 or via internet to dconway@fcc.gov.

FOR FURTHER INFORMATION CONTACT: For additional information or copies of the information collections contact Dorothy Conway at 202–418–0217 or via internet at dconway@fcc.gov.

SUPPLEMENTARY INFORMATION:

OMB Approval Number: 3060–0685.

Title: Annual Updating of Maximum Permitted Rates for Regulated Cable Services.

Form No.: FCC Form 1240.

Type of Review: Extension of approval of a currently approved collection.

Respondents: Business or other for-profit entities; state and local governments.

Number of Respondents: 4,500. (3,000 cable operators and 1,500 local franchise authorities (''LFAs'').

Estimated Time Per Response: 1–15 hours.

Total Annual Burden: 47,250 hours. We report the burden for all aspects of this information collection as follows: The modification of the Form 1240 rate methodology requirement only pertains to first-time filings of FCC Form 1240. The modification merely results in permitting operators to project and recoup certain costs sooner, rather than later; therefore there is no measurable burden revision for this information collection. If there were an additional burden significant enough to be measured, any burden added to an operator's first Form 1240 filing would be negated by the decreased burden in completing the operator's second Form 1240 filing. The Commission therefore reports no revised burden to complete Form 1240 on a per filing basis. However, based on latest data available, the Commission adjusts the estimated number of Form 1240 filings that are annually filed by operators.

The Commission estimates that there are no more than 3,000 Form 1240s filed annually; roughly 1,500 (50%) with the Commission and roughly 1,500 (50%) with LFAs. Burden for operators: We estimate that 25% of operators will contract out the burden of filing and that it will take 1 hour to coordinate information with those contractors. The remaining 75% of operators are estimated to employ in house staff to complete the filing. 750 filings (25% contracted out) × 1 hour = 750 hours. 2,250 filings (75% in house) × 15 hours = 33,750 hours. Additionally, 76.933(g)(2) states: If an LFA has taken no action within the 90-day review period, then the proposed rates may go into effect at the end of the review period, subject to a prospective rate reduction and refund if the LFA subsequently issues a written decision disapproving any portion of such rates. However, if an operator inquires as to whether the LFA intends to issue a rate order after the initial review period, the LFA or its designee must notify the operator of its intent in this regard within 15 days of the operator's inquiry. We estimate this will occur in 25% of the instances when Form 1240s are filed by cable operators with their LFAs. 25% of 1,500 = 375 inquiries at an estimated 1 burden for each inquiry = 375 hours.

Total burden hours to operators = 750 + 33,750 + 375 = 34,875 hours.

Burden to LFAs: The Commission estimates there will be 1,500 FCC Form 1240s filed with LFAs, annually. Average LFA reviewing time for each FCC Form 1240 is estimated to be 8 hours. 1,500 × 8 hours = 12,000 burden hours. Additionally, we estimate 375 responses to operator requests pursuant to 76.933(g)(2). 375 notifications at an estimated 1 burden hour for each notification = 375 hours.

Total burden hours to LFAs = (1,500 × 8 hrs.) + (375 × 1 hr.) = 12,375 hrs.

Total burden hours for all respondents = 34,875 + 12,375 = 47,250 hours.

Total costs for Respondents: $1,139,000. We estimate an annual purchase of 1,000 diskette versions of FCC Form 1240 @ $5 per diskette = $5,000. Printing, photocopying and postage costs incurred by operators and LFAs is estimated to be $2 per entity (4,500 entities × $2) = $9,000. We estimate that assistance for completing Form 1240 filings will be performed by legal and accounting contractors at an average of $100/hour for 25% of the filings. $100/hour × 750 filings (25% of Form 1240 filings) × 15 hours = $1,125,000.

Total respondent costs: $5,000 + $9,000 + $1,125,000 = $1,139,000.

Needs and Uses: On September 22, 1995, the Commission released the Thirteenth Order on Reconsideration (''Order''), FCC 95–397, MM Docket No. 92–266, which adopted a new optional rate adjustment methodology permitting cable operators to make annual rate changes to their basic service tiers (''BSTs'') and cable programming

service tiers (''CPSTs''). Operators electing to use this methodology adjust their rates once per year to reflect reasonably certain and reasonably quantifiable changes in external costs, inflation, and the number of regulated channels that are projected for the 12 months following the rate change. To enable operators to use this optional rate adjustment methodology the Commission created FCC Form 1240 Annual Updating of Maximum Permitted Rates for Regulated Cable Services. Subsequent to the availability of FCC Form 1240, the Commission received numerous requests for waiver of certain rate adjustment requirements contained in the Order. Therefore, on, November 1, 1996, the Commission released an Order, DA 96–1804, which granted for all cable operators' initial Form 1240 filing, a waiver of the requirement that only costs that have actually been incurred may be included in the true-up period. Specifically, an operator's initial Form 1240 filing may now include projected changes in costs, inflation, channels and subscriber information attributable to the period between the last date for which historical cost data is available and the effective date of the new rates. These projections must be accompanied by a separate calculation and explanation of the basis for the costs (for the period between the last full month for which actual cost data is available and the effective date of the new rate).

The creation of this blanket waiver modified the Form 1240 information collection requirement (though not the actual Form 1240, hence the July 1996 edition remains intact) and therefore required the approval of the Office of Management and Budget (''OMB''). The Commission received emergency OMB approval on December 12, 1996. The Commission now initiates a 60-day public comment period concerning the Form 1240 information collection requirement in order to obtain regular OMB approval for the collection.

FCC Form 1240 is filed by cable operators seeking to adjust maximum permitted rates for regulated services to reflect changes in external costs. Cable operators submit FCC Form 1240 to their respective local franchising authorities to justify rates for the basic service tier or with the Commission (in situations where the Commission has assumed jurisdiction). FCC Form 1240 is also filed with the Commission when responding to a complaint filed with the Commission about cable programming service rates and associated equipment. Information contained in FCC Form 1240 filings has been used by the Commission and LFAs to adjudicate permitted rates for regulated cable services and equipment, for the addition of new programming tiers, to account for the addition and deletion of channels, and for the allowance for pass through of external costs and costs due to inflation.

Federal Communications Commission.

William F. Caton,

Acting Secretary.

[FR Doc. 97–3257 Filed 2–10–97; 8:45 am]

BILLING CODE 6712–01–P

Public Information Collections Approved by Office of Management and Budget

February 5, 1997.

The Federal Communications Commission (FCC) has received Office of Management and Budget (OMB) approval for the following public information collections pursuant to the Paperwork Reduction Act of 1995, Public Law 104–13. An agency may not conduct or sponsor and a person is not required to respond to a collection of information unless it displays a currently valid control number. For further information contact Shoko B. Hair, Federal Communications Commission, (202) 418–1379.

Federal Communications Commission

OMB Control No.: 3060–0165.

Expiration Date: 01/31/2000.

Title: Records to be Maintained and Reports to be Filed—Part 41 Franks, Section 41.31.

Form No.: N/A.

Estimated Annual Burden: 408 total annual hours; 6 hours per respondent (avg.); 68 respondents.

Estimated Annual Reporting and Recordkeeping Cost Burden: $0.

Description: Section 210 of the Communications Act of 1934, as amended, 47 U.S.C. 210, requires that common carriers subject to the Act maintain records to reflect the name, address, etc., of persons holding telephone or telegraph franks, so as to enable the Commission and/or carriers to compile, if needed, reports in this area. Though the Commission is not currently requiring the actual periodic reporting of this data, it is information which should continue to be maintained in case the need arises to assure that the franking privileges are being adequately policed by the companies themselves. Section 41.31 of the Commission's rules implements Section 210. The information helps to ensure that franks are being addressed fairly. Failure to have the information recorded would prohibit the Commission from being able to respond to complaints and from generally being able to police the activity.

OMB Control No.: 3060–0147.

Expiration Date: 01/31/2000.

Title: Extension of Unsecured Credit for Interstate and Foreign—Section 64.804.

Form No.: N/A.

Estimated Annual Burden: 104 total annual hours; 8 hours per respondent; 13 respondents.

Estimated Annual Reporting and Recordkeeping Cost Burden: $0.

Description: Collection of this information is required by statute—Section 401 of the Federal Election Campaign Act of 1971, Public Law 92–225. Pursuant to Section 64.804 of FCC Rules and Regulations, records of each account, involving the extension by a carrier of unsecured credit to a candidate or person on behalf of such candidate for common carrier communications services shall be maintained by the carrier as to show separately, for interstate and foreign communications services all charges, credits, adjustments, and security, if any, and balance receivable. Section 64.804 requires communications common carriers with operating revenues exceeding $1 million who extend unsecured credit to a political candidate or person on behalf of such candidate for Federal office to report, twice a year, data including due and outstanding balances. The information is used by the agency to monitor the extent of credit extended to candidates for Federal office.

OMB Control No.: 3060–0745.

Expiration Date: 08/31/97.

Title: Implementation of the Local Exchange Carrier Tariff Streamlining Provisions in the Telecommunications Act of 1996, CC Docket No. 96–187.

Form No.: N/A.

Estimated Annual Burden: 4090 total annual hours; 37.18 hours per respondent (avg.); 110 respondents.

Estimated Annual Reporting and Recordkeeping Cost Burden: $170,000.

Description: In the Report and Order issued in CC Docket 96–187, the Commission adopted measures to implement the specific streamlining tariff filing requirements for local exchange carriers (LECs) of the Telecommunications Act of 1996 (1996 Act). In order to achieve a streamlined and deregulatory environment for LEC tariff filings, the item will permit LECs to file tariffs electronically. The 1996 Act provides that LEC tariffs seeking rate increases shall be effective in fifteen days and LEC tariffs seeking rate decreases shall be effective in seven days. The Commission adopted its proposal that carriers wishing to take

advantage of the seven day notice period must file rate decreases in separate transmittals. Because of the short notice periods, the Commission adopted the requirement that carriers identify specifically transmittals filed pursuant to Section 204(a)(3), including whether the transmittals contain rate increases, rate decreases or both. The Commission requires that LECs display prominently in the upper right hand corner of the tariff transmittal letters a statement indicating that the tariff is being filed on a streamlined basis under section 204(a)(3) of the Act and whether the tariff filing contains proposed rate increase, decrease or both. Under existing Commission rules, LECs are required to submit revisions to their annual access tariffs on 90 days' notice to be effective on July 1. Because these revisions are eligible for streamlined treatment, we will require carriers subject to price cap regulation to file a TRP prior to the filing of the annual access tariff revisions absent any information on the carriers' proposed rates, and to make it available to the public. Early filing of the TRPs will facilitate review of the annual access filings within the streamlined notice periods by resolving most of the major issues currently raised with the annual access proceedings. The information collected under the program of electronic filing will facilitate access to tariff and associated documents by the public, specially by interested persons who do not have ready access to the Commission's public reference rooms, and state and federal regulators. All of the requirements would be used to ensure that LECs comply with their obligations under the Communications Act and that the Commission be able to ensure compliance within the streamlined timeframes established by the 1996 Act.

Public reporting burden for the collections of information is as noted above. Send comments regarding the burden estimate or any other aspect of the collections of information, including suggestions for reducing the burden to the Records Management Branch, Washington, DC 20554.

Federal Communications Commission.

William F. Caton,

Acting Secretary.

[FR Doc. 97–3256 Filed 2–10–97; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL EMERGENCY MANAGEMENT AGENCY

[FEMA–864–DR]

Hawaii; Amendment to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency (FEMA).

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster for the State of Hawaii (FEMA–864–DR), dated May 18, 1990, and related determinations.

EFFECTIVE DATE: January 27, 1997.

FOR FURTHER INFORMATION CONTACT: Magda Ruiz, Response and Recovery Directorate, Federal Emergency Management Agency, Washington, DC 20472, (202) 646–3260.

SUPPLEMENTARY INFORMATION: Notice is hereby given that the incident period for this disaster is closed effective January 31, 1997.

(Catalog of Federal Domestic Assistance No. 83.516, Disaster Assistance)

Lacy E. Suiter,

Executive Associate Director, Response and Recovery Directorate.

[FR Doc. 97–3354 Filed 2–10–97; 8:45 am]

BILLING CODE 6718–DR–P

[FEMA–1154–DR]

Idaho; Amendment to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency (FEMA).

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster for the State of Idaho (FEMA–1154–DR), dated January 4, 1997 and related determinations.

EFFECTIVE DATE: January 31, 1997.

FOR FURTHER INFORMATION CONTACT: Magda Ruiz, Response and Recovery Directorate, Federal Emergency Management Agency, Washington, DC 20472, (202) 646–3260.

SUPPLEMENTARY INFORMATION: Notice is hereby given that in a letter dated January 31, 1997, the President amended his declaration of January 4, 1997 to define the incident period for this disaster as November 16, 1996, through and including January 3, 1997.

(Catalog of Federal Domestic Assistance No. 83.516, Disaster Assistance)

Lacy E. Suiter,

Executive Associate Director, Response and Recovery Directorate.

[FR Doc. 97–3352 Filed 2–10–97; 8:45 am]

BILLING CODE 6718–02–P

[FEMA–1157–DR]

North Dakota; Amendment to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency (FEMA).

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster for the State of North Dakota (FEMA–1157–DR), dated January 12, 1997, and related determinations.

EFFECTIVE DATE: January 30, 1997

FOR FURTHER INFORMATION CONTACT: Magda Ruiz, Response and Recovery Directorate, Federal Emergency Management Agency, Washington, DC 20472, (202) 646–3260.

SUPPLEMENTARY INFORMATION: Notice is hereby given that the incident period for this disaster is closed effective January 31, 1997.

(Catalog of Federal Domestic Assistance No. 83.516, Disaster Assistance)

Catherine H. Light,

Deputy Associate Director, Response and Recovery Directorate.

[FR Doc. 97–3350 Filed 2–10–97; 8:45 am]

BILLING CODE 6718–02–P

[FEMA–1138–DR]

Pennsylvania; Amendment to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency (FEMA).

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster for the Commonwealth of Pennsylvania (FEMA–1138–DR dated September 13, 1996, and related determinations.

EFFECTIVE DATE: November 15, 1996

FOR FURTHER INFORMATION CONTACT: Pauline C. Campbell, Response and Recovery Directorate, Federal Emergency Management Agency, Washington, DC 20472, (202) 646–3606.

SUPPLEMENTARY INFORMATION: The notice of a major disaster for the Commonwealth of Pennsylvania, is hereby amended to include Public Assistance in the following areas determined to have been adversely affected by the catastrophe declared a major disaster by the President in his declaration of September 13, 1996:

The counties of Huntingdon, Juniata, Mifflin, Perry, Cumberland, and Montgomery for Public Assistance (already designated for Individual Assistance and Hazard Mitigation Assistance).

(Catalog of Federal Domestic Assistance No. 83.516, Disaster Assistance)

Catherine H. Light,

Deputy Associate Director, Response and Recovery Directorate.

[FR Doc. 97–3353 Filed 2–10–97; 8:45 am]

BILLING CODE 6718–02–P

[FEMA–3123–EM]

Rhode Island; Amendment to Notice of an Emergency Declaration

AGENCY: Federal Emergency Management Agency (FEMA).

ACTION: Notice.

SUMMARY: This notice amends the notice of an emergency for the State of Rhode Island (FEMA–3123-EM), dated November 19, 1996, and related determinations.

EFFECTIVE DATE: January 28, 1997.

FOR FURTHER INFORMATION CONTACT: Magda Ruiz, Response and Recovery Directorate, Federal Emergency Management Agency, Washington, DC 20472, (202) 646–3260.

SUPPLEMENTARY INFORMATION: Notice is hereby given that the incident period for this disaster is closed effective November 27, 1996.

(Catalog of Federal Domestic Assistance No. 83.516, Disaster Assistance)

Catherine H. Light,

Deputy Associate Director, Response and Recovery Directorate.

[FR Doc. 97–3348 Filed 2–10–97; 8:45 am]

BILLING CODE 6718–02–P

[FEMA–3123–EM]

Rhode Island; Amendment to Notice of an Emergency Declaration

AGENCY: Federal Emergency Management Agency (FEMA).

ACTION: Notice.

SUMMARY: This notice amends the notice of an emergency for the State of Rhode Island (FEMA–3123-EM), dated November 19, 1996, and related determinations.

EFFECTIVE DATE: January 28, 1997

FOR FURTHER INFORMATION CONTACT: Magda Ruiz, Response and Recovery Directorate, Federal Emergency Management Agency, Washington, DC 20472, (202) 646–3260.

SUPPLEMENTARY INFORMATION: Notice is hereby given that in a letter dated January 24, 1997, the President amended his declaration of November 19, 1996, to define the incident period for this disaster as November 17, 1996 and continuing.

(Catalog of Federal Domestic Assistance No. 83.516, Disaster Assistance)

Catherine H. Light,

Deputy Associate Director, Response and Recovery Directorate.

[FR Doc. 97–3349 Filed 2–10–97; 8:45 am]

BILLING CODE 6718–02–P

[FEMA–1156–DR]

South Dakota; Amendment to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency (FEMA).

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster for the State of South Dakota (FEMA–1156-DR), dated January 10, 1997, and related determinations.

EFFECTIVE DATE: January 30, 1997.

FOR FURTHER INFORMATION CONTACT: Magda Ruiz, Response and Recovery Directorate, Federal Emergency Management Agency, Washington, DC 20472, (202) 646–3260.

SUPPLEMENTARY INFORMATION: Notice is hereby given that the incident period for this disaster is closed effective January 31, 1997.

(Catalog of Federal Domestic Assistance No. 83.516, Disaster Assistance)

Catherine H. Light,

Deputy Associate Director, Response and Recovery Directorate.

[FR Doc. 97–3351 Filed 2–10–97; 8:45 am]

BILLING CODE 6718–02–P

FEDERAL MARITIME COMMISSION

Ocean Freight Forwarder License Applicants

Notice is hereby given that the following applicants have filed with the Federal Maritime Commission applications for licenses as ocean freight forwarders pursuant to section 19 of the Shipping Act of 1984 (46 U.S.C. app. 1718 and 46 CFR 510).

Persons knowing of any reason why any of the following applicants should not receive a license are requested to contact the Office of Freight Forwarders, Federal Maritime Commission, Washington, D.C. 20573.

Air Sea International Forwarding, Inc., 155 W. Chestnut Street, Suite 2B, Union, NJ 07083. Officers: Ray Tobia, President, Michael DiPede, Vice President

Air Sea Transport Inc., 2450 West Main Street, Alhambra, CA 91801. Officers: Scott Wang, President, Tommy Shing, Vice President

Dated: February 6, 1997.

Joseph C. Polking,

Secretary.

[FR Doc. 97–3346 Filed 2–10–97; 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 February 25, 1997.

A. Federal Reserve Bank of St. Louis (Randall C. Sumner, Vice President) 411 Locust Street, St. Louis, Missouri 63102-2034:

1. Gerald L. and Shirley M. Moon, both of Effingham, Illinois; to acquire an additional 14.63 percent, for a total of 23.64 percent, of the voting shares of Omni Bancorp, Inc., Effingham, Illinois, and thereby indirectly acquire Crossroads Bank, Effingham, Illinois.

Board of Governors of the Federal Reserve System, February 5, 1997.

Jennifer J. Johnson,

Deputy Secretary of the Board.

[FR Doc. 97–3262 Filed 2-10-97; 8:45 am]

BILLING CODE 6210-01-F

Change in Bank Control Notices; Formations of, Acquisitions by, and Mergers of Bank Holding Companies; Correction

This notice corrects a notice (FR Doc. 97-2658) published on page 5232 of the issue for Tuesday, February 4, 1997.

Under the Federal Reserve Bank of San Francisco heading, the entry for Regency Bancorp, Fresno, California, is revised to read as follows:

A. Federal Reserve Bank of San Francisco (Kenneth R. Binning,

Director, Bank Holding Company) 101 Market Street, San Francisco, California 94105-1579:

1. Regency Bancorp, Fresno, California; to acquire Regency Investment Advisors, Inc., Fresno, California, and thereby engage in investment advisory activities, pursuant to § 225.25(b)(4) of the Board's Regulation Y, and in fiduciary activities, pursuant to § 225.25(b)(3) of the Board's Regulation Y.

Comments on this application must be received by February 18, 1997.

Board of Governors of the Federal Reserve System, February 5, 1997.

Jennifer J. Johnson,

Deputy Secretary of the Board.

[FR Doc. 97–3263 Filed 2-10-97; 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). 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 March 7, 1997.

A. Federal Reserve Bank of St. Louis (Randall C. Sumner, Vice President) 411 Locust Street, St. Louis, Missouri 63102-2034:

1. First Commercial Corporation, Little Rock, Arkansas; to merge with Southwest Bancshares, Inc., Jonesboro, Arkansas, and thereby indirectly acquire First Bank of Arkansas, Jonesboro, Arkansas; First Bank of Arkansas, Russellville, Arkansas; First Bank of Arkansas, Searcy, Arkansas; and First Bank of Arkansas, Wynne, Arkansas.

2. Security Bancorp of Tennessee, Inc., Halls, Tennessee; to acquire at least 30 percent of the voting shares of The Bank of Jackson, Jackson, Tennessee (in organization).

Board of Governors of the Federal Reserve System, February 5, 1997.

Jennifer J. Johnson,

Deputy Secretary of the Board.

[FR Doc. 97–3261 Filed 2-10-97; 8:45 am]

BILLING CODE 6210-01-F

Notice of Proposals to Engage in Permissible Nonbanking Activities or to Acquire Companies that are Engaged in Permissible Nonbanking Activities

The companies listed in this notice have given notice under section 4 of the Bank Holding Company Act (12 U.S.C. 1843) (BHC Act) and Regulation Y, (12 CFR Part 225) to engage *de novo,* or to acquire or control voting securities or assets of a company that engages either directly or through a subsidiary or other company, in a nonbanking activity that is listed in § 225.25 of Regulation Y (12 CFR 225.25) or that the Board has determined by Order to be closely related to banking and permissible for bank holding companies. Unless otherwise noted, these activities will be conducted throughout the United States.

Each notice is available for inspection at the Federal Reserve Bank indicated. Once the notice has been accepted for processing, it will also be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the question whether the proposal complies with the standards of section 4 of the BHC Act, including whether consummation of the proposal can ''reasonably be expected to produce benefits to the public, such as greater convenience, increased competition, or gains in efficiency, that outweigh possible adverse effects, such as undue concentration of resources, decreased or unfair competition, conflicts of interests, or unsound banking practices'' (12 U.S.C. 1843). Any request for a hearing on this question must be accompanied by a statement of the reasons a written presentation would not suffice in lieu of a hearing, identifying specifically any questions of fact that are in dispute, summarizing the evidence that would be presented at a hearing, and indicating how the party commenting would be aggrieved by approval of the proposal.

Unless otherwise noted, comments regarding the applications must be received at the Reserve Bank indicated or the offices of the Board of Governors not later than February 25, 1997.

A. Federal Reserve Bank of Atlanta (Lois Berthaume, Vice President) 104 Marietta Street, N.W., Atlanta, Georgia 30303-2713:

1. Barnett Banks, Inc., Jacksonville, Florida; to acquire Oxford Resources Corp., Melville, New York, and thereby engage in consumer finance and leasing personal or real property or acting as agent, broker of adviser in leasing such property, pursuant to §§ 225.25(b)(1)(i) and (b)(5) of the Board's Regulation Y.

Board of Governors of the Federal Reserve System, February 5, 1997.

Jennifer J. Johnson,

Deputy Secretary of the Board.

[FR Doc. 97–3260 Filed 2-10-97; 8:45 am]

BILLING CODE 6210-01-F

FEDERAL TRADE COMMISSION

Granting of Request for Early Termination of the Waiting Period Under the Premerger Notification Rules

Section 7A of the Clayton Act, 15 U.S.C. 18a, as added by Title II of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, requires persons contemplating certain mergers or acquisitions to give the Federal Trade Commission and the Assistant Attorney General advance notice and to wait designated periods before consummation of such plans. Section 7A(b)(2) of the Act permits the agencies, in individual cases, to terminate this waiting period prior to its expiration and requires that notice of this action be published in the Federal Register.

The following transactions were granted early termination of the waiting period provided by law and the premerger notification rules. The grants

were made by the Federal Trade Commission and the Assistant Attorney General for the Antitrust Division of the Department of Justice. Neither agency intends to take any action with respect to these proposed acquisitions during the applicable waiting period.

TRANSACTIONS GRANTED EARLY TERMINATION BETWEEN: 122396 *and* 123196

Name of acquiring person; name of acquired person; name of acquired entity	PMN No.	Date terminated
RailTex, Inc., Canadian National Railway Company, Grand Trunk Western Railway, Inc	97–0595	12/23/96
The Seagram Company Ltd., Gannett Co., Inc., Multimedia, Inc, Multimedia Entertainment, Inc	97–0601	12/23/96
IMCO Recycling, Inc., James T. Skoch, Rock Creek Aluminum, Inc	97–0607	12/23/96
The Trover Clinic Foundation, Incorporated, Trover Clinic, P.S.C., Trover Clinic, P.S.C	97–0627	12/23/96
Warburg, Pincus Ventures, L.P., Times Mirror Company, CRC Press, Inc	97–0667	12/23/96
Regency Health Services, Inc., Horizon/CMS Healthcare Corporation, San Diego Health Associates Limited Partnership	97–0690	12/23/96
Lynch Corporation, Leslie G. Matthews and Cecile C. Matthews, Upper Peninsula Telephone Company	97–0696	12/23/96
Thomas and Mary LaPorte, IMC Mortgage Company, IMC Mortgage Company	97–0698	12/23/96
Shaw Industries, Inc., Gary R. Schwartz, Carpet Exchange Denver, Inc., G.S. Investment Co., Inc	97–0701	12/23/96
Shaw Industries, Michael J. Goldfarb, G.S. Investment Company, Inc., Carpet Exchange Denver	97–0703	12/23/96
Hughes Supply, Inc., Brent W. Scheps, Sunbelt Supply Co	97–0709	12/23/96
Hughes Supply, Inc., Larry A. Feld, Sunbelt Supply Co	97–0710	12/23/96
W.C. Bradley Co., Nippon Sanso Corporation (a Japanese company), The Thermos Company	97–0721	12/23/96
Norrell Corporation, Michael C. Mullins, Comtex Information Systems, Inc./Comtex Systems, Inc	97–0723	12/23/96
AB Volvo, General Electric Company, Volvo Car Finance, Inc	97–0729	12/23/96
Aon Corporation, Alexander & Alexander Services Inc., Alexander & Alexander Services Inc	97–0730	12/23/96
Aon Corporation, Alexander & Alexander Services Inc., Alexander & Alexander Services Inc	97–0731	12/23/96
Bagel Store Development Funding, L.L.C., Boston Chicken, Inc., Einstein/Noah Bagel Corp	97–0733	12/23/96
Holiday Companies, Burger Bros., Inc., Burger Bros., Inc	97–0734	12/23/96
Metropolitan Life Insurance Company, The New Cherokee Corporation Employee Stock Ownership, The New Cherokee Corporation	97–0735	12/23/96
Olin Corporation, E.I. du Pont Nemours & Company, Niachlor	97–0737	12/23/96
Hicking Pentecost PLC, Noel Group, Inc., Belding Heminway Co., Inc. et al	97–0739	12/23/96
Michael A. Ashcroft, ISS International Service System A/S, a Danish company, ISS International Service System, Inc	97–0741	12/23/96
Patrick M. Egan, Republic Industries, Inc., Republic Industries, Inc	97–0748	12/23/96
Republic Industries, Inc., Patrick M. Egan, Lanscaster Alarm Co., Inc	97–0749	12/23/96
Central Parking Corporation, Square Industries, Inc., Square Industries, Inc	97–0751	12/23/96
Masayoshi Son, UTStarcom, Inc., UTStarcom, Inc	97–0759	12/23/96
Moorman Manufacturing Company, Wruble Elevator, Inc., Wruble Elevator, Inc	97–0760	12/23/96
PacifiCorp, Mr. Steve Gerlicher, OrCom Systems, Inc	97–0761	12/23/96
KN Energy, Inc., Mr. Steve Gerlicher, OrCom Systems, Inc	97–0762	12/23/96
Viag AG, Johnson Controls, Inc., Hoover Universal, Inc. and Apple Container Corporation	97–0766	12/23/96
Olin Corporation, Olin Corporation, Niachlor	97–0776	12/23/96
Belden, Inc., Philip R. Cowen, Alpha Wire Corporation, Alpha Wire Division	97–0781	12/23/96
K–III Communications Corporation, Gareth Stevens, Inc., Gareth Stevens, Inc	97–0782	12/23/96
John Rutledge Partners II, L.P., H&C Purchase Corporation, H&C Purchase Corporation	97–0724	12/24/96
Leggett & Platt, Incorporated, Rodgers Wade Manufacturing Company, Rodgers Wade Manufacturing Company	97–0674	12/26/96
C. Dean Metropoulos, Dr. Arend Oetker (a German national), Best Brands, Inc. and subsidiaries	97–0687	12/26/96
Biogen, Inc., Creative BioMolecules, Inc., Creative BioMolecules, Inc	97–0706	12/26/96
Bell Atlantic Corporation, Sunrise Trust, North Carolina 4 Cellular LP	97–0736	12/26/96
Reynolds & Reynolds Company, American Business Products, Inc., Vanier Graphics Corporation	97–0589	12/27/96
FPA Medical Management, Inc., AHI Healthcare Systems, Inc., AHI Healthcare Systems, Inc	97–0623	12/27/96
Union Bank of Switzerland, Daganeve Foundation, Tetra Laval Convenience Food Inc., Formax, Inc., Cashin	97–0652	12/27/96
Komatsu Ltd., Emil Evasovic, Pioneer Equipment Company of Nevada	97–0655	12/27/96
Christopher Goldsbury, Jr., HOB Entertainment, Inc., HOB Entertainment, Inc	97–0657	12/27/96
Intermatic Incorporated, Samuel W. Friedman Charitable Trust dated Nov. 15, 1996, M. Stephens Mfg., Inc	97–0663	12/27/96
John C. Malone, Telecommunications, Inc., TCI Satellite Entertainment, Inc	97–0666	12/27/96
Estate of Bob Magness, Tele-Communications, Inc., TCI Satellite Entertainment, Inc	97–0713	12/27/96
The Williams Companies, Inc., Sumner M. Redstone, Viacom MGS Services Inc	97–0725	12/27/96
Aurora Equity Partners L.P., John Frederick Fulton, Huntington Pennysaver, Inc	97–0738	12/27/96
Aurora Equity Partners L.P., Ralph Whittier Fulton, Huntington Pennysaver, Inc	97–0747	12/27/96
Fiat S.p.A., Ford Motor Company, Ford New Holland Credit Company	97–0774	12/27/96
Cox Enterprises, Inc., Cox Enterprises, Inc., Cox Communications, Inc	97–0631	12/29/96
Gilat Satellite Networks Ltd., Skydata, Inc., Skydata, Inc	97–0656	12/30/96
Winton M. Blount, Edward L. Benson, Frederick Manufacturing Corporation and Orbex, Inc	97–0680	12/30/96
MBNA Corporation, AMCORE Financial, Inc., AMCORE Financial Inc	97–0811	12/30/96
Monsieur Francois Pinault, Rexel Inc., Rexel Inc	97–0599	12/31/96
Enron Corp, Zond Corporation, Zond Corporation	97–0662	12/31/96
R. Quintus Anderson, Oneida Ltd., Camden Wire Company	97–0740	12/31/96
CSS Industries, Inc., Andrew Ogren, Color-Clings, Inc	97–0754	12/31/96
Clark USA, Inc., Silcorp Limited, a Canadian company, Hop-in Michigan, Inc., Gal Corp., Monroe Oil Co. & Wahl	97–0755	12/31/96
O.T. Fulghum, Jr., James River Corporation of Virginia, James River Corporation of Virginia	97–0771	12/31/96
Independence Blue Cross, Highmark Inc., Highmark Inc	97–0777	12/31/96

TRANSACTIONS GRANTED EARLY TERMINATION BETWEEN: 122396 *and* 123196—Continued

Name of acquiring person; name of acquired person; name of acquired entity	PMN No.	Date terminated
Colorstrip, Inc., Marshall I. Wais, Pinole Point Steel Company	97–0779	12/31/96
K–III Communications Corporation, Clyde Packer, WEP, Inc	97–0785	12/31/96
Greenwhich Street Capital Partners, L.P., Mark IV Industries, Inc., Gulton Industries, Inc	97–0789	12/31/96
Accor S.A. (a French company), Newco, Newco	97–0795	12/31/96
Watsco, Inc., United Technologies Corporation, Carrier Corporation	97–0797	12/31/96
Cinram Ltd., Quixote Corporation, Disc Manufacturing, Inc	97–0800	12/31/96
First Data Corporation, Eastman Kodak Company, Eastman Kodak Company	97–0802	12/31/96
Health Systems International, Inc., FOHP, Inc., FOHP, Inc	97–0803	12/31/96
Ghaznavi Family Trust, Vitro, Sociedad Anonima, Anchor Glass Container Corporation, debtor-in-possession	97–0806	12/31/96
Owens-Illinois, Inc., Vitro, Sociedad Anonima, Anchor Glass Container Corporation, debtor-in-possession	97–0807	12/31/96
Newbridge Networks Corporation, Tandem Computers Incorporated, Ungermann-Bass Networks, Incorporated	97–0808	12/31/96
Welsh, Carson, Anderson & Stowe VII, L.P., Steven and Bonnie Knier, American Research Group, Inc	97–0812	12/31/96
Litton Industries, Inc., Science Applications International Corporation, SAI Technology Companies	97–0814	12/31/96
Sierra Health Services, Inc., Physicians Corporation of America, Physicians Corporation of America	97–0815	12/31/96
Pon Holdings B.V., Jay N. Zidell, Zidell Resources, Inc.; Zidell Explorations, Inc.; Zide	97–0816	12/31/96
Cott Corporation, Jeffrey Hettinger, Premium Beverage Packers, Inc	97–0818	12/31/96
Russel Metals Inc., Sunbelt Trading Company, Inc., Sunbelt Trading Company, Inc	97–0819	12/31/96
Lloyd Thompson Group, plc, Jardine Matheson Holdings Limited, JIB Group plc	97–0820	12/31/96
AmeriMark Building Products, Inc., Reynolds Metals Company, Reynolds Company	97–0821	12/31/96
James M. Moran, Republic Industries, Inc., Republic Industries, Inc	97–0824	12/31/96
George D. Johnson, Jr., Republic Industries, Inc., Republic Industries, Inc	97–0825	12/31/96
Steven R. Berrard, Republic Industries, Inc., Republic Industries, Inc	97–0826	12/31/96
Republic Industries, Inc., H. Wayne Huizenga, AutoNation Incorporated	97–0827	12/31/96
AXA, Compagnie UAP, Compagnie UAP	97–0828	12/31/96
Masco Corporation, La Gard, Inc., La Gard, Inc	97–0829	12/31/96
Reinhold Wurth (a German natural person), Jeffrey A. Louis and Isabel A. Louis, Louis and Company, Inc	97–0841	12/31/96
Centex Corporation, Cavco Industries, Inc., Cavco Industries, Inc	97–0842	12/31/96
Centrex Corporation, MFH Holding Co., MFH Holding Co	97–0844	12/31/96
MiTAC International Corporation, Merisel, Inc., Merisel FAB, Inc	97–0845	12/31/96
Ripplewood Partners, L.P., Clarence V. Nalley, III, Nalley Chevrolet, Inc., Nalley Asian Autos, Inc	97–0847	12/31/96
Alfred R. and Janet M. Ghelfi, MFH Holding Company, MFH Holding Company	97–0848	12/31/96
Universal Foods Corporation, Tricon Colors, Incorporated, Tricon Colors, Incorporated	97–0855	12/31/96
Gamma Holding N.V., Fleet Financial Group, Inc., Chemprene Holdings, Inc	97–0856	12/31/96
Reinhold Wurth, Baer Supply Co., Baer Supply Co	97–0861	12/31/96

FOR FURTHER INFORMATION CONTACT: Sandra M. Peay or Parcellena P. Fielding, Contact Representatives, Federal Trade Commission, Premerger Notification Office, Bureau of Competition, Room 303, Washington, D.C. 20580, (202) 326–3100.

By Direction of the Commission.

Donald S. Clark,

Secretary.

[FR Doc. 97–3338 Filed 2–10–97; 8:45 am]

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Granting of Request for Early Termination of the Waiting Period Under the Premerger Notification Rules

Section 7A of the Clayton Act, 15 U.S.C. 18a, as added by Title II of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, requires persons contemplating certain mergers or acquisitions to give the Federal Trade Commission and the Assistant Attorney General advance notice and to wait designated periods before consummation of such plans. Section 7A(b)(2) of the Act permits the agencies, in individual cases, to terminate this waiting period prior to its expiration and requires that notice of this action be published in the Federal Register.

The following transactions were granted early termination of the waiting period provided by law and the premerger notification rules. The grants were made by the Federal Trade Commission and the Assistant Attorney General for the Antitrust Division of the Department of Justice. Neither agency intends to take any action with respect to these proposed acquisitions during the applicable waiting period.

TRANSACTIONS GRANTED EARLY TERMINATION BETWEEN: 010297 AND 011797

Name of Acquiring person; name of acquired person; name of acquired entity	PMN No.	Date terminated
Einhorn Verwaltungsgesellschaft, J.F. Jelenko & Co., J.F. Jelenko & Co	97–0697	01/02/97
Everett R. Dobson Irrevocable Family Trust, Horizon Cellular Telephone Company, L.P., Horizon Cellular Telephone Company of Hagerstown, L.P	97–0832	01/03/97
Tele-Communications. Inc., Tele-Communications. Inc., US Cable of Northern Indiana, L.P	97–0705	01/07/97
A. Jerrold Perenchio, Chester and Naomi Smith, Sainte Limited, LP	97–0712	01/07/97
Century Telephone Enterprises, Inc., Pecoco, Inc., Pecoco, Inc	97–0783	01/07/97
Thomas M. and Linda M. Clarke, Vencor, Inc., Vencor, Inc	97–0791	01/07/97
Iomega Corporation, Qauntum Corporation, Quantum Storage (Malaysia) SDN, BGD	97–0793	01/07/97
K–III Communications Corporation, Kerry Packer, WEP, Inc.	97–0796	01/07/97
TPG Partners, L.P., David Babiarz, Dae-Julie, Inc	97–0836	01/07/97
Century Fasteners Acquisition Corporation, Illinois Tool Works Inc., Medalist Industries, Inc., C-Tech Division	97–0853	01/07/97

TRANSACTIONS GRANTED EARLY TERMINATION BETWEEN: 010297 AND 011797—Continued

Name of Acquiring person; name of acquired person; name of acquired entity	PMN No.	Date terminated
Sterling Chemicals Holdings, Inc., Cytec Industries, Inc., Cytec Technology Corp., Cytec Acrylic Fibers Inc	97–0859	01/07/97
Jupiter Partners LP, Melvin Sosnick Company, Melvin Sosnick Company	97–0867	01/07/97
Aurora Equity Partners, L.P., Raymond V. O'Brien, III, Richray Industries	97–0871	01/07/97
Ronald O. Perelman, The Cosmetic Center, Inc., The Cosmetic Center, Inc	97–0872	01/07/97
ESCO Electronics Corporation, Clarence and Marilyn Schawk, Schawk, Inc., and voting securities of Filtrotec, Inc	97–0873	01/07/97
AAA South Central New England, The American Automobile Association, The American Automobile Association	97–0891	01/07/97
Scott K. Ginsburg, Steven Dinetz or Hicks, Muse, Tate & Furst Equity Fund, Shamrock Broadcasting, Inc	97–3050	01/08/97
Scott K. Ginsburg, Lane Investment Limited Partnership, Secret Communications Limited Partnership	97–3055	01/08/97
Harbour Group Investments III, L.P., Panatech Reserarch and Development Corporation, Panatech Reserarch and Development Corporation	97–0716	01/08/97
Pitt County Memorial Hospital, Inc., Roanoke-Chowan Alliance, Inc., Roanoke-Chowan Hospital, Inc	97–0893	01/08/97
Universal Outdoor Holdings, Inc., James P. McAndrew, Matthew Outdoor Advertising Acquisition Co., L.P	97–0764	01/09/97
Triathlon Broadcasting Company, American Radio Systems Corporation, KFAB (AM) and KGOR (FM)	97–0770	01/09/97
InPhyNet Medical Management Inc., Dr. Jacob Nudel, Nudel & Gluck, M.D., P.A., Gut Management, Inc	97–0849	01/09/97
John N. Irwin, III, Kenneth R. Thomson (a resident of Canada), Thomson Newspapers Inc	97–0858	01/09/97
OM Group, Inc., U.S. Industries, Inc., SCM Metal Products, Inc	97–0866	01/09/97
Dana Corporation, Ingersoll-Rand Company, Clark-Hurth Components, et al	97–0876	01/09/97
Millipore Corporation, Tylan General, Inc., Tylan General, Inc	97–0884	01/09/97
Holiday Gander Acquiring, L.L.C., Gander Mountain, Inc., Gander Mountain, Inc	97–0902	01/09/97
World Color Press, Inc., Rand McNally & Company, Rand McNally Book & Media Services Company	97–0773	01/010/97
Mr. Alain Merieux, Silliker Laboratories Group, Inc., Silliker Laboratories Group, Inc	97–0702	01/13/97
Lane Industries, Inc., Quartet Manufacturing Company, Quartet Manufacturing Company	97–0786	01/13/97
James H. Goodnight, Ph.D., Zell/Chilmark Fund, L.P., Midway Airlines Corporation	97–0889	01/13/97
Aurora Equity Partners, L.P., Richard A. Riddle, Richray Industries	97–0877	01/14/97
Fried. Krupp AG Hoesch-Krupp (a German company), Mexinox S.A. de C.V. (a Mexican company), Mexinox S.A. de C.V	97–0809	01/15/97
Jim Jannard, Oakley, Inc., Oakley, Inc	97–0780	01/17/97
Cable Systems Holding Company, Raymond A. Kedzior, LoDan Electronics, Inc	97–0887	01/17/97
Quality Food Centers, Inc., Hughes Markets, Inc., Hughes Markets, Inc	97–0892	01/17/97
Dennis R. Washington, Canadian Pacific Limited, Soo Line Railroad Company d/b/a Canadian Pacific Rwy	97–0898	01/17/97
Stonington Capital Appreciation 1994 Fund, L.P., Canberra Industries, Canberra Industries	97–0899	01/17/97
Fenway Partners Capital Fund, LP, Iron Age Holdings Corporation, Iron Age Holdings Corporation	97–0901	01/17/97
Blackstone Capital Partners II Merchant Banking Fund LP, MLGA Fund II, L.P., Haynes Holdings, Inc	97–0924	01/17/97

FOR FURTHER INFORMATION CONTACT: Sandra M. Peay or Parcellena P. Fielding, Contact Representatives, Federal Trade Commission, Premerger Notification Office, Bureau of Competition, Room 303, Washington, DC 20580, (202) 326–3100.

By Direction of the Commission.

Donald S. Clark,

Secretary.

[FR Doc. 97–3339 Filed 2–10–97; 8:45 am]

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The following transactions were granted early termination of the waiting period provided by law and the premerger notification rules. The grants were made by the Federal Trade Commission and the Assistant Attorney General for the Antitrust Division of the Department of Justice. Neither agency intends to take any action with respect to these proposed acquisitions during the applicable waiting period.

TRANSACTIONS GRANTED EARLY TERMINATION BETWEEN: 012097 AND 013197

Name of acquiring person; name of acquired person; name of acquired entity	PMN No.	Date terminated
Williams Holdings plc, Herrajes TESA S.A., Herrajes TESA S.A	97–0830	01/21/97
Avon Products, Edwin Nemeth and Lane Nemeth, Discovery Toys, Inc	97–0888	01/21/97
The Trust of Fred R. Smith and Ouida M. Smith, Union Pacific Corporation, Union Pacific Motor Freight Company	97–0896	01/21/97
John Gray, Union Pacific Corporation, Union Pacific Motor Freight Corporation	97–0897	01/21/97
Titan Holdings, Inc., E.W. Blanch Holdings, Inc., Elite Premium Service, Inc./Elite Premium Finance, Ltd	97–0900	01/21/97
Kotobuki Fudosan Ltd., Joint Venture, Joint Venture	97–0905	01/21/97
Cerberus Partners, L.P., WEI Holdings, Inc., debtor-in-possession, WEI Holdings, Inc., debtor-in-possession	97–0907	01/21/97
INVESCO PLC, A I M Management Group Inc., A I M Management Group Inc	97–0908	01/21/97
Charles T. Bauer, INVESCO PLC, INVESCO PLC	97–0909	01/21/97

TRANSACTIONS GRANTED EARLY TERMINATION BETWEEN: 012097 AND 013197—Continued

Name of acquiring person; name of acquired person; name of acquired entity	PMN No.	Date terminated
Robert H. Graham, INVESCO PLC, INVESCO PLC	97–0910	01/21/97
Gary T. Crum, INVESCO PLC, INVESCO PLC	97–0911	01/21/97
Michael J. Cemo, INVESCO PLC, INVESCO PLC	97–0912	01/21/97
Bank United Corporation, The Royal Bank of Scotland Group plc (a British co), Citizens Mortgage Corporation; Citizens Bank of	97–0948	01/21/97
U.S. Office Products Company, Robert A. Knoll, Action Wholesale Service, Inc./K&W Enterprises	97–0952	01/21/97
Edward S. Adams, U.S. Office Products Company, U.S. Office Products Company	97–0954	01/21/97
U.S. Office Products Company, Edward S. Adams, Professional Travel Corporation	97–0955	01/21/97
Hanson PLC, Concrete Pipe and Products Company, Incorporated, Concrete Pipe and Products Company, Incorporated	97–0342	01/22/97
Duke Power Company, PanEnergy Corp., PanEnergy Corp	97–0804	01/22/97
John V. Saeman, Orion Newco Services, Inc., Orion Newco Services, Inc	97–0838	01/22/97
Rice Partners II, L.P., Southland Holding Company, Southland Holding Company	97–0840	01/22/97
Robert E. Low and Lawana Low, Palace Casinos, Inc. (a debtor-in-possession), Maritime Group, Ltd	97–0860	01/22/97
PennCorp Financial Group, Inc., Washington National Corporation, Washington National Corporation	97–0880	01/22/97
Allied Domecq PLC, Michael T. Cobler, MTC Management, Inc	97–0885	01/22/97
Hoechst Aktiengesellschaft, Cookson Group plc, Cookson Pigments, Inc.	97–0915	01/22/97
Caribiner International, Inc., Donald D. Blumberg and Carole M. Blumberg, Blumberg Communications, Inc.	97–0916	01/22/97
Countrywide Credit Industries, Inc., Robert H. Leshner, Lesher Financial Services, Inc.	97–0917	01/22/97
Healthcare Underwriters Mutual Insurance Company, OHA: The Association for Hospitals and Health Systems, OHIC Insurance Company	97–0919	01/22/97
Frank M. Ward, Valmont Industries, Inc., Valmont Electric, Inc.	97–0927	01/22/97
W. Don Cornwell, Aben E. Johnson, Jr., WXON–TV, Inc.	97–0934	01/22/97
Jon M. Huntsman, Texaco, Inc., Texaco Chemical Inc.	97–0942	01/22/97
Joseph D. Fail, Mary M. Beazley and John W. Street (Husband and Wife), TeleConcepts, Inc.	97–0944	01/22/97
Gibraltar Steel Corporation, Southeastern Metals Manufacturing Company, Inc., Southeastern Metals Manufacturing Company, Inc.	97–0945	01/22/97
Robert A. Knoll, U.S. Office Products Company, U.S. Office Products Company	97–0953	01/22/97
Heilig-Meyers Company, Richard B. Levitz Sons, Inc., Richard B. Levitz Sons, Inc.	97–0957	01/22/97
Allen K. and Johnnie Cordell Breed, BTI Investments, Inc., BTI Investments, Inc.	97–0959	01/22/97
IWKA Aktiengesellschaft, EX-CELL-O Holding Aktiengesellschaft, EX-CELL-O Holding Aktiengesellschaft	97–0971	01/22/97
Jacor Communications, Inc., Nationwide Mutual Insurance Company, Nationwide Communications Inc.	97–0354	01/23/97
Nationwide Mutual Insurance Company, Jacor Communications, Inc., Citicasters Co.	97–0355	01/23/97
Dennis R. Hendrix, Duke Power Company, Dupe Power Company	97–0875	01/23/97
Media/Communcations Partners II Limited Partnership, Thomas S. Bagley, HUEBCORE Communications, Inc.	97–0933	01/23/97
Sisters of the Sorrowful Mother Generalate, Inc., Sisters of Charity of Saint Elizabeth, St. Joseph's Health Care System, Inc.	97–0839	01/24/97
Arnold Industries, Inc., Harold R. Tate, Motor Cargo Industries, Inc., Ute Trucking and Leasing	97–0956	01/27/97
Teleport Communications Group Inc., James N. Blue, CERFnet Services, Inc.	97–0964	01/27/97
American Business Information, Inc., Paul Goldner, DBA Holdings, Inc.	97–0965	01/27/97
InaCom Corp., HW Electronics, Inc. Voting Trust, Arynkel, Inc. dba HW Electronics, Inc.	97–0970	01/27/97
American General Corporation, Home Beneficial Corporation, Home Beneficial Corporation	97–0972	01/27/97
Mr. and Mrs. Lucien Flournoy, DI Industries, Inc., DI Industries, Inc	97–0973	01/27/97
DI Industries, Mr. and Mrs. Lucien Flournoy, Flournoy Drilling Company	97–0974	01/27/97
Arrow Electronics, Inc., Dennis J. and Sandra L. Logelin, Consan Incorporated	97–0991	01/27/97
Arrow Electronics, Inc., Dennis L. and Connie F. Maetzoid, Consan Incorporated	97–0992	01/27/97
Craig O. McCaw, Craig O. McCaw, NEXTLINK Communications, Inc	97–0994	01/27/97
First Data Corporation, Charles and Lisa Burtzloff, Cardservice International, Inc	97–0999	01/27/97
Inland Steel Industries, Inc., Thypin Steel Company, Inc., Thypin Steel Company. Inc	97–1003	01/27/97
Warburg, Pincus Ventures, L.P., Envirogen, Inc., Envirogen, Inc	97–1009	01/27/97
American Refining Group, Inc., Witco Corporation, Witco Corporation	97–1010	01/27/97
Jacor Communications, Inc., Par Broadcasting Company, Inc, Par Broadcasting Company, Inc	97–0311	01/28/97
Monsanto Company, Ethical Holdings, plc, Ethical Holdings, plc	97–0869	01/28/97
John C. Lincoln Hospital & Health Center, Phoenix General Healthcare System Inc., Phoenix General Healthcare System Inc	97–0870	01/28/97
Allegiance Corporation, Age Wave, Inc., Med Max, Inc	97–0903	01/28/97
Clear Channel Communications, Inc./Heftel Broadcasting, Orvon Gene Autry, Golden West Broadcasters	97–0906	01/28/97
Textron, Inc., MAAG Holding AG (A Swiss Corporation), Maag Pump Systems AG; Maag Pump Systems of America, Inc	97–0914	01/28/97
R.R. Donnelley & Sons Company, NYNEX Corporation, NYNEX International MediaCompany	97–0928	01/28/97
U S West Inc., Booth American Company, Booth Communications SE Michigan, Inc.; Booth	97–0937	01/28/97
James Hardie Industries Limited, Boral Limited, Boral Gypsum, Inc	97–0938	01/28/97
The SK Equity Fund, L.P., PepsiCo, Inc., East Side Mario's Restaurants, Inc	97–0950	01/28/97
SunAmerica Inc., John Alden Financial Corporation, John Alden Life Insurance Co.; John Alden Life	97–0958	01/28/97
MSC Industrial Direct Co., Inc., Zalman Usiskin, Executor of Estate of Charles Usiskin, Enco Manufacturing Company	97–0961	01/28/97
Transamerica Corporation, Metropolitan Mortgage Company, Metropolitan Mortgage Company	97–0967	01/28/97
Aurora Health Care, Inc., Friendship Living Centers, Inc., Friendship Living Centers, Inc.	97–0981	01/28/97
William L. Sauder, Guy Cholette, Can-Am Millwork, Ltd.	97–0986	01/28/97
Mezzanine Lending Associates III, L.P., Newco, Newco	97–0988	01/28/97
Willis Stein & Partners, Corning Incorporated, Corning Franklin Health, Inc.	97–0993	01/28/97

TRANSACTIONS GRANTED EARLY TERMINATION BETWEEN: 012097 AND 013197—Continued

Name of acquiring person; name of acquired person; name of acquired entity	PMN No.	Date terminated
Mr. Steven P. Jobs, Apple Computer, Inc., Apple Computer, Inc.,	97–1011	01/28/97
Apple Computer, Inc., Steven P. Jobs, NeXT Software, Inc.	97–1012	01/28/97
Code, Hennessy & Simmons II, L.P., Rand McNally & Company, DocuSystems Division	97–1020	01/28/97
Leonard Riggio, Barnes & Noble, Inc., Barnes & Noble, Inc.	97–1029	01/28/97
Potomac Electric Power Company, Baltimore Gas and Electric Company, 1Baltimore Gas and Electric Company	96–1879	01/29/97
Baltimore Gas and Electric Company, Potomac Electric Power Company, Potomac Electric Power Company	96–1880	01/29/97
Tenet Healthcare Corporation, OrNda Healthcorp., OrNda Healthcorp.	97–0309	01/29/97
Evening Post Publishing Company, Post Publishing Company, Post Publishing Company	97–0969	01/30/97
William L. Sauder, Ronald Cholette, Can-Am Millwork, Ltd.	97–0987	01/30/97
Paul Goldner, American Business Information, Inc., American Business Information, Inc.	97–1000	01/30/97
Broderbund Software, Inc., Advanced Voting Trust, of Samuel I. Newhouse, Living Books	97–1007	01/30/97
BankAmerica Corporation, Homeside, Inc., Honolulu Mortgage Company	97–1017	01/30/97
United Auto Group, Inc., Kevin J. Coffey, Crown Jeep Eagle, Inc.	97–1024	01/30/97
Automatic Data Processing, Inc., HealthPlan Services Corporation, HealthPlan Services Corporation	97–1027	01/30/97
Payless ShoeSource, Inc., J. Baker, Inc., JBI, Inc., Parade of Shoes Division	97–1042	01/30/97
Philip Environmental Inc., Gil Mains, Sr., RMF Global, Inc.	97–0982	01/31/97
Primark Corporation, Information Partners Capital Fund, LP, WEFA Holdings, Inc.	97–1008	01/31/97
Cable and Wireless plc, Cable and Wireless Communications plc (Joint Venture), Cable and Wireless Communications plc (Joint Venture) NYNEX Corporation,.	97–1034	01/31/97
Cable and Wireless Communications plc (Joint Venture), Cable and Wireless Communications plc (Joint Venture)	97–1035	01/31/97
Metropolitan Life Insurance Company, Andrew Goldfarb, HCC Industries, Inc.	97–1037	01/31/97
Kenneth R. Thomson, Thomas L. Thomas, Creative Solutions, Inc	97–1043	01/31/97
Irish Life plc, GR Holding Company, Inc., Guarantee Reserve Life Insurance Co.	97–1061	01/31/97
Supervalu Inc., Kerry Smith, Signature Mondial, Inc.	97–1062	01/31/97
Handy & Harman, Saugatuck Capital Company Limited Partnership III, Olympic Manufacturing Group, Inc.	97–1072	01/31/97
AMF Holdings Inc., American Recreation Centers, Inc., American Recreation Centers, Inc.	97–1077	01/31/97

FOR FURTHER INFORMATION CONTACT: Sandra M. Peay or Parcellena P. Fielding, Contact Representatives, Federal Trade Commission, Premerger Notification Office, Bureau of Competition, Room 303, Washington, DC 20580, (202) 326–3100.

By Direction of the Commission.

Donald S. Clark,

Secretary.

[FR Doc. 97–3340 Filed 2–10–97; 8:45 am]

BILLING CODE 6750–01–M

[File No. 951–0106]

American Cyanamid Company; 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 prohibit, among other things, the Parsipanny, New Jersey-based company from conditioning the payment of rebates or other incentives on the resale prices its dealers charge for its products, or from otherwise agreeing with its dealers to control or maintain resale prices. The complaint accompanying the consent agreement alleges that the company violated antitrust laws by fixing the resale prices of its agricultural chemical products.

DATES: Comments must be received on or before April 14, 1997.

ADDRESSES: Comments should be directed to: FTC/Office of the Secretary, Room 159, 6th St. and Pa. Ave., NW., Washington, DC 20580.

FOR FURTHER INFORMATION CONTACT: William J. Baer, Federal Trade Commission, H–374, 6th and Pennsylvania Ave, NW., Washington, DC 20580. (202) 326–2932. Mark Whitener, Federal Trade Commission, H–374, 6th and Pennsylvania Ave, NW., Washington, DC 20580. (202) 326–2845. Michael E. Antalics, Federal Trade Commission, S–2627, 6th and Pennsylvania Ave, NW, Washington, DC 20580. (202) 326–2821.

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 accompanying complaint. An electronic copy of the full text of the consent agreement package can be obtained from the Commission Actions sections of the FTC Home Page (for January 30, 1997), 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, NW., Washington, DC 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 To Aid Public Comment on the Proposed Consent Order

The Federal Trade Commission (''the Commission'') has accepted an agreement to a proposed consent order from American Home Products Corporation (''AHP''), through its wholly-owned subsidiary, American Cyanamid Company (''American Cyanamid''), located in Parsippany, New Jersey. The agreement would settle charges by the Commission that

American Cyanamid violated Section 5 of the Federal Trade Commission Act by engaging in practices that restricted completion in the domestic markets for crop protection chemicals, which are herbicides and insecticides widely used in commercial agriculture.

The proposed consent order has been placed on the public record for sixty (60) days for receipt of comments by interested persons. Comments received during this period will become part of the public record. After sixty (60) days, the Commission will again 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.

The purpose of this analysis is to invite public comment concerning the consent order and any other aspect of American Cyanamid's alleged anticompetitive conduct relating to its C.R.O.P. and A.P.E.X. rebate programs. This analysis is not intended to constitute an official interpretation of the agreement and order or to modify its terms in any way.

The Complaint

The complaint prepared for issuance by the Commission along with the proposed order alleges that American Cyanamid has engaged in acts and practices that have unreasonably restrained competition in the sale and distribution of crop protection chemicals in the United States. In 1995, the Commission's proposed complaint alleges, American Cyanamid sold at retail more than $1 billion of its crop protection chemicals and was the market share leader in three domestic crop protection chemical markets: soybean broadleaf herbicides, soybean grass herbicides, and corn soil insecticides, as well as being the second-largest domestic producer of cotton grass herbicides.

According to the complaint, American Cyanamid operated two cash rebate programs for its retail dealers for approximately five years. From 1989–1992, the plan was called the ''Cash Reward on Performance'' (''C.R.O.P.'') program, and was renamed the ''Award for Performance Excellence'' (''A.P.E.X.'') program in late 1992 through August 1995. The complaint states that American Cyanamid entered into written agreements with its dealers under these programs, pursuant to which American Cyanamid offered to pay its dealers substantial rebates on each sale of its crop protection chemicals that was made at or above specified minimum resale prices. According to the complaint, the dealers overwhelmingly accepted American Cyanamid's rebate offer by selling at or above the specified minimum resale prices.

The complaint further alleges that the wholesale prices in the agreements were set at a level equal to the specified minimum resale prices, and because a dealer received no rebate on sales below the specified prices, those sales were made at a loss to the dealer.

The complaint further states that although American Cyanamid included certain non-price performance criteria in its rebate programs that could increase the amount of the rebate, a dealer's compliance with these performance criteria was neither necessary nor, by itself, sufficient to obtain rebates. As examples, the complaint alleges that if a dealer met all of American Cyanamid's performance criteria, but sold the product for less than American Cyanamid's specified minimum resale price, that dealer received no rebate on the sale. On the other hand, if the dealer met none of the performance criteria, but sold the product at or above American Cyanamid's specified minimum resale price, the dealer nonetheless received a rebate on that sale.

American Cyanamid's conditioning of financial payments on dealers' charging a specified minimum price amounted to the *quid pro quo* of an agreement on resale prices. In cases where this issue has arisen, both before and after the Supreme Court examined the *per se* rule against resale price maintenance in *Monsanto* and *Sharp*,[1] courts have treated such agreements as *per se* illegal. *See Lehman* v. *Gulf Oil Corp.*, 464 F.2d 26, 39, 40 (5th Cir.), *cert. denied*, 409 U.S. 1077 (1972) (stating that '' * * * adherence to a suggested price schedule was the *quid pro quo* for Lehrman's receiving Gulf's TCAs [temporary competitive allowances]'' and ''there is no comparable justification for conditioning wholesale price support upon adherence to a schedule of *minimum* retail prices.'' (emphasis in original)); *Butera* v. *Sun Oil Co., Inc.* 496 F.2d 434, 437 (1st Cir. 1974). By offering financial inducements in return for selling at specified minimum prices, a manufacturer seeks the ''acquiescence or agreement'' of its dealers in a resale price-fixing scheme. *Monsanto,* 465 U.S. at 764 n. 9. The dealer, in turn, accepts the manufacturer's offer by selling at or above the specified minimum prices. *See* Isaksen v. *Vermont Castings, Inc.*, 825 F.2d 1158, 1164 (7th Cir. 1987) (Posner, J.) (an ''obvious'' resale price-fixing agreement is found '' * * * if [the manufacturer] had told [the dealer] that it would reduce its wholesale price to him if he raised his retail price, and [the dealer] had accepted the offer by raising his price.''). See also Khan v. *State Oil Co.*, 93 F.3d 1358, 1360–61 (7th Cir. 1996) (Posner, J.), *petition for cert. pending* No. 96–871 (agreement on price found where dealership agreement on its face allowed dealer to charge any resale price it wished, but distributor tied financial consequences to dealers' not charging the resale prices it suggested). As a result, incentives to reduce price below the specified level were substantially affected by American Cyanamid's rebate scheme.

The rebate programs challenged in this case are unlike situations where manufacturers are permitted to condition a discount or other incentive on that discount being ''passed through'' to consumers, which prevents a dealer form simply ''pocketing'' the discount. In these types of cases, the dealer is free to sell at even lower prices than the amount of the direct ''pass through'' of the discount or other incentive. Discounts cannot be conditioned, therefore, on the dealers' adherence to specified minimum price. *See* AAA Liquors, Inc. v. *Joseph E. Seagram and Sons, Inc.*, 705 F.2d 1203, 1206 (10th Cir. 1982), *cert denied,* 461 U.S. 919 (183) (Seagram's requirement of passing through its discount ''[did] not prohibit the wholesaler from making greater reductions in price that the discount provides.'') *See also* Acquaire v. *Canada Dry Bottling Co.*, 24 F.3d 401, 409–10 (2d Cir. 1994); *Lewis Service Center, Inc.* v. *Mack Trucks, Inc.*, 714 F.2d 842, 845–47 (8th Cir. 1983) (because dealers could discount more than Mack's sales assistance, the court found that ''the purpose of Mack's discount program [was] not to force adherence to any particular price scheme of Mack's.'').

The Proposed Consent Order

Part I of the proposed order covers definitions. These definitions make clear that the consent order applies to the directors, officers, employees, agents and representatives of American Cyanamid. The order also defines the terms product, dealer and resale price.

Part II of the order contains two major operative provisions: Part II(A) deals with the specific conduct at issue in this case. It prohibits American Cyanamid from conditioning the payment of rebates or other incentives on the resale prices its dealers charge for its products. Part II(B) prevents American Cyanamid from otherwise agreeing with its dealers generally to control or maintain resale prices.

[1] *Business Electronics Corp.* v. *Sharp Electronics Corp.*, 485 U.S. 717 (1988); *Monsanto Co.* v. *Spray-Rite Service Corp.*, 465 U.S. 752 (1984).

Neither of these provisions should be construed to prohibit lawful cooperative advertising programs or ''pass through'' discount programs that are not otherwise part of an unlawful resale price maintenance scheme. The Commission has previously determined that order provisions prohibiting agreements on resale prices do not restrict a company's ability to implement otherwise lawful cooperative advertising and ''pass through'' rebate plans because such programs do not, in themselves, constitute agreements on resale prices. See, e.g., *In Re Magnavox Co.*, 113 F.T.C. 255, 263, 269–70 (1990).

Part III of the order requires that for a period of three (3) years from the date on which the order becomes final, American Cyanamid shall include a statement, posted clearly and conspicuously, on any price list, advertising, catalogue or other promotional material where it has suggested a resale price for any product to any dealer. The required statement explains that while American Cyanamid may suggest resale prices for its products, dealers remain free to determine on their own the prices at which they will sell American Cyanamid's products.

Part IV of the order requires that for a period of three (3) years from the date on which the order becomes final, American Cyanamid shall mail the letter attached to the order as Exhibit A and a copy of this order to all of its current dealers, distributors, officers, management employees, and agents or representatives with sale or policy responsibilities for American Cyanamid's products. American Cyanamid also must mail the letter and order to any new dealer, distributor or employee in the above positions within thirty (30) days after the commencement of that person's affiliation or employment with American Cyanamid. All of the above dealers, distributors and employees must sign and return a statement to American Cyanamid within thirty (30) days of receipt that acknowledges they have read the order and that they understand that non-compliance with the order may subject American Cyanamid to penalties for violation of the order.

Part V of the order requires that American Cyanamid file with the Commission an annual verified written report giving the details of the manner and form in which American Cyanamid is complying and has complied with the order. In addition, Part V of the order also requires American Cyanamid to maintain and make available to the Commission upon reasonable notice all records of communications with dealers, distributors, and agents or representatives relating to sale prices in the United States, as well as records of any action taken in connection with activities covered by the rest of the order. Finally, American Cyanamid must inform the Commission at least thirty (30) days before any proposed changes in the corporation, such as dissolution or sale.

Donald S. Clark,

Secretary.

Statement of Chairman Robert Pitofsky and Commissioners Janet D. Steiger and Christine A. Varney in the Matter of American Cyanamid, File No. 951–0106

The Commission today accepts a proposed consent agreement with American Cyanamid prohibiting it from engaging in conduct designed to prevent its dealers from making discounted sales below the minimum price that American Cyanamid specified. American Cyanamid entered into written agreements with its dealers that provided dealers with ''rebates'' each time they sold their product at or above a certain resale price (the floor transfer price). For dealers who sold at the specified price, this rebate constituted their entire profit margin. The Commission believes that this conduct amounted to an illegal resale price maintenance agreement.

Commissioner Starek, in his dissent, criticizes this enforcement action for a number of reasons. As explained below, we disagree with Commissioner Starek's reasoning.

First, the dissenting statement appears to conclude that a situation where a manufacturer and a dealer enter into an express agreement that the manufacturer will pay the dealer to adhere to the manufacturer's specified resale price, is not an ''agreement on resale prices'' but rather some form of voluntary behavior. Judge Posner responded to similar arguments in *Khan* v. *State Oil.*[1]

In *Khan*, the court declared a maximum resale price arrangement *per se* illegal where the manufacturer permitted dealers to charge above a maximum price, but required them in such case to provide any resulting profit above the maximum price to the manufacturer. The ''voluntary'' nature of the arrangement did not detract from the finding that there was an agreement. Judge Posner noted that the arrangement was indistinguishable from an agreement not to exceed the maximum price, because the dealer was sanctioned for violating the agreement by having to remit any resulting profit to the manufacturer. In responding to State Oil's argument that there was no price fixing agreement, Judge Posner observed: ''The purely formal character of the distinction that it urges can be seen by imagining that the contract had forbidden Khan to exceed the suggested resale price and had provided that if he violated the prohibition the sanction would be for him to remit any resulting profit to State Oil.'' [2]

We agree with Judge Posner. In this case, the sanction was loss of the rebate for sales made below the floor transfer price. If an agreement to forego one's entire profit margin if one departs from the specified price does not constitute a price maintenance agreement, then nothing remains of the *per se* rule.

Second, the dissent seems to suggest that this case is one where agreement is being inferred from unilateral conduct. We cannot concur. American Cyanamid entered into written agreements which offered financial incentives for adherence to a minimum price schedule. Courts, both before and after *Sharp*,[3] have held such arrangements unlawful where adherence to a suggested price was the quid pro quo for the financial inducements. Judge Posner's decision in *Khan* is consistent with this approach.[4]

Third, the dissenting statement, relying in large part on recent economic literature, argues that American Cyanamid's program should not be condemned without proof of a supplier cartel, dealer cartel, or market power.[5] That view is inconsistent with the Supreme Court's view that resale price maintenance continues to be illegal *per se* and we reject the idea that the Supreme Court can be overruled by scholarly contributions to economic journals.

Finally, we cannot agree with the suggestion that this enforcement action somehow creates uncertainty about the Commission's treatment of pass through rebates or cooperative advertising programs. As the analysis to aid public comment explains, pass through programs have always been permitted,

[1] 93 F.3d 1358 (7th Cir. 1996).

[2] *Id.* at 1361. *See also Isaksen* v. *Vermont Castings, Inc.*, 825 F.2d 1158, 1164 (7th Cir. 1987) (in finding a violation based on economic coercion, Judge Posner noted, ''It is as if Vermont Castings had told Isaksen that it would reduce its wholesale price to him if he raised his retail price, and Isaksen had accepted the offer by raising his price.'').

[3] *Business Electronics Corp.* v. *Sharp Electronics Corp.*, 485 U.S. 717 (1988).

[4] 93 F.3d at 1362.

[5] Although we do not fully detail our disagreement with the description of the facts in the dissent, we believe that a full trial would have shown that an overwhelming portion of sales were made at or above the minimum resale price. Moreover, a dealer's advisory council voted to advise American Cyanamid to retain the program in order to protect its margins.

as long as the dealer is free to discount to an even greater extent than the pass through amount. Similarly, both the courts and the Commission have judged cooperative advertising cases under the rule of reason, as long as the arrangements do not limit the dealer's right: (1) To discount below the advertised price, and (2) to advertise at any price when the dealer itself pays for the advertisement. Unlike those programs, American Cyanamid's rebate program controlled the actual prices charged and was structured to prevent dealers from pricing below the floor transfer price.

Concurring Statement of Commissioner Mary L. Azcuenaga in American Cyanamid Co., File No. 951–0106

I concur in the decision to accept the consent agreement for public comment but decline to join the separate statement of the majority. The consent agreement, which includes the consent order and the complaint on which it is based, constitutes the decisional document of the Commission. My substantive views on this matter are contained entirely within the four corners of the decisional document. If the majority wants to revise or expand its decision, the proper course is to revise the decisional document. *See* Dissenting Statement of Commissioner Mary L. Azcuenaga in *Dell Computer Corp.* at 21–23 (Docket No. 3658, May 20, 1996).

Dissenting Statement of Commissioner Roscoe B. Starek III, in the Matter of American Cyanamid Company, File No. 951–0106

I respectfully dissent from the Commission's decision to accept a consent agreement with the American Cyanamid Company (''AmCy''), a producer of agricultural chemicals. The proposed complaint claims that certain aspects of AmCy's compensation arrangement with its dealers constitute per se illegal resale price maintenance (''RPM''), in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45. I do not agree that AmCy's dealer rebate policies constitute the functional and legal equivalent of RPM agreements. Consequently, I conclude that the decision to challenge AmCy's distribution policies would expand substantially the range of activities condemned by the Commission as Illegal per se. This policy is ill-advised and runs contrary to twenty years of case law in which the scope of vertical arrangements subject to per se condemnation has been steadily narrowed. This case is an especially poor vehicle for expanding the scope of the per se rule, for it would be difficult to find conduct that better exemplifies the economic deficiencies of that standard.

Condemning certain conduct as illegal per se normally is rationalized by the belief that the conduct in question is so frequently pernicious that one cannot justify the cost of attempting to identify the few instances in which it is not. Whether RPM warrants characterization as per se illegal conduct has increasingly been called into question by antitrust scholars;[1] indeed, it would be difficult to find an antitrust economist who would defend this enforcement standard.[2] RPM remains illegal per se, however, and, consistent with this standard, I have voted to support enforcement actions against RPM agreements when I have been convinced that (1) the conduct in question plainly constituted an illegal agreement on price (as construed by contemporary case law), and (2) the relief was appropriately tailored to deter future illegal conduct.

Notwithstanding the continued per se treatment of RPM—and my willingness to support RPM cases in the limited circumstances identified above—I cannot ignore the persistent accumulation of economic evidence demonstrating the potentially procompetitive (or, or worst, economically neutral) nature of RPM agreements. At minimum, this evidence counsels against expanding the boundaries of per se illegal conduct to envelop activities that (at best) only weakly satisfy the legal criteria for finding the existence of an ''agreement'' and, more important, appear to be procompetitive in both purpose and effect. Under these evaluative criteria, the present matter is a poor candidate for an enforcement action.

The Supreme Court set forth the legal standard for finding an illegal RPM ''agreement'' in *Monsanto Co.* v. *Spray-Rite Service Corporation:*[3]

> The correct standard is that there must be evidence that tends to exclude the possibility of independent action by the manufacturer and distributor. That is, there must be direct or circumstantial evidence that reasonably tends to provide that the manufacturer and others had a conscious commitment to a common scheme designed to achieve an unlawful objective.

Monsanto, 465 U.S. at 768. The Court stated further that the ''concept of 'a meeting of the minds' or 'a common scheme' * * * includes more than a showing that the distributor conformed to the suggested price. It means as well that evidence must be presented both that the distributor communicated its acquiescence or agreement, and that this was sought by the manufacturer.'' Id. at 764 n. 9 (emphasis added).

While it is true that AmCy entered into contracts with its distributors providing for compensation for sales at or above the wholesale purchase price, it is clear that there was no ''meeting of the minds'' or ''common scheme,'' and thus no illegal agreement, to maintain resale prices. At no time did AmCy tell its distributors that they must sell agricultural chemicals at specific prices or risk losing supplies; AmCy did not attempt to coerce or intimidate its distributors into selling at specific price levels; distributors did not communicate an agreement to sell at specific prices; no distributors were ever terminated for selling at prices below the wholesale price; and distributors remained free (explicitly provided by contract) to resell products at any price of choosing. That distributors sometimes sold at prices below the wholesale level without loss of supply or termination is testament to the unilateral nature of the distributors' pricing decisions and to the absence of any agreement to maintain resale prices.[4] In this instance, all of the

[1] There is a substantial body of economic literature demonstrating that RPM frequently can be socially beneficial. See, e.g., Michael L. Katz, ''Vertical Contractual Relations,'' in Richard Schmalensee and Robert D. Willig, 1 Handbook of Industrial Organization 655 (1989). The existing empirical literature fails to find evidence supporting an anticompetitive characterization of RPM. See e.g., Pauline M. Ippolito & Thomas R. Overstreet, Jr., ''Resale Price Maintenance: An Economic Assessment of the Federal Trade Commission's Case Against the Corning Glass Works,'' 39 J.L. & Econ. 285 (1996) (evidence convincingly rejects anticompetitive theories and suggests instead that RPM increase sales of Corning's products); Pauline M. Ippolito, ''Resale Price Maintenance: Empirical Evidence from Litigation,'' 34 J.L. & Econ. 263 (1991) (empirical evidence cannot support a collusive explanation for the use of RPM).

[2] I also emphasize that in none of the RPM actions brought by the Commission during my tenure could one have plausibly characterized the condemned conduct as having an anticompetitive effect (indeed, in several instances, procompetitive rationales for the restrictions were plainly evident). In only one instance, Nintendo of America Inc., 114 F.T.C. 702 (1991), could one have plausibly ascribed market power to the manufacturer that was party to the agreement. Without manufacturer market power, RPM agreements between a single manufacturer and its dealers cannot harm consumers. Of course, it cannot be overemphasized that market power is only a necessary, but not a sufficient, condition for vertical restraints to reduce consumer welfare; by itself, market power does not establish that the conduct is anticompetitive. Even when a manufacturer possesses substantial market power, all of the procompetitive rationales for vertical restraints remain potentially valid.

[3] 465 U.S. 752 (1984).

[4] Evidence suggests that distributors in fact sold specific products covered by the AmCy program at retail prices both above and below the wholesale transfer price. Wide variation in distributor resale prices runs contrary to usual evidence of a

hallmarks of a per se illegal RPM agreement are lacking.

Evidence that dealers did in fact resell AmCy products at or above the wholesale purchase price does not relieve the Commission of its obligation to demonstrate the existence of an illegal agreement. As made clear by Colgate,[5] a unilateral, self-motivated decision by a distributor to accept a manufacturer's pricing policies, and thus sell products at a suggested retail price, does not constitute an illegal RPM agreement. In Monsanto, the Supreme Court stated: ''Under Colgate, the manufacturer can announce its resale prices in advance and refuse to deal with those who fail to comply. And a distributor is free to acquiesce in the manufacturer's demand in order to avoid termination.'' 465 U.S. at 761. As Monsanto and Colgate make clear, something more than mere acquiescence by a distributor in a manufacturer's pricing policies is necessary to convert a unilateral decision by a distributor into an agreement to maintain resale prices.

I am therefore puzzled why the majority is so quick to infer the existence of a per se illegal RPM agreement from evidence that many distributors found it in their self-interest unilaterally to sell at or above the wholesale price and thereby receive rebates from AmCy. To infer the existence of a per se illegal RPM agreement in this context, when AmCy never announced minimum resale prices nor sought a commitment from distributors to sell at or above certain price levels, violates the fundamental legal principle of RPM law announced in Colgate. How can the majority find a per se illegal agreement here—under arguably weaker factual circumstances than existed in Colgate—and believe that it still seeks to enforce the rule announced in Colgate, and reiterated in Monsanto, that mere acquiescence by a distributor in the pricing policies of a manufacturer is insufficient as a matter of law to warrant inference of the existence of a per se illegal RPM agreement?[6]

The majority's finding that AmCy entered into illegal RPM agreements with its distributors is nothing less than a retreat from the principles of vertical restraints analysis laid down by the Supreme Court in Colgate, Monsanto, Sylvania,[7] and Sharp.[8] In cases involving allegations of concerted price fixing, ''the antitrust plaintiff must present evidence sufficient to carry its burden of proving that there was such an agreement. If an inference of such an agreement may be drawn from highly ambiguous evidence, there is a considerable danger that the doctrines enunciated in Sylvania and Colgate will be seriously eroded.'' Monsanto, 465 U.S. at 763. I conclude that the standard set forth by Supreme Court for the finding of a price-fixing agreement has not been met. That the majority is willing to infer the existence of an agreement in this instance on the basis of such ambiguous evidence, and to rely primarily on pre-Sharp case law and post-Sharp dicta and one case not on point[9] to justify its conclusion, represents an effort to circumvent the law of RPM (and of vertical restraints in general) laid down by the Supreme Court over the last twenty years.[10]

The majority's decision to accept a consent agreement here also cannot be supported on economic grounds. The per se treatment of RPM usually is justified by the assertion that such agreements almost invariably are used to support collusion, either among manufacturers or among distributors.[11] RPM could support manufacturer collusion for two reasons.[12] First, RPM may make it easier to detect cheating on a cartel agreement, because resale prices (presumably) are easier to observe than wholesale prices, and successful monitoring of prices is necessary for any successful collusive price agreement to work.[13] Second, RPM may reduce the incentive to cheat on a cartel because a manufacturer cutting its wholesale price will not increase sales by very much if the corresponding resale price cannot fall.[14] If RPM is being used to facilitate manufacturer collusion, we would expect to see other manufacturers adopting similar price restrictions; collectively, these manufacturers would

minimum resale price fixing agreement. As Chairman Pitofsky has stated: ''The one point that emerges clearly in any debate concerning the per se rule is that minimum vertical price agreements lead to higher, and usually uniform, resale prices.'' Robert Pitofsky, ''In Defense of Discounters: The No-Frills Case for a Per Se Rule Against Vertical Price Fixing,'' 71 Geo. L.J. 1487, 1488 (1983). The Commission's proposed compliant does not allege, nor provide supporting evidence, that the rebate program resulted in higher retail prices for AmCy's products. Moreover, the wide dispersion in resale prices demonstrates the absence of the type of uniformity believed to be an indicator of a minimum resale price agreement. This dispersion in retail prices suggests that distributors were engaging in loss-leader programs out of a desire to increase future sales of AmCy products. In addition to encouraging distributors to provide valuable pre-sale services, AmCy's rebate program may have encouraged distributors to engage in loss-leader programs as a means of persuading customers to switch to AmCy products.

[5] *United States* v. *Colgate & Co.*, 250 U.S. 300 (1919).

[6] Although the majority's reply emphasizes ''written agreements'' pursuant to which dealers were offered compensation for sales at prices above the wholesale transfer price (Statement of Chairman Robert Pitofsky and Commissioners Janet D. Steiger and Christine A Varney in the Matter of American Cyanamid, at 2), the proposed complaint in this case indicates that the Commission is willing—despite the clear warnings of Colgate and Monsanto to the contrary—to infer the existence of per se illegal RPM ''agreements'' solely from the dealers' unilateral acceptance of AmCy's ''offer.'' Proposed Complaint, at ¶ 6 (''The dealers overwhelmingly accepted AmCy's offer by selling at or above the specified minimum prices.'').

[7] *Continental T.V., Inc.* v. *GTE Sylvania Inc.*, 433 U.S. 36 (1977).

[8] *Business Electronics Corp.* v. *Sharp Electronics Corp.*, 485 U.S. 717 (1988).

[9] The majority relies heavily on Judge Posner's opinion in *Khan* v. *State Oil Co.*, 93 F.3d 1358 (7th Cir. 1996). Besides the obvious difference that *Khan* deals with maximum rather than minimum RPM, the facts of *Khan* are fundamentally different. The contract between State Oil (the supplier) and Khan (the dealer) provided that State Oil would announce a suggested retail price for gasoline and sell it to Khan for 3.25 cents per gallon less. The contract further required Khan to rebate to State Oil any profit received for sales above the suggested retail price. As Judge Posner noted, the contract eliminated any incentive for Khan to charge above the suggested retail price. Since absolute compliance was thus guaranteed under the facts of *Khan*, it is not surprising that a dealer challenged the program. AmCy, on the other hand, never announced suggested retail prices to its dealers, never established an explicit mark-up, and never required dealers to seek permission before lowering their price. The fact that AmCy's dealers frequently lowered retail prices below the wholesale purchaseprice indicates that AmCy did not implement its rebate program in order to eliminate dealers' incentives to reduce prices (*e.g.*, to develop new customers, to increase business with existing customers, or to encourage switching by customers from other manufacturers' agricultural products to AmCy's products). The majority's reliance on *Khan* is therefore of doubtful relevance to this case.

[10] Today's action by the Commission has by no means established a clearer and more certain legal rule for RPM cases than exists under the rule of Colgate and other Supreme Court decisions. Whereas a supplier before today's decision might know with certainty that mere voluntary adherence by a distributor to a unilaterally announced resale price policy does not constitute illegal RPM, the same supplier must now worry that the Commission may henceforth use such voluntary adherence as evidence of a per se illegal agreement to maintain resale prices. Moreover, as a result of today's decision, the business community may be left wondering how the Commission can—and whether it will—maintain the functional distinction it currently draws between, on the one hand, rebate-pass-through provisions and cooperative advertising programs—programs that the Commission generally does not consider to be per se illegal—and, on the other hand, other types of rebate programs that similarly impose restrict conditions on the buyer.

[11] Of course, much of the empirical literature on the actual uses of RPM (see note 1, supra) casts serious doubt upon the validity of this proposition.

[12] See Lester G. Telser, ''Why Should Manufacturers Want Fair Trade?,'' 3 J.L. & Econ. 86 (1960).

[13] See George J. Stigler, ''A Theory of Oligopoly,'' in The Organization of Industry 39, 43 (1968) (''In general the policing of a price agreement involves an audit of the transactions prices.'').

[14] This argument is subject to the obvious limitation that a manufacturer wishing to cheat on the collusive arrangement would have little incentive to enforce the RPM agreement.

have to account for sufficient total output to give them power over price.[15]

As far as I can tell, the ''manufacturer cartel'' theory is not relevant to the present case. The Commission's proposed complaint does not allege, let alone provide supporting evidence, that AmCy has attempted to collude with other agricultural chemical makers, such as DuPont, Monsanto, Ciba-Geigy, or BASF. There is also no evidence that these other firms used RPM, as is required for the theory to work. But even putting aside the absence of such evidence, it is difficult to imagine an arrangement less suited to cartel stability than that which existed between AmCy and its distributors. Specifically, under the terms of AmCy's C.R.O.P.™ and A.P.E.X.™ programs, a dealer's compensation was tied explicitly to the share of chemical sales accounted for by AmCy's products. Given that a crucial element of cartel enforcement is the discovery of some means by which each member can commit credibly to maintaining—but not increasing—its market share,[16] how could a program that explicitly rewards market share expansion plausibly be characterized as a cartel enforcement tool?

Furthermore, the available evidence suggests that the C.R.O.P.™ and A.P.E.X.™ programs were extraordinarily successful in expanding AmCy's sales and market share, which grew substantially while the program was in use. Certainly, other factors (*e.g.*, the successful introduction of several new product lines) may have accounted for a portion of this increase; [17] nevertheless, it is difficult (if not impossible) to reconcile the behavior of AmCy's output—or of total market output—during this period with any coherent theory of competitive harm involving collusion with other chemical makers.

In the alternative, *per se* treatment sometimes is predicated on the characterization of RPM as an aid to dealer collusion. Under such a scenario, a group of dealers pressures the supplier to adopt RPM to achieve and maintain a collusive resale price arrangement among the dealers. When RPM is used for this purpose, we would expect to see coordinated pressure on the manufacturer to adopt RPM from a group of dealers with sufficient market power to credibly threaten the manufacturer. Moreover, to be effective, the dealer cartel must enter into similar arrangements with enough manufacturers to be able to affect market price; otherwise, the collusive retail price of price-maintained products would be undermined by competition from products not subject to RPM agreements. Under such conditions, we would expect the manufacturer to be a reluctant participant in the scheme, though it would enforce the RPM agreement if the dealer threats were credible. Finally, it is unlikely that the colluding dealers would carry competing products not subject to RPM agreements, as that would be equivalent to cheating on the collusively-determined resale margin.

This second anticompetitive theory fits the facts of this case no better than the first. The Commission's complaint does not allege, let alone provide supporting evidence, that AmCy is the victim of a dealer cartel. As I already have noted, it does not appear that other manufacturers had similar arrangements with the members of any putative ''dealer cartel,'' or that this ''cartel'' eschewed the products of rival manufacturers.[18] Had AmCy been the victim of a cartel, its attitude toward the Commission and numerous state investigations should have been one of grateful acquiescence, because the enforcement agencies would be rescuing it from the clutches of its rapacious dealers. In fact, of course, AmCy unilaterally terminated the challenged provisions of the C.R.O.P.™ and A.P.E.X.™ programs several years ago. so much for ''dealer coercion.'' [19]

Given that neither of the two traditional anticompetitive theories can be reconciled with the terms of the AmCy program, could the Commission's action be justified on some other basis? The Commission might attempt to seek refuge in some unilateral theory of market power, under which a manufacturer with substantial *pre-existing* market power is hypothesized to use vertical restraints because, for some reason, it cannot extract the full value of its market power simply by raising its wholesale price. The economics literature certainly acknowledges such possibilities, but these theories provide a fragile basis for antitrust enforcement.[20] As such models show, vertical restraints often can improve consumer welfare even when adopted by firms with substantial market power; [21] the models fail, however, to provide empirical criteria by which enforcers can distinguish anticompetitive from procompetitive effects.[22] Thus, the practical utility of these theories is questionable even for conduct judged under the rule of reason; their inability to justify a policy of *per se* illegality appears self-evident.

On several grounds, therefore, acceptance of the consent agreement in this matter represents a poor policy choice by the Commission. From a legal perspective, AmCy's conduct does not constitute an illegal agreement to maintain resale prices; from an economic perspective, the evidence points to the conclusion that AmCy's conduct was procompetitive; and from a policy perspective, the Commission's decision hardly delineates a clearer distinction (and in fact seriously blurs the line) between conduct likely to be subject to *per se* condemnation and conduct that is not. Instead of reaching for ways to expand the application of the *per se* rule to conduct that is plainly procompetitive, enforcers should

[15] Of course, all of the standard factors used to analyze market power and the ability to implement and maintain collusive pricing (e.g., ease of entry, heterogeneity of the products, and so forth) would also be relevant to judging the likelihood of successful supplier collusion.

[16] As Stigler (*supra* note 13, at 42) noted, ''[f]ixing market shares is probably the most efficient of all methods of combating secret price reductions.''

[17] The likelihood of successfully maintaining collusion in the face of product innovation (as was occurring in this instance) is, of course, quite small. Collusion is more likely to be successful, the greater the degree of similarity (*e.g.*, in terms of cost, demand, and product characteristics) among the parties to the agreement.

[18] This is unsurprising, because over 2500 dealers participated in the C.R.O.P.™ and A.P.E.X.™ programs. It is fanciful to believe that a cartel could have been formed from among such a large number of dealers. If such a cartel exists, one might reasonably ask why the dealers that belong to it are not also named in the Commission's complaint.

[19] In its reply, the majority appears to suggest that the existence of a dealer cartel can be inferred from the allegation that ''a dealer's advisory council voted to advise American Cyanamid to retain the program in order to protect their margins.'' Statement of Chairman Robert Pitofsky and Commissioners Janet D. Steiger and Christine A. Varney in the Matter of American Cyanamid, at note 5. Even if an advisory council furnished this advice to AmCy, communications of this nature between dealers and manufacturers do not establish that the dealers acted collusively. Moreover, the fact that dealers may have communicated this advance says nothing about the competitive effects of AmCy's rebate program. One would expect dealers to provide this same ''advice'' if AmCy's program were designed to prevent discounters from free-riding on the pre-sale services provided by other dealers.

[20] *See, e.g.*, Remarks of Commissioner Roscoe B. Starek, III, ''Reinventing Antitrust Enforcement? Antitrust at the FTC in 1995 and Beyond,'' before a conference on ''A New Age of Antitrust Enforcement: Antitrust in 1995'' (Marina del Rey, California, Feb. 24, 1995).

[21] As I noted earlier (*supra* note 2), market power is a necessary, but not a sufficient, condition for vertical restraints to reduce consumer welfare.

[22] As Katz (*supra* note 1, at 713–14) notes, ''[m]uch of the literature on vertical restraints has been conducted with the express aim of deriving policy conclusions. But in many, if not most, instances there is no widespread agreement on whether a particular vertical practice is socially beneficial or harmful. This unhappy state of affairs is due, in part, to the fact that all of the practices can be beneficial in some instances and harmful in others, and it may be extremely difficult to distinguish between the two cases.''

reserve their heavy hand for conduct that falls within standards for *per se* illegality clearly enunciated by the Supreme Court. Accordingly, I cannot support the proposed enforcement action made public today.

[FR Doc. 97–3341 Filed 2–10–97; 8:45 am]

BILLING CODE 6750–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[30DAY–28]

Agency Forms Undergoing Paperwork Reduction Act Review

The Centers for Disease Control and Prevention (CDC) publishes a list of information collection requests under review by the Office of Management and Budget (OMB) in compliance with the Paperwork Reduction Act (44 U.S.C. Chapter 35). To request a copy of these requests, call the CDC Reports Clearance Office on (404) 639–7090. Send written comments to CDC, Desk Officer; Human Resources and Housing Branch, New Executive Office Building, Room 10235; Washington, DC 20503. Written comments should be received within 30 days of this notice.

The following request has been submitted for review since the last publication date on February 4, 1997.

Proposed Project

1. Biomechanical Stress Control in Drywall Installation—New-Drywall installers represented approximately 1.42% of the construction workforce in 1992. Based on analysis of the Supplementary Data System (BLS) of 21 states, the compensable injury/incidence rate (27.5 cases per 100 workers for this group) was nearly three times the injury rate of 9.5 for all other construction occupations combined, in 1987. Data from the 1992 and 1993 Annual Survey of Occupational Injuries and Illnesses (BLS) indicated that there were an estimated 4,680 traumatic injuries among drywall installers involving days away from work in the construction industry in 1992, and 4,122 in 1993. In 1993, bodily reaction and exertion (31.8%), falls (28.6%), and contact with objects (24.6%) were the leading events of injury and illness involving days away from work. As a result, sprains and strains (40.6%) constituted the most frequent nature of injuries and illnesses category in 1994.

To gain an understanding of these injuries, NIOSH has initiated this project to examine different approaches in both field and laboratory settings to identify and control the high-risk activities associated with the traumatic injuries and overexertion hazards of drywall installation work. One of the field study components for this project is to identify high-risk tasks and activities for drywall installers, using a drywall installation survey which was developed at NIOSH. The findings of this survey will provide further understanding and focus laboratory research efforts on the most hazardous tasks/activities of drywall-installation work. Study populations will include drywall installers or construction workers with drywall installation experience. Each questionnaire will take approximately 20 minutes to complete. The total annual burden is 30.

Respondents	Number of respondents	Number of responses/respondent	Average burden/response (in hrs.)
Drywall Installers	120	1	.25

Dated: February 5, 1997.

Wilma G. Johnson,

Acting Associate Director for Policy Planning and Evaluation, Centers for Disease Control and Prevention (CDC).

[FR Doc. 97–3332 Filed 2–10–97; 8:45 am]

BILLING CODE 4163–18–P

Food and Drug Administration

[Docket No. 96E–0388]

Determination of Regulatory Review Period for Purposes of Patent Extension; MERREM® I.V.

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) has determined the regulatory review period for MERREM® I.V. and is publishing this notice of that determination as required by law. FDA has made the determination because of the submission of an application to the Commissioner of Patents and Trademarks, Department of Commerce, for the extension of a patent which claims that human drug product.

ADDRESSES: Written comments and petitions should be directed to the Dockets Management Branch (HFA–305), Food and Drug Administration, 12420 Parklawn Dr., rm. 1–23, Rockville, MD 20857.

FOR FURTHER INFORMATION CONTACT: Brian J. Malkin, Office of Health Affairs (HFY–20), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301–443–1382.

SUPPLEMENTARY INFORMATION: The Drug Price Competition and Patent Term Restoration Act of 1984 (Pub. L. 98–417) and the Generic Animal Drug and Patent Term Restoration Act (Pub. L. 100–670) generally provide that a patent may be extended for a period of up to 5 years so long as the patented item (human drug product, animal drug product, medical device, food additive, or color additive) was subject to regulatory review by FDA before the item was marketed. Under these acts, a product's regulatory review period forms the basis for determining the amount of extension an applicant may receive.

A regulatory review period consists of two periods of time: A testing phase and an approval phase. For human drug products, the testing phase begins when the exemption to permit the clinical investigations of the drug becomes effective and runs until the approval phase begins. The approval phase starts with the initial submission of an application to market the human drug product and continues until FDA grants permission to market the drug product. Although only a portion of a regulatory review period may count toward the actual amount of extension that the Commissioner of Patents and Trademarks may award (for example, half the testing phase must be subtracted as well as any time that may have occurred before the patent was issued), FDA's determination of the length of a regulatory review period for a human drug product will include all of the testing phase and approval phase as specified in 35 U.S.C. 156(g)(1)(B).

FDA recently approved for marketing the human drug product MERREM® I.V. (meropenem). MERREM® I.V. is indicated as single agent therapy for the treatment of the following infections

when caused by susceptible strains of the following designated microorganisms: Intra-abdominal Infections: Complicated appendicitis and peritonitis caused by viridans group streptococci, *Escherichia coli*, *Klebsiella pneumoniae*, *Pseudomonas aeruginosa*, *Bacteroides fragilis*, *B. thetaiotaomicron*, and *Peptostreptococcus* species. Bacterial Meningitis (pediatric patients ≥ 3 months only): Bacterial meningitis caused by *Streptococcus pneumoniae*, *Haemophilus influenzae* (β-lactamase and non-β-lactamase-producing strains), and *Neisseria meningitidis*. Subsequent to this approval, the Patent and Trademark Office received a patent term restoration application for MERREM® I.V. (U.S. Patent No. 4,943,569) from Sumitomo Pharmaceutical Co., Ltd., and the Patent and Trademark Office requested FDA's assistance in determining this patent's eligibility for patent term restoration. In a letter dated November 4, 1996, FDA advised the Patent and Trademark Office that this human drug product had undergone a regulatory review period and that the approval of MERREM® I.V. represented the first permitted commercial marketing or use of the product. Shortly thereafter, the Patent and Trademark Office requested that FDA determine the product's regulatory review period.

FDA has determined that the applicable regulatory review period for MERREM® I.V. is 2,608 days. Of this time, 1,640 days occurred during the testing phase of the regulatory review period, while 968 days occurred during the approval phase. These periods of time were derived from the following dates:

1. *The date an exemption under section 505(i) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 355(i)) became effective*: May 3, 1989. FDA has verified the applicant's claim that the date that the investigational new drug application became effective was on May 3, 1989.

2. *The date the application was initially submitted with respect to the human drug product under section 507 of the Federal Food, Drug, and Cosmetic Act* (21 U.S.C. 357): October 28, 1993. FDA has verified the applicant's claim that the new drug application (NDA) for MERREM® I.V. (NDA 50–706) was initially submitted on October 28, 1993.

3. *The date the application was approved*: June 21, 1996. FDA has verified the applicant's claim that NDA 20–506 was approved on June 21, 1996.

This determination of the regulatory review period establishes the maximum potential length of a patent extension. However, the U.S. Patent and Trademark Office applies several statutory limitations in its calculations of the actual period for patent extension. In its application for patent extension, this applicant seeks 1,063 days of patent term extension.

Anyone with knowledge that any of the dates as published is incorrect may, on or before April 14, 1997, submit to the Dockets Management Branch (address above) written comments and ask for a redetermination. Furthermore, any interested person may petition FDA, on or before August 11, 1997, for a determination regarding whether the applicant for extension acted with due diligence during the regulatory review period. To meet its burden, the petition must contain sufficient facts to merit an FDA investigation. (See H. Rept. 857, part 1, 98th Cong., 2d sess., pp. 41–42, 1984.) Petitions should be in the format specified in 21 CFR 10.30.

Comments and petitions should be submitted to the Dockets Management Branch (address above) in three copies (except that individuals may submit single copies) and identified with the docket number found in brackets in the heading of this document. Comments and petitions may be seen in the Dockets Management Branch between 9 a.m. and 4 p.m., Monday through Friday.

Dated: January 31, 1997.

Stuart L. Nightingale,

Associate Commissioner for Health Affairs.

[FR Doc. 97–3313 Filed 2–10–97; 8:45 am]

BILLING CODE 4160–01–F

[Docket No. 96E–0360]

Determination of Regulatory Review Period for Purposes of Patent Extension; DIFFERIN Topical Gel

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) has determined the regulatory review period for DIFFERIN Topical Gel and is publishing this notice of that determination as required by law. FDA has made the determination because of the submission of an application to the Commissioner of Patents and Trademarks, Department of Commerce, for the extension of a patent which claims that human drug product.

ADDRESSES: Written comments and petitions should be directed to the Dockets Management Branch (HFA–305), Food and Drug Administration, 12420 Parklawn Dr., rm. 1–23, Rockville, MD 20857.

FOR FURTHER INFORMATION CONTACT: Brian J. Malkin, Office of Health Affairs (HFY–20), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301–443–1382.

SUPPLEMENTARY INFORMATION: The Drug Price Competition and Patent Term Restoration Act of 1984 (Pub. L. 98–417) and the Generic Animal Drug and Patent Term Restoration Act (Pub. L. 100–670) generally provide that a patent may be extended for a period of up to 5 years so long as the patented item (human drug product, animal drug product, medical device, food additive, or color additive) was subject to regulatory review by FDA before the item was marketed. Under these acts, a product's regulatory review period forms the basis for determining the amount of extension an applicant may receive.

A regulatory review period consists of two periods of time: A testing phase and an approval phase. For human drug products, the testing phase begins when the exemption to permit the clinical investigations of the drug becomes effective and runs until the approval phase begins. The approval phase starts with the initial submission of an application to market the human drug product and continues until FDA grants permission to market the drug product. Although only a portion of a regulatory review period may count toward the actual amount of extension that the Commissioner of Patents and Trademarks may award (for example, half the testing phase must be subtracted as well as any time that may have occurred before the patent was issued), FDA's determination of the length of a regulatory review period for a human drug product will include all of the testing phase and approval phase as specified in 35 U.S.C. 156(g)(1)(B).

FDA recently approved for marketing the human drug product DIFFERIN Topical Gel (adapalene). DIFFERIN Topical Gel is indicated for the topical treatment of acne vulgaris. Subsequent to this approval, the Patent and Trademark Office received a patent term restoration application for DIFFERIN Topical Gel (U.S. Patent No. 4,717,720) from Centre International de Recherches Dermatologiques (CIRD), and the Patent and Trademark Office requested FDA's assistance in determining this patent's eligibility for patent term restoration. In a letter dated October 24, 1996, FDA advised the Patent and Trademark Office that this human drug product had undergone a regulatory review period and that the approval of DIFFERIN Topical Gel represented the first permitted commercial marketing or use of the product. Shortly thereafter, the

Patent and Trademark Office requested that FDA determine the products regulatory review period.

FDA has determined that the applicable regulatory review period for DIFFERIN Topical Gel is 2,447 days. Of this time, 1,401 days occurred during the testing phase of the regulatory review period, while 1,046 days occurred during the approval phase. These periods of time were derived from the following dates:

1. *The date an exemption under section 505(i) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 355(i)) became effective*: September 20, 1989. FDA has verified the applicant's claim that the date that the investigational new drug application became effective was on September 20, 1989.

2. *The date the application was initially submitted with respect to the human drug product under section 505(b) of the Federal Food, Drug, and Cosmetic Act*: July 21, 1993. The applicant claims July 15, 1993, as the date the new drug application (NDA) for DIFFERIN Topical Gel (NDA 20–380) was initially submitted. However, FDA records indicate that NDA 20–380 was submitted on July 21, 1993.

3. *The date the application was approved*: May 31, 1996. FDA has verified the applicant's claim that NDA 20–380 was approved on May 31, 1996.

This determination of the regulatory review period establishes the maximum potential length of a patent extension. However, the U.S. Patent and Trademark Office applies several statutory limitations in its calculations of the actual period for patent extension. In its application for patent extension, this applicant seeks 1,512 days of patent term extension.

Anyone with knowledge that any of the dates as published is incorrect may, on or before April 14, 1997, submit to the Dockets Management Branch (address above) written comments and ask for a redetermination. Furthermore, any interested person may petition FDA, on or before August 11, 1997, for a determination regarding whether the applicant for extension acted with due diligence during the regulatory review period. To meet its burden, the petition must contain sufficient facts to merit an FDA investigation. (See H. Rept. 857, part 1, 98th Cong., 2d sess., pp. 41–42, 1984.) Petitions should be in the format specified in 21 CFR 10.30.

Comments and petitions should be submitted to the Dockets Management Branch (address above) in three copies (except that individuals may submit single copies) and identified with the docket number found in brackets in the heading of this document. Comments and petitions may be seen in the Dockets Management Branch between 9 a.m. and 4 p.m., Monday through Friday.

Dated: January 31, 1997.

Stuart L. Nightingale,

Associate Commissioner for Health Affairs.

[FR Doc. 97–3314 Filed 2–10–97; 8:45 am]

BILLING CODE 4160–01–F

[Docket No. 96E–0387]

Determination of Regulatory Review Period for Purposes of Patent Extension; DECTOMAX

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) has determined the regulatory review period for DECTOMAX and is publishing this notice of that determination as required by law. FDA has made the determination because of the submission of an application to the Commissioner of Patents and Trademarks, Department of Commerce, for the extension of a patent which claims that animal drug product.

ADDRESSES: Written comments and petitions should be directed to the Dockets Management Branch (HFA–305), Food and Drug Administration, 12420 Parklawn Dr., rm. 1–23, Rockville, MD 20857.

FOR FURTHER INFORMATION CONTACT: Brian J. Malkin, Office of Health Affairs (HFY–20), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301–443–1382.

SUPPLEMENTARY INFORMATION: The Drug Price Competition and Patent Term Restoration Act of 1984 (Pub. L. 98–417) and the Generic Animal Drug and Patent Term Restoration Act (Pub. L. 100–670) generally provide that a patent may be extended for a period of up to 5 years so long as the patented item (human drug product, animal drug product, medical device, food additive, or color additive) was subject to regulatory review by FDA before the item was marketed. Under these acts, a product's regulatory review period forms the basis for determining the amount of extension an applicant may receive.

A regulatory review period consists of two periods of time: A testing phase and an approval phase. For animal drug products, the testing phase begins on the earlier date when either a major environmental effects test was initiated for the drug or when an exemption under section 512(j) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 360b(j)) became effective and runs until the approval phase begins. The approval phase starts with the initial submission of an application to market the animal drug product and continues until FDA grants permission to market the drug product. Although only a portion of a regulatory review period may count toward the actual amount of extension that the Commissioner of Patents and Trademarks may award (for example, half the testing phase must be subtracted as well as any time that may have occurred before the patent was issued), FDA's determination of the length of a regulatory review period for an animal drug product will include all of the testing phase and approval phase as specified in 35 U.S.C. 156(g)(4)(B).

FDA recently approved for marketing the animal drug product DECTOMAX (doramectin). DECTOMAX is indicated for cattle treatment and control of gastrointestinal roundworms, lungworms, eyeworms, grubs, lice, and mange mites, and protection against infection or reinfection with *Ostertagla ostertagia* for up to 21 days. Subsequent to this approval, the Patent and Trademark Office received a patent term restoration application for DECTOMAX (U.S. Patent No. 5,089,480) from Pfizer, Inc., and the Patent and Trademark Office requested FDA's assistance in determining this patent's eligibility for patent term restoration. In a letter dated October 25, 1996, FDA advised the Patent and Trademark Office that this animal drug product had undergone a regulatory review period and that the approval of DECTOMAX represented the first commercial marketing of the product. Shortly thereafter, the Patent and Trademark Office requested that FDA determine the product's regulatory review period.

FDA has determined that the applicable regulatory review period for DECTOMAX is 2,836 days. Of this time, 2,695 days occurred during the testing phase of the regulatory review period, while 141 days occurred during the approval phase. These periods of time were derived from the following dates:

1. *The date an exemption under section 512(j) of the Federal Food, Drug, and Cosmetic Act became effective*: October 26, 1988. The applicant claims December 7, 1988, as the date the investigational new animal drug application (INAD) became effective. However, FDA records indicate that the date of FDA's official acknowledgment letter assigning a number to the INAD was October 26, 1988, which is considered to be the effective date for the INAD.

2. *The date the application was initially submitted with respect to the animal drug product under section 512(b) of the Federal Food, Drug, and Cosmetic Act*: March 12, 1996. The applicant claims March 7, 1996, as the date the new animal drug application (NADA) for DECTOMAX (NADA 141–061) was initially submitted. However, FDA records indicate that the date of FDA's official acknowledgment letter assigning a number to the NADA was March 12, 1996, which is considered to be the NADA initially submitted date.

3. *The date the application was approved*: July 30, 1996. FDA has verified the applicant's claim that NADA 141–061 was approved on July 30, 1996.

This determination of the regulatory review period establishes the maximum potential length of a patent extension. However, the U.S. Patent and Trademark Office applies several statutory limitations in its calculations of the actual period for patent extension. In its application for patent extension, this applicant seeks 527 days of patent term extension.

Anyone with knowledge that any of the dates as published is incorrect may, on or before April 14, 1997, submit to the Dockets Management Branch (address above) written comments and ask for a redetermination. Furthermore, any interested person may petition FDA, on or before August 11, 1997, for a determination regarding whether the applicant for extension acted with due diligence during the regulatory review period. To meet its burden, the petition must contain sufficient facts to merit an FDA investigation. (See H. Rept. 857, part 1, 98th Cong., 2d sess., pp. 41–42, 1984.) Petitions should be in the format specified in 21 CFR 10.30.

Comments and petitions should be submitted to the Dockets Management Branch (address above) in three copies (except that individuals may submit single copies) and identified with the docket number found in brackets in the heading of this document. Comments and petitions may be seen in the Dockets Management Branch between 9 a.m. and 4 p.m., Monday through Friday.

Dated:January 31, 1997.

Stuart L. Nightingale,

Associate Commissioner for Health Affairs.

[FR Doc. 97–3315 Filed 2–10–97; 8:45 am]

BILLING CODE 4160–01–F

DEPARTMENT OF THE INTERIOR

Office of the Secretary; Glen Canyon Dam Adaptive Management Work Group; Notice of Establishment

This notice is published in accordance with Section 9(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463). Following consultation with the General Services Administration, notice is hereby given that the Secretary of the Interior (Secretary) is establishing the Glen Canyon Dam Adaptive Management Work Group. The purpose of the Adaptive Management Work Group shall be to advise and provide recommendations to the Secretary with respect to his responsibility to comply with the Grand Canyon Protection Act of October 30, 1992, embodied in Public Law 102–575.

Further information regarding the advisory council may be obtained from the Bureau of Reclamation, Department of the Interior, 1849 C Street, NW, Washington, DC 20240.

The certification of establishment is published below.

Certification

I hereby certify that establishment of the Glen Canyon Dam Adaptive Management Work Group is in the public interest in connection with the purpose of duties imposed on the Department of the Interior by 30 U.S.C. 1–8.

Dated: January 15, 1997.

Bruce Babbitt,

Secretary of the Interior.

[FR Doc. 97–3318 Filed 2–10–97; 8:45 am]

BILLING CODE 4310–94–M

Fish and Wildlife Service

Endangered and Threatened Species Permit Applications

ACTION: Notice of receipt of applications.

SUMMARY: The following applicants have applied for a permit to conduct certain activities with endangered species. This notice is provided pursuant to section 10(c) of the Endangered Species Act of 1973, as amended (16 U.S.C. 1531, *et seq.*).

Permit No. 823110

Applicant: Charles W. Cartwright, Jr., Albuquerque, New Mexico

The applicant requests authorization for research and recovery purposes to survey for the cactus ferruginous pygmy owl (*Glaucidium brasilianum cactorum*) and the Yuma clapper rail (*Rallus longirostris yumanensis*).

Permit No. 813889

Applicant: Larry Benallie, Sr., Window Rock, Arizona

The applicant requests authorization for research and recovery purposes to survey parts of the Navajo Nation for the possible occurrence of the Kanab ambersnail (*Oxyloma haydeni ssp. kanabensis*).

Permit No. 823253

Applicant: John Lloyd-Reilley, Kingsville, Texas

The applicant requests authorization to perfom an intensive study of slender rush-pea (*Hoffmannseggia tenella*) for possible reintroduction to wildland sites. Applicant was previously granted permission to collect the seeds of slender rushpea and propagate plants for research and recovery purposes.

Permit No. 823293

Applicant: Joseph B. Gebler, Tucson, Arizona

Applicant requests authorization for research and recovery purposes to collect up to 10 of the following endangered fish species from various locales within Arizona for ecological and contaminant assessment. Except when vouchered, endangered and threatened species will be released unharmed immediately.

Chub, bonytail (*Gila elegans,*)
Pupfish, desert (*Cyprinodon macularius*)
Minnow, loach (*Rhinichthys* (=*Tiaroga*) *cobitis*)
Squawfish, Colorado (*Ptychocheilus lucius*)
Spikedace (*Meda fulgida*)
Sucker, razorback (*Xyrauchen texanus*)
Topminnow, Gila (*Poeciliopsis occidentalis*)
Trout, Apache (*Oncorhynchus apache*)
Trout, Gila (*Oncorhynchus gilae*)
Woundfin (*Plagopterus argentissimus*)

Permit No. 823354

Applicant: Dr. Ross Dawkins, San Angelo, Texas

Applicant requests authorization to survey, map territory distribution, capture (using mist nets) band, measure, and immediately release unharmed no more than five black-capped vireos (*Vireo atricapillus*). Work would be conducted in Terrell, Brushy Canyon, and Brewster Counties, Texas.

Permit No. 823431

Applicant: Nancy London, Wickenburg, Arizona

The applicant requests authorization to observe, survey, and monitor for southwestern willow flycatchers (*Empidonax traillii extimus*) to determine habitat preferences of the species.

Permit No. 823442

Applicant: Richard Long, Houston, Texas

The applicant requests authorization to collect specimens of prairie dawn (*Hymenoxys texana*) from population sites in the wild at Addicks and Barker reservoirs, southwest Harris County and northeast Fort Bend County, Texas. They will be preserved for use as an educational exhibit of the interpretive center at the U.S. Army Corps of Engineers Addick Project Office at Barker reservoir.

Permit No. PRT–823964

Applicant: Dr. Paul Krausman, Tucson, Arizona

The applicant requests authorization to survey for Mexican spotted owls (*Strix occidentalis lucida*) on U.S. Navy Observatory property in Flagstaff, Arizona for the purpose of making appropriate management decisions regarding timber thinning and fire control.

Permit No. PRT–823956

Applicant: Dr. Thomas M. Engels, Austin, Texas

The applicant requests authorization to conduct surveys of large fruited sand verbena (*Abronia macrocarpa*), Navasota ladies'-tresses (*Spiranthes parksii*), and the Houston toad (*Bufo houstonensis*) at the ALCOA Sandow Mine and surrounding areas in Milam and Lee Counties, Texas. No individuals of any species will be handled, captured, or removed from the wild at any time.

Permit No. PRT–824062

Applicant: Joseph Lawrence Kowalski, McAllen, Texas

The applicant requests authorization to receive deceased sea turtle specimens from the Coastal Studies Laboratory in South Padre Island, Texas. The director of the facility, has agreed to sign over any deceased listed, sea turtle specimens to Mr. Kowalski for taxonomy and comparative anatomy studies in his classroom.

Permit No. PRT–824714

Applicant: Barney Wegener, Farmington, New Mexico

The applicant requests authorization to conduct field surveys, locate, and map the distribution of Mexican spotted owls (*Strix occidentalis lucida*) on lands administered by the Bureau of Land Management in Rio Arriba, San Juan, and McKinley Counties, New Mexico.

DATES: Written comments on these permit applications must be received on or before March 13, 1997.

ADDRESSES: Written data or comments should be submitted to the Legal Instruments Examiner, Division of Endangered Species/Permits, Ecological Services, P.O. Box 1306, Albuquerque, New Mexico 87103. Please refer to the respective permit number for each application when submitting comments. All comments received, including names and addresses, will become part of the official administrative record and may be made available to the public.

FOR FURTHER INFORMATION CONTACT: U.S. Fish and Wildlife Service, Ecological Services, Division of Endangered Species/Permits, P.O. Box 1306, Albuquerque, New Mexico 87103. Please refer to the respective permit number for each application when requesting copies of documents. Documents and other information submitted with these applications are available for review, subject to the requirements of the Privacy Act and Freedom of Information Act, by any party who submits a written request for a copy of such documents within 30 days of the date of publication of this notice, to the address above.

Lynn B. Starnes,

Acting Regional Director, Region 2, Albuquerque, New Mexico.

[FR Doc. 97–3333 Filed 2–10–97; 8:45 am]

BILLING CODE 4510–55–P

Bureau of Land Management

[ES–930–07–1310–00–241A; LAES 46792]

Mississippi: Proposed Reinstatement of Terminated Oil and Gas Lease

Under the provisions of Public Law 97–451, a petition for reinstatement of oil and gas lease LAES 46792, Wayne County, Mississippi, was timely filed and accompanied by all required rentals and royalties accruing from June 1, 1996, the date of termination.

No valid lease has been issued affecting the lands. The lessee has agreed to new lease terms for rentals and royalties at rates of $10 per acre and 16⅔ percent. Payment of $500 in administrative fees and a $125 publication fee has been made.

The Bureau of Land Management is proposing to reinstate the lease effective June 1, 1996, subject to the original terms and conditions of the lease and the increased rental and royalty rates cited above. This is in accordance with section 31(d) and (e) of the Mineral Leasing Act of 1920, as amended (30 U.S.C. 188 (d) and (e)).

FOR FURTHER INFORMATION CONTACT: Gina Goodwin at (703) 440–1534.

Dated: January 31, 1997.

Marilyn H. Johnson,

Associate State Director.

[FR Doc. 97–3368 Filed 2–10–97; 8:45 am]

BILLING CODE 4310–GJ–M

[ES–930–07–1310–00–241A; LAES 46793]

Mississippi: Proposed Reinstatement of Terminated Oil and Gas Lease

Under the provisions of Public Law 97–451, a petition for reinstatement of oil and gas lease LAES 46793, Wayne County, Mississippi, was timely filed and accompanied by all required rentals and royalties accruing from June 1, 1996, the date of termination.

No valid lease has been issued affecting the lands. The lessee has agreed to new lease terms for rentals and royalties at rates of $10 per acre and 16⅔ percent. Payment of $500 in administrative fees and a $125 publication fee has been made.

The Bureau of Land Management is proposing to reinstate the lease effective June 1, 1996, subject to the original terms and conditions of the lease and the increased rental and royalty rates cited above. This is in accordance with section 31 (d) and (e) of the Mineral Leasing Act of 1920, as amended (30 U.S.C. 188 (d) and (e)).

FOR FURTHER INFORMATION CONTACT: Gina Goodwin at (703) 440–1534.

Dated: January 30, 1997.

Marilyn H. Johnson,

Associate State Director.

[FR Doc. 97–3369 Filed 2–10–97; 8:45 am]

BILLING CODE 4310–GJ–M

[OR–036–07–1220–04: GP7–0086]

Prohibited Acts in Owyhee National Wild and Scenic River Area

AGENCY: Vale District, Bureau of Land Management, Interior.

ACTION: Notice of amendment to closures and restrictions within the boundaries of the Main Owyhee River as established in the Main, West Little and North Fork Owyhee National Wild and Scenic Rivers Management Plan. Refer to Federal Register Notice Vol. 59, No. 240 dated Thursday, December 15, 1994.

SUMMARY: The Vale District is amending 2 closures or restrictions that were initiated as part of the implementation of the 1993 Main, West Little and North Fork Owyhee National Wild and Scenic Rivers Management Plan. One change is made to incorporate the original intent of requiring all float boaters to carry a firepan, and the other is to allow

motorized watercraft access only in that portion of the Wild and Scenic River that is the recognized ''slack water'' of the Owyhee Reservoir (approximately 4 miles upstream from the existing boundary). The amended closures or restrictions are the minimum necessary to protect and enhance ORVs and are consistent with the approved plan. Pursuant to 43 CFR 8351.2–1, the following acts are prohibited on all public lands within the boundaries at the Owyhee River component of the National Wild and Scenic River System administered by the Bureau of Land Management:

Violation of these prohibitions is punishable by a fine of not more than $500 or imprisonment for not more than 6 months or both. (Title 16 U.S.C. 1281).

1. Fire.

a. Failure, on any float trip, to carry and use a firepan or similar device to contain campfires.

4. Boating.

a. Operation of any motor-driven (including electric motor-driven) watercraft upstream of T.26S., R.43E., section 29 NE¼ SW¼ SE¼.

FOR FURTHER INFORMATION CONTACT: Cathi Wilbanks, Bureau of Land Management, Vale District, 100 Oregon Street, Vale, OR 97918, (Telephone 541–473–3144).

Lynn P. Findley,

Assistant District Manager, Operations.

[FR Doc. 97–3303 Filed 2–10–97; 8:45 am]

BILLING CODE 4310–33–M

National Park Service

Public Use Statistics Program Center; Notice of Request for Extension of a Currently Approved Information Collection

AGENCY: DOI, National Park Service.

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, this notice announces the National Park Service (NPS) intention to request an extension for a currently approved information collection in support of the Public Use Statistics Program.

DATES: Comments on this notice must be received by April 14, 1997 to be assured of consideration.

ADDITIONAL INFORMATION OR COMMENTS: Contact Albert A. Galipeau, Statistician or Sandra D. Valdez, Program Administrator, U.S. Department of Interior, Park Operations and Education, National Park Service, Public Use Statistics Program Center, 12795 W. Alameda Parkway, Denver, CO, 80225–0287, (303) 987–6950.

SUPPLEMENTARY INFORMATION: .

Title: Public Use Reporting.

OMB Number: 1024–0036.

Expiration Date of Approval: February 28, 1997.

Type of Request: Extension of a currently approved collection.

Abstract: The survey is used by NPS for the purpose of collecting public interview data which are used to determine conversion factors used in converting electro-mechanical visitor counts into recreation visits.

Estimate of Burden: Public reporting burden for this collection of information is estimated to average 3 minutes per response.

Respondents: Individuals visiting parks.

Estimated Number of Respondents: 18,000.

Estimated Number of Responses per Respondent: 7.

Estimated Total Annual Burden on Respondents: 900 hours.

Copies of this information collection can be obtained from Sandra D. Valdez, Program Administer.

Send comments regarding the accuracy of the burden estimate, ways to minimize the burden, including through the use of automated collection techniques or other forms of information technology, or any other aspect of this collection of information to:

Sandra D. Valdez, Program Administrator, U.S. Department of Interior, National Park Service, Park Operations and Education, Public Use Statistics Program Center, 12795 W. Alameda Parkway, Denver, CO, 80225–0287, (303) 987–6950.

All responses to this notice will be summarized and included in the request for OMB approval. All comments will also become a matter of public record.

Dated: February 4, 1997.

Terry N. Tesar,

Information Collection Clearance Officer.

[FR Doc. 97–3248 Filed 2–10–97; 8:45 am]

BILLING CODE 4310–70–M

Notice of Intent To Issue a Prospectus for Operation of Marina Facilities at Lake Roosevelt National Recreation Area

SUMMARY: The National Park Service will be releasing a concession prospectus authorizing continued operation of marina services, which includes seasonal moorage, rental of boats and houseboats, sale of marina supplies and general merchandise, limited grocery and camping supplies, and marina fuel and oil, for the public at Lake Roosevelt National Recreation Area for a period of ten years from May 1, 1997 through April 30, 2007.

SUPPLEMENTARY INFORMATION: The existing concessioner, Lake Roosevelt Vacations, Inc., has performed its obligations to the satisfaction of the Secretary under an existing permit which expires by limitation of time on December 31, 1997, and therefore pursuant to the provisions of Section 5 of the Act of October 9, 1965 (79 Stat. 969 U.S.C. 20), is entitled to be given preference in the renewal and execution of a new contract providing that the existing concessioner submits a responsive offer (a timely offer which meets the terms and conditions of the Prospectus). This means that the contract will be awarded to the party submitting the best offer, provided that if the best offer was not submitted by the existing concessioner, then the existing concessioner will be afforded the opportunity to match the best offer. If the existing concessioner agrees to match the best offer, then the contract will be awarded to the existing concessioner.

If the existing concessioner does not submit a responsive offer, the right of preference in renewal shall be considered to have been waived, and the contract will then be awarded to the party that has submitted the best responsive offer.

The Secretary will consider and evaluate all proposals received as a result of this notice.

The cost for purchasing a prospectus is $30.00. Parties interested in obtaining a copy should send a check payable to ''National Park Service'' to the following address: National Park Service, Office of Concession Program Management, Pacific Great Basin Support Office, 600 Harrison St., Suite 600, San Francisco, California 94107–1372. The front of the envelope should be marked ''Attention: Office of Concession Program Management—Mail Room Do Not Open''. Please include a mailing address indicating where to send the prospectus. Inquiries may be directed to Ms. Teresa Jackson, Secretary, Office of Concession Program Management at (415) 744–3981.

Dated: January 21, 1997.

Patricia L. Neubacher,

Acting Field Director, Pacific West Area.

[FR Doc. 97–3246 Filed 2–10–97; 8:45 am]

BILLING CODE 4310–70–P

Final General Management Plans/ Environmental Impact Statements, Manhattan Sites, New York; Notice of Availability of Final Plans and Environmental Impact Statements

Pursuant to Council on Environmental Quality regulations and National Park Service policy, the National Park Service (NPS) announces the release of the Final General Management Plans/Environmental Impact Statements, Manhattan Sites, New York. The National Park Service, Manhattan Sites, New York, has prepared the Final General Management Plans/Environmental Impact Statements for the park unit. These plans provide the analysis necessary to determine the alternatives for future management and use of each of the sites including Castle Clinton National Monument, Federal Hall and General Grant National Memorials, and Saint Paul's Church and Theodore Roosevelt Birthplace National Historic Sites, New York and Westchester Counties, New York. In accordance with section 102(2)(C) of the National Environmental Policy Act of 1969, the National Park Service is required to prepare an environmental impact statement to assess the impacts of the proposed action(s). The National Park Service is the responsible federal agency.

The 45-day no-action period following the Environmental Protection Agency notice of availability of the final Environmental Impact Statement will end March 31, 1997. At that time, a Record of Decision will be prepared, and released soon thereafter.

FOR FURTHER INFORMATION CONTACT: Superintendent, Joseph T. Avery, Manhattan Sites, National Park Service, 26 Wall Street, New York, NY 10005 (212–825–6990).

SUPPLEMENTARY INFORMATION: Alternatives for future management and use of each of the sites listed (Castle Clinton National Monument, Federal Hall and General Grant National Memorials, and Saint Paul's Church and Theodore Roosevelt Birthplace National Historic Sites, New York and Westchester Counties, New York) are presented and analyzed in the final document. Under each site there is a ''no-action'' alternative that presents a continuation of existing trends and management, meets the minimum requirements, and provides a basis to evaluate the other alternatives. Three alternatives are proposed for Castle Clinton National Monument which range from continuing existing conditions, provisions for a new Statue of Liberty/Ellis Island ticketing sales structure outside of the fort, and one alternative analyzing preservation of the old fort walls while providing for an auditorium and seating for the performing arts at the site. At Federal Hall, three alternatives are proposed which range from continuing existing management, to preserving and restoring the structure and installing a visitor information center, to converting the use of Federal Hall exclusively to the public and for collection storage, with a state-of-the-art visitor information center and the relocation of offices to another facility. The proposals for General Grant National Memorial include three alternatives which ranged from providing for the rehabilitation, security, and maintenance of the structure and site, to restoring the structure and site to the original design intent of the architect and continuing interpretation through handbooks and occasional living history programs, to preserving the tomb and site as they are and building a visitor center in the pavilion across Riverside Drive. At Saint Paul's Church National Historic Site, two alternatives are proposed which range from continuing the interpretive programs and existing site management through the cooperators, to changing park management to the National Park Service with assistance from the cooperating association and renting a facility for curatorial storage and preservation. Three alternatives are proposed for Theodore Roosevelt Birthplace National Historic Site which include the continuation of interpretive and site/resource preservation, to installing a central air-conditioning system and a closet elevator from the third to fourth floor.

For copies of the Final General Management Plans/Final Environmental Impact Statements for the Manhattan Sites, New York, please contact the Superintendent at the above address.

Dated: February 4, 1997.

Joseph T. Avery,

Superintendent, Manhattan Sites.

[FR Doc. 97–3247 Filed 2–10–97; 8:45 am]

BILLING CODE 4310–70–P

Availability of a Plan of Operations and Environmental Assessment for a Plan of Operations; Williams Field Services Company, North Padre Island Lateral Natural Gas Pipeline, Padre Island National Seashore, Kenedy County, Texas

The National Park Service has received from Williams Field Services Company, a Plan of Operations for the existing North Padre Island Lateral Natural Gas Pipeline at Padre Island National Seashore, Kenedy County, Texas.

Pursuant to § 9.52(b) of Title 36 of the Code of Federal Regulations, Part 9, Subpart B (36 CFR 9B); the Plan of Operations and Environmental Assessment are available for public review and comment for a period of 30 days from the publication date of this notice in the Office of the Superintendent, Padre Island National Seashore, 9405 South Padre Island Drive, Corpus Christi, Texas. Copies of the documents are available from the Superintendent, Padre Island National Seashore, 9405 South Padre Island Drive, Corpus Christi, Texas 78418, and will be sent upon request.

Dated: February 3, 1997.

Patrick C. McCrary,

Superintendent, Padre Island National Seashore.

[FR Doc. 97–3245 Filed 2–10–97; 8:45 am]

BILLING CODE 4310–70–P

Subsistence Resource Commission meeting

SUMMARY: The Superintendent of Denali National Park and the Chairperson of the Subsistence Resource Commission for Denali National Park announce a forthcoming meeting of the Denali National Park Subsistence Resource Commission.

The following agenda items will be discussed:

(1) Call to order by Chair.
(2) Roll call and confirmation of quorum.
(3) Superintendent's welcome and introductions.
(4) Approval of minutes of last meeting.
(5) Additions and corrections to agenda.
(6) Old business:
  a. Wildlife studies.
  b. NPS Subsistence Issue Paper report.
  c. Park planning and North Access updates.
(7) New business:
  a. Federal subsistence proposals.
  b. Regional Advisory Council actions.
  c. Denali subsistence resource management plan.
(8) Public and other agency comments.

(9) Determine time and date of next meeting.
(10) Adjourn.

DATES: The meeting will be held Friday, February 28, 1997. The meeting will begin at 9 a.m. and conclude around 6 p.m.

LOCATION: The meeting will be held at the Healy Community Center, Healy, Alaska.

FOR FURTHER INFORMATION CONTACT: Steve Martin, Superintendent, Denali National Park and Preserve, PO Box 9, Denali Park, Alaska 99755. Phone (907) 683–2294.

SUPPLEMENTARY INFORMATION: The Subsistence Resource Commissions are authorized under Title VIII, Section 808, of the Alaska National Interest Lands Conservation Act, Pub. L. 96–487, and operate in accordance with the provisions of the Federal Advisory Committees Act.

Paul R. Anderson,

Acting Field Director.

[FR Doc. 97–3249 Filed 2–10–97; 8:45 am]

BILLING CODE 4310–70–M

Subsistence Resource Commission Meeting

SUMMARY: The Superintendent of Wrangell-St. Elias National Park and the Chairperson of the Subsistence Resource Commission for Wrangell-St. Elias National Park announce a forthcoming meeting of the Wrangell-St. Elias National Park Subsistence Resource Commission.

The following agenda items will be discussed:

(1) Introduction of Commission members and guests.
(2) Review of SRC function and purpose.
(3) Review and approval of minutes of December 5–6, 1996 meeting.
(4) Superintendent's report.
(5) Commission membership status.
(6) Election of officers.
(7) Public and other agency comments.
(8) Old business:
  a. Federal Subsistence Program update.
  b. Review 1997–98 subsistence hunting proposals and analysis.
  c. Review draft rulemaking to add Northway, Tetlin, Dot Lake and Tanacross as resident zone communities.
  d. Review draft SRC Subsistence Plan.
  e. NPS Subsistence Issue Paper review.
(9) New business.
(10) Set time and place of next SRC meeting.

DATES: The meeting will be held Tuesday and Wednesday, February 25–26, 1997. The meeting will begin at 9 a.m. and conclude around 5 p.m. each day.

LOCATION: The meeting will be held at the Caribou Cafe, Glennallen, Alaska.

FOR FURTHER INFORMATION CONTACT: Jonathan Jarvis, Superintendent, Wrangell-St. Elias National Park and Preserve, PO Box 439, Copper Center, Alaska 99573. Phone (907) 822–5234.

SUPPLEMENTARY INFORMATION: The Subsistence Resource Commissions are authorized under Title VIII, Section 888, of the Alaska National Interest Lands Conservation Act, Pub. L. 96–487, and operate in accordance with the provisions of the Federal Advisory Committees Act.

Paul R. Anderson,

Acting Field Director.

[FR Doc. 97–3250 Filed 2–10–97; 8:45 am]

BILLING CODE 4310–70–M

National Register of Historic Places; Notification of Pending Nominations

Nominations for the following properties being considered for listing in the National Register were received by the National Park Service before February 1, 1997. Pursuant to section 60.13 of 36 CFR Part 60 written comments concerning the significance of these properties under the National Register criteria for evaluation may be forwarded to the National Register, National Park Service, P.O. Box 37127, Washington, D.C. 20013–7127. Written comments should be submitted by February 26, 1997.

Beth Boland,

Acting Keeper of the National Register.

COLORADO

Jefferson County

Rio Grande Southern Railroad, Motor No. 7, 17155 W. 44th Ave., Golden vicinity, 97000161

FLORIDA

Leon County

Van Brunt House, FL 59, N of jct. with Moccasin Gap Rd., Miccosukee, 97000162

KENTUCKY

Clark County

Owen—Gay Farm, Gay Rd., jct. with Donaldson Rd. at the Bourbon—Clark Co. line, Winchester vicinity, 97000163

NEW YORK

Suffolk County

Big Duck, The, NY 24, NW of jct. with Bellows Pond Rd., Town of Southampton, Flanders vicinity, 97000164

NORTH CAROLINA

Moore County

Lincoln Park School, 1272 S. Currant St., Pinebluff vicinity, 97000167

New Hanover County

Address Restricted, Homesite (31Nh95**1), Carolina Beach vicinity, 97000165
Address restricted, Newton Homesite and Cemetery, Carolina Beach vicinity, 97000166

Wake County

Ben—Wiley Hotel (Wake County MPS), 331 S. Main St., Fuquay-Varina, 97000195

NORTH DAKOTA

Adams County

Cedar Creek Bridge (Historic Roadway Bridges of North Dakota MPS) Across Cedar Cr., unnamed co. rd., approximately 6 mi. N and 11 mi. E of Haynes, Haynes vicinity, 97000168

Barnes County

Rainbow Arch Bridge (Historic Roadway Bridges of North Dakota MPS) Main St., E, across the Sheyenne River, Valley City, 97000170
West Park Bridge (Historic Roadway Bridges of North Dakota MPS) 4th St., SW, across the Sheyenne River, Valley City, 97000169

Benson County

West Antelope Bridge (Historic Roadway Bridges of North Dakota MPS) Across the Sheyenne River, unnamed co. rd., approximately 30 mi. SE of jct. of ND 30 and US 2, Flora vicinity, 97000171

Burleigh County

Liberty Memorial Bridge (Historic Roadway Bridges of North Dakota MPS) I–94, Business Loop, across the Missouri River, Bismark, 97000172

Foster County

Grace City Bridge (Historic Roadway Bridges of North Dakota MPS) Across the James River, unnamed co. rd., 1 mi. SW of Grace City, Grace City vicinity, 97000174

Grand Forks County

Midway Bridge (Historic Roadway Bridges of North Dakota MPS) Across an unnamed creek, unnamed co. rd., approximately 1.5 mi. S and 2 mi. W of Johnstown, Johnstown vicinity, 97000176
Northwood Bridge (Historic Roadway Bridges of North Dakota MPS) Across the Goose River, unnamed co. rd., 1.5 mi. SW of Northwood, Northwood vicinity, 97000175
Ost Valle Bridge (Historic Roadway Bridges of North Dakota MPS) Across an unnamed tributary of the Red River, unnamed co. rd., approximately 6 mi. E and 1 mi. N of Thompson, Thompson vicinity, 97000178

Griggs County

Romness Bridge (Historic Roadway Bridges of North Dakota MPS) Across the Sheyenne River, unnamed co. rd., approximately 8 mi. N and 1 mi. E of Cooperstown, Cooperstown vicinity, 97000179

McHenry County

Elliott Bridge (Historic Roadway Bridges of North Dakota MPS) Across the Souris River, unnamed co. rd., approximately 4 mi. N of Towner, Towner vicinity, 97000181

Westgaard Bridge (Historic Roadway Bridges of North Dakota MPS) Across the Sheyenne River, unnamed co. rd., approximately 6 mi. N and 1 mi. E of Voltaire, Voltaire vicinity, 97000180

Mountrail County

Great Northern Railway Underpass (Historic Roadway Bridges of North Dakota MPS) Burlington Northern Santa Fe Railway tracks, over ND 8, N end of Stanley, Stanley, 97000182

Nelson County

Nesheim Bridge (Historic Roadway Bridges of North Dakota MPS) Across the Sheyenne River, unnamed co. rd., approximately 2 mi. SW of McVille, McVille vicinity, 97000185

Ransom County

Colton's Crossing Bridge (Historic Roadway Bridges of North Dakota MPS) Across the Sheyenne River, unnamed co. rd., approximately 2 mi. S and 2 mi. E of Lisbon, Lisbon vicinity, 97000186

Lisbon Bridge (Historic Roadway Bridges of North Dakota MPS) Across the Sheyenne River, ND 32, N end of Lisbon, Lisbon, 97000184

Steele County

Beaver Creek Bridge (Historic Roadway Bridges of North Dakota MPS) Across Beaver Creek, unnamed co. rd., approximately 13 mi. E and 4 mi. N of Finley, Finley vicinity, 97000183

Stutsman County

Midland Continental Overpass (Historic Roadway Bridges of North Dakota MPS) Over abandoned railroad grade, former US 10, approximately 7 mi. E of Jamestown, Jamestown vicinity, 97000194

Traill County

Blanchard Bridge (Historic Roadway Bridges of North Dakota MPS) Across the Elm River, unnamed co. rd., approximately .5 mi. S of Blanchard, E of ND 18, Blanchard vicinity, 97000189

Caledonia Bridge (Historic Roadway Bridges of North Dakota MPS) Across the Goose River, unnamed co. rd., approximately 1 mi. W of the Minnesota state line, Caledonia vicinity, 97000188

Goose River Bridge (Historic Roadway Bridges of North Dakota MPS) Across the Goose River, unnamed co. rd., approximately 6 mi. E and 1 mi. N of Hillsboro, Hillsboro vicinity, 97000187

Norway Bridge (Historic Roadway Bridges of North Dakota MPS) Across the Goose River, unnamed co. rd., approximately 6 mi. E and 3 mi. S of Mayville, Mayville vicinity, 97000192

Porter Elliott Bridge (Historic Roadway Bridges of North Dakota MPS) Across the Sheyenne River, unnamed co. rd., approximately 5 mi. E and 1 mi. N of Hillsboro, Hillsboro vicinity, 97000193

Portland Park Bridge (Historic Roadway Bridges of North Dakota MPS) Across the S branch of the Goose River, unnamed co. rd., NE edge of Portland, Portland vicinity, 97000191

Viking Bridge (Historic Roadway Bridges of North Dakota MPS) Across the Goose River, unnamed co. rd., approximately 1 mi. NW of Portland, Portland vicinity, 97000190

OHIO

Franklin County

Masonic Temple, 34 N. 4th St., Columbus, 97000201

Hocking County

Saint John the Evangelist Catholic Church Complex, 351 N. Market St., Logan, 97000200

Sandusky County

Sandusky County Jail and Sheriff's House, 622 Croghan St., Fremont, 97000198

Tuscarawas County

Zoarville Bridge, Across the Conotton Cr., S of jct. of OH 212 and OH 800, Zoarville vicinity, 97000199

OKLAHOMA

Comanche County

Lawton High School, 809 C Ave., Lawton, 97000197

Dewey County

McAllister House, 311 N. Locust St., Seiling, 97000196

SOUTH DAKOTA

Clay County

New Rockford Bridge (Historic Roadway Bridges of North Dakota MPS) Across the James River, unnamed co. rd., jct. with ND 15, New Rockford vicinity, 97000173

TEXAS

El Paso County

San Elizario Historic District, Roughly bounded by Rio Grande St., Socorro and Convent Rds., and the San Elizario Lateral, San Elizario, 97000205

Harris County

Wunderlich, Peter and Sophie, Farm, 18202 Theiss Mill Rd., Klein, 97000202

VIRGINIA

Northumberland County

Versailles, VA 360, .25 mi. W of jct. with VA 200, Burgess vicinity, 97000204

Portsmouth Independent City Commodore Theatre, 421 High St., Portsmouth, 97000203

[FR Doc. 97–3377 Filed 2–10–97; 8:45 am]

BILLING CODE 4310–70–P

INTERNATIONAL DEVELOPMENT COOPERATION AGENCY

Agency for International Development

Renewal of the Advisory Committee on Voluntary Foreign Aid

AGENCY: United States Agency for International Development.

ACTION: Notice of renewal of advisory committee.

SUMMARY: Pursuant to the Federal Advisory Committee Act, the Administrator has determined that renewal of the Advisory Committee on Voluntary Foreign Aid for a two-year period, beginning January 1, 1997, is necessary and in the public interest.

FOR FURTHER INFORMATION CONTACT: Elise Storck, (703) 351–0204.

Dated: January 6, 1997.

Astrid Jimenez,

Special Assistant, Legal Counsel, Office of the General Counsel.

[FR Doc. 97–3365 Filed 2–10–97; 8:45 am]

BILLING CODE 6116–01–M

JUDICIAL CONFERENCE OF THE UNITED STATES

Meeting of the Judicial Conference Advisory Committee on Rules of Bankruptcy Procedure

AGENCY: Judicial Conference of the United States Advisory Committee on Rules of Bankruptcy Procedure.

ACTION: Notice of open meeting.

SUMMARY: The Advisory Committee on Rules of Bankruptcy Procedure will hold a two-day meeting. The meeting will be open to public observation but not participation and will be held each day from 8:30 a.m. to 5:00 p.m.

DATES: March 13–14, 1997.

ADDRESSES: The Mills House Hotel, Meeting and Queen Streets, Charleston, South Carolina.

FOR FURTHER INFORMATION CONTACT: John K. Rabiej, Chief, Rules Committee Support Office, Administrative Office of the United States Courts, Washington, D.C. 20544, telephone (202) 273–1820.

Dated: February 4, 1997.

John K. Rabiej,

Chief, Rules Committee Support Office.

[FR Doc. 97–3270 Filed 2–10–97; 8:45 am]

BILLING CODE 2210–01–M

Meeting of the Judicial Conference Advisory Committee on Rules of Civil Procedure

AGENCY: Judicial Conference of the United States, Advisory Committee on Rules of Civil Procedure.

ACTION: Notice of open meeting.

SUMMARY: The Advisory Committee on Rules of Civil Procedure will hold a two-day meeting. The meeting will be open to public observation but not participation and will be held each day from 3:30 p.m. to 5:00 p.m.

DATES: March 20–21, 1997.

ADDRESSES: The University of Alabama School of Law, 101 Paul Bryant Drive, Tuscaloosa, Alabama.

FOR FURTHER INFORMATION CONTACT:

John K. Rabiej, Chief, Rules Committee Support Office, Administrative Office of the United States Courts, Washington, D.C. 20544, telephone (202) 273–1820.

Dated: February 4, 1997.

John K. Rabiej,

Chief, Rules Committee Support Office.

[FR Doc. 97–3271 Filed 2–10–97; 8:45 am]

BILLING CODE 2210–01–M

Meeting of the Judicial Conference Advisory Committee on Rules of Appellate Procedure

AGENCY: Judicial Conference of the United States, Advisory Committee on Rules of Appellate Procedure.

ACTION: Notice of open meeting.

SUMMARY: The Advisory Committee on Rules of Appellate Procedure will hold a two-day meeting. The meeting will be open to public observation but not participation and will be held each day from 8:30 a.m. to 5:00 p.m.

DATES: April 3–4, 1997.

ADDRESSES: Thurgood Marshall Federal Judiciary Building, Judicial Conference Center, One Columbus Circle, NE., Washington, DC.

FOR FURTHER INFORMATION CONTACT: John K. Rabiej, Chief, Rules Committee Support Office, Administrative Office of the United States Courts, Washington, DC 20544, telephone (202) 273–1820.

Dated: February 4, 1997.

John K. Rabiej,

Chief, Rules Committee Support Office.

[FR Doc. 97–3272 Filed 2–10–97; 8:45 am]

BILLING CODE 2210–01–M

Meeting of the Judicial Conference Advisory Committee on Rules of Criminal Procedure

AGENCY: Judicial Conference of the United States, Advisory Committee on Rules of Criminal Procedure.

ACTION: Notice of open meeting.

SUMMARY: The Advisory Committee on Rules of Criminal Procedure will hold a two-day meeting. The meeting will be open to public observation but not participation and will be held each day from 8:30 a.m. to 5:00 p.m.

DATES: April 7–8, 1997.

ADDRESSES: Thurgood Marshall Federal Judiciary Building, Judicial Conference Center, One Columbus Circle, N.E., Washington, DC.

FOR FURTHER INFORMATION CONTACT: John K. Rabiej, Chief, Rules Committee Support Office, Administrative Office of the United States Courts, Washington, D.C. 20544, telephone (202) 273–1820.

Dated: February 4, 1997.

John K. Rabiej,

Chief, Rules Committee Support Office.

[FR Doc. 97–3273 Filed 2–10–97; 8:45 am]

BILLING CODE 2210–01–M

Meeting of the Judicial Conference Advisory Committee on Rules of Evidence

AGENCY: Judicial Conference of the United States, Advisory Committee on Rules of Evidence.

ACTION: Notice of open meeting.

SUMMARY: The Advisory Committee on Rules of Evidence will hold a two-day meeting. The meeting will be open to public observation but not participation and will be held each day from 8:30 a.m. to 5:00 p.m.

DATES: April 14–15, 1997.

ADDRESSES: Thurgood Marshall Federal Judiciary Building, Judicial Conference Center, One Columbus Circle, N.E., Washington, DC.

FOR FURTHER INFORMATION CONTACT: John K. Rabiej, Chief, Rules Committee Support Office, Administrative Office of the United States Courts, Washington, D.C. 20544, telephone (202) 273–1820.

Dated: February 4, 1997.

John K. Rabiej,

Chief, Rules Committee Support Office.

[FR Doc. 97–3274 Filed 2–10–97; 8:45 am]

BILLING CODE 2210–01–M

Meeting of the Judicial Conference Advisory Committee on Rules of Civil Procedure

AGENCY: Judicial Conference of the United States, Advisory Committee on Rules of Civil Procedure.

ACTION: Notice of open meeting.

SUMMARY: The Advisory Committee on Rules of Civil Procedure will hold a two-day meeting. The meeting will be open to public observation but not participation and will be held each day from 8:30 a.m. to 5:00 p.m.

DATES: May 1–2, 1997.

ADDRESSES: La Playa Hotel, 9891 Gulf Shore Drive, Naples, Florida.

FOR FURTHER INFORMATION CONTACT: John K. Rabiej, Chief, Rules Committee Support Office, Administrative Office of the United States Courts, Washington, DC 20544, telephone (202) 273–1820.

Dated: February 4, 1997.

John K. Rabiej,

Chief, Rules Committee Support Office.

[FR Doc. 97–3275 Filed 2–10–97; 8:45 am]

BILLING CODE 2210–01–M

DEPARTMENT OF JUSTICE

Immigration and Naturalization Service

Agency Information Collection Activities: Proposed Collection; Comment Request

ACTION: Revision of existing collection; application for asylum and withholding of removal.

The Department of Justice, Immigration and Naturalization Service has submitted the following information collection request for review and clearance in accordance with the Paperwork Reduction Act of 1995. The proposed information collection is published to obtain comments from the public and affected agencies. Comments are encouraged and will be accepted until April 14, 1997.

Written comments and suggestions from the public and affected agencies concerning the proposed collection of information should address one or more of the following four points:

(1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agencies estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechnical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

Overview of this information collection:

(1) Type of Information Collection: *Revision of a currently approved collection.*

(2) Title of the Form/Collection: Application for Asylum and Withholding of Removal.

(3) Agency form number, if any, and the applicable component of the Department of Justice sponsoring the collection: Form I–589. Office of International Affairs, Asylum Division, Immigration and Naturalization Service.

(4) Affected public who will be asked or required to respond, as well as a brief abstract: Primary: Individuals or Households. The information collected is used by the INS and EOIR to access eligibility of persons applying for asylum and withholding of deportation.

(5) An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond: 80,000 responses at three and one half (3.5) hours per response.

(6) An estimate of the total public burden (in hours) associated with the collection: 280,000 annual burden hours.

If you have additional comments, suggestions, or need a copy of the proposed information collection instrument with instructions, or additional information, please contact Richard A. Sloan 202–616–7600, Director, Policy Directives, and Instructions Branch, Immigrataion and Naturalization Service, U.S. Department of Justice, Room 5307, 425 I Street, NW., Washington, DC 20536. Additionally, comments and/or suggestions regarding the item(s) contained in this notice, especially regarding the estimated public burden and associated response time may also be directed to Mr. Richard A. Sloan.

If additional information is required contact: Mr. Robert B. Briggs, Clearance Officer, United States Department of Justice, Information Management and Security Staff, Justice Management Division, Suite 850, Washington Center, 1001 G Street, NW, Washington, DC 20530.

Dated: February 6, 1997.

Robert B. Briggs,

Department Clearance Officer, United States Department of Justice.

[FR Doc. 97–3392 Filed 2–10–97; 8:45 am]

BILLING CODE 4410–18–M

Agency Information Collection Activities; Extension of Existing Collection; Comment Request

ACTION: Notice of information collection under review; report of complaint.

Office of Management and Budget (OMB) approval is being sought for the information collection listed below. This proposed information collection was previously published in the Federal Register on November 14, 1996 at 61 FR 58425, allowing for a 60-day public comment period. No comments were received by the Immigration and Naturalization Service. The purpose of this notice is to allow an additional 30 days for public comments from the date listed at the top of this page in the Federal Register. This process is conducted in accordance with 5 CFR Part 1320.10.

Written comments and/or suggestions regarding the item(s) contained in this notice, especially regarding the estimated public burden and associated response time, should be directed to the Office of Management and Budget, Office of Regulatory Affairs, Attention: Department of Justice Desk Officer, Washington, DC 20530. Additionally, comments may be submitted to OMB via facsimile to 202–395–7285. Comments may also be submitted to the Department of Justice (DOJ), Justice Management Division, Information Management and Security Staff, Attention: Department Clearance Officer, Suite 850, 1001 G Street, NW., Washington, DC 20530. Additionally, comments may be submitted to DOJ via facsimile to 202–514–1534.

Written comments and suggestions from the public and affected agencies should address one or more of the following points:

(1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency/component, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agencies/components estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

Overview of this Information Collection:

(1) Type of information collection; Extension of a currently approved collection.

(2) The title of the form/collection: Report of Complaint.

(3) The agency form number, if any, and the applicable component of the Department sponsoring the collection: Form I–847. Border Patrol Division, Immigration and Naturalization Service.

(4) Affected public who will be asked or required to respond, as well as a brief abstract: Primary: Individuals or Households. This information collection is used by the Immigration and Naturalization Service (INS) to establish a record of complaint and to initiate an investigation of misconduct by an officer of the INS.

(5) An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond: 250 responses at 15 minutes per response.

(6) An estimate of the total public burden (in hours) associated with the collection: 62.5 annual burden hours.

If additional information is required contact: Mr. Robert Briggs, Clearance Officer, United States Department of Justice, Information Management and Security Staff, Justice Management Division, Suite 850, Washington Center, 1001 G Street, NW., Washington, DC 20530.

Dated February 6, 1997.

Robert B. Briggs,

Department Clearance Officer, United States Department of Justice.

[FR Doc. 97–3391 Filed 1–10–97; 8:45 am]

BILLING CODE 4410–18–M

Agency Information Collection Activities: New Collection; Comment Request

ACTION: Request OMB emergency approval; Certificate of eligibility for nonimmigrant student (F–1/M–1) status for academic, language and vocation students (Pilot).

The Department of Justice, Immigration and Naturalization Service has submitted the following information collection request (ICR) utilizing emergency review procedures, to the

Office of Management and Budget (OMB) for review and clearance in accordance with the Paperwork Reduction Act of 1995. OMB approval has been requested by February 14, 1997. If granted, the emergency approval is only valid for 180 days. Comments should be directed to OMB, Office of Information and Regulatory Affairs, Attention: Ms. Debra Bond, 202–395–7316, Department of Justice Desk Officer, Washington, DC 20503.

During the first 60 days of this same period a regular review of this information collection is also being undertaken. Comments are encouraged and will be accepted until April 14, 1997. Written comments and suggestions from the public and affected agencies concerning the proposed collection of information should address one or more of the following four points:

(1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility.

(2) Evaluate the accuracy of the agencies estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology; e.g., permitting electronic submission of responses.

If you have additional comments, suggestions, or need a copy of the proposed information collection instrument with instructions, or additional information, please contact Richard A. Sloan 202–616–7600, Director, Policy Directives and Instructions Branch, Immigration and Naturalization Service, U.S. Department of Justice, Room 5307, 425 I Street, NW., Washington, DC 20536. Additionally, comments and/or suggestions regarding the item(s) contained in this notice, especially regarding the estimated public burden and associated response time may also be directed to Mr. Richard A. Sloan.

Overview of this information collection:

(1) Type of Information Collection: *New Information Collection.*

(2) Title of the Form/Collection: Certificate of Eligibility for Nonimmigrant Student (F–1/M–1) Status for Academic, Language and Vocational Students (Pilot).

(3) Agency form number, if any, and the applicable component of the Department of Justice sponsoring the collection: Form I–20P. Adjudications Division, Immigration and Naturalization Service.

(4) Affected public who will be asked or required to respond, as well as a brief abstract: Primary: Not-for-profit institutions, Business or other for profit. The information collection is used by the INS to electronically collect and submit information in a limited pilot environment, from nonimmigrant students attending schools in the U.S. in order that INS can monitor the students' immigration status and ensure that the students maintain the conditions imposed by their nonimmigrant status while attending school.

(5) An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond: 20,000 responses at 30 minutes per response.

(6) An estimate of the total public burden (in hours) associated with the collection: 10,000.

If additional information is required contact: Mr. Robert B. Briggs, Clearance Officer, United States Department of Justice, Information Management and Security Staff, Justice Management Division, Suite 850, Washington Center, 1001 G Street, NW, Washington, DC 20530.

Dated: February 6, 1997.

Robert B. Briggs,

Department Clearance Officer, United States Department of Justice.

[FR Doc. 97–3393 Filed 2–10–97; 8:45 am]

BILLING CODE 4410–18–M

DEPARTMENT OF LABOR

Employment and Training Administration

Job Training Partnership Act: Migrant and Seasonal Farmworker Programs; Application of Waiver Provision, and Solicitation for Grant Application

AGENCY: Employment and Training Administration, Labor.

ACTION: Notice of the application of the waiver from the requirement for competition of migrant and seasonal farmworker grants every two years, and notice of solicitation for grant applications (SGA) for funding of migrant and seasonal farmworker training and employment programs in five State service areas.

SUMMARY: This action concerns funding of the Migrant and Seasonal Farmworker grants authorized under section 402 of the Job Training Partnership Act (29 U.S.C. 1672). The Department of Labor (DOL or Department) announces that for state service areas currently served by grantees that are performing satisfactorily, the Department is exercising its option to waive competition for the second two-year funding period of the current four-year funding cycle that began with the 1995 Program Year (PY) on July 1, 1995.

The State service areas for which competition is not waived are Minnesota, Mississippi, North Dakota, Puerto Rico, and South Dakota. Since competition is not waived for these areas, this notice solicits proposals for grant applications from qualifying organizations to serve these areas during Program Years 1997 and 1998 (July 1, 1997 through June 30, 1999). Applicants selected will be designated as grantees for these five areas for PYs 1997 and 1998 (July 1, 1997 through June 30, 1999). For the purpose of this solicitation, Preapplication for Federal Assistance (SF 424) will be included in the application package as opposed to being submitted as a separate and preceding document.

DATES: Applications for Grant Agreements shall be submitted by certified or registered mail, return receipt requested, and postmarked no later than April 14, 1997. Applications submitted by hand-delivery will be accepted daily between the hours of 8:15 a.m. and 4:45 p.m., Eastern Time, but no later than 4:45 p.m., Eastern Time, on April 14, 1997.

No exceptions to the mailing and hand-delivery conditions set forth in this notice will be granted. Funding applications failing to meet the conditions set forth in this notice will not be accepted.

ADDRESSES: Funding applications shall be mailed or hand-delivered to James DeLuca, Grant Officer, ETA, 200 Constitution Avenue, NW., Room S–4203, Washington, DC 20210.

FOR FURTHER INFORMATION CONTACT: Charles C. Kane, Chief, Division of Seasonal Farmworker Programs, 200 Constitution Avenue, NW., Room N–4641, Washington, DC 20210. Phone: (202) 219–5500 (this is not a toll-free number). E-mail: KANEC@DOLETA.GOV.

A. Notice of Waiver of Competition

The Department announces that it is waiving the requirement to conduct a competition for grants to serve migrant

and seasonal farmworkers during the 1997 and 1998 Program Years under Section 402 of the Job Training Partnership Act for all grantees except those serving Minnesota, Mississippi, North Dakota, Puerto Rico, and South Dakota.

This waiver is exercised in accordance with JTPA section 402(c)(2) which states as follows:

> The competition for grants under this section shall be conducted every 2 years, except that if a recipient of such a grant has performed satisfactorily under the terms of the existing grant agreement, the Secretary may waive the requirement for such competition upon receipt from the recipient of a satisfactory 2-year grant period.

This waiver applies to the ''succeeding 2-year grant'' period of the four year funding cycle that began July 1, 1995. Grants for the first 2-year grant period covering PYs 1995 and 1996 (July 1, 1995 through June 30, 1997) were competed through a solicitation for grant agreements for every State service area.

The Department has determined that there are three grantees that have not performed satisfactorily during the current Program Year. These grantees operate Section 402 migrant and seasonal farmworker grant programs in the five State service areas of Minnesota, Mississippi, North Dakota, Puerto Rico and South Dakota. Since the waiver does not apply to these five areas, the Department seeks qualifying grantees for operating programs in these five areas under the Solicitation that follows.

B. Solicitation for Grant Agreements

This notice provides instructions consisting of: Part I—Introduction; and Part II—Solicitation for Grant Application (SGA). Part II constitutes invitations from the Department for public agencies, and private nonprofit organizations authorized by their Charters or Articles of Incorporation to provide training and employment and other services described in this notice, to submit funding applications for operating migrant and seasonal farmworker programs during PY 1997 in Minnesota, Mississippi, North Dakota, Puerto Rico and South Dakota.

Part I—Introduction and Background

JTPA, 29 U.S.C. 1501 *et seq.*, establishes programs to prepare youth and unskilled adults for entry into the labor force, and to afford job training to those economically disadvantaged individuals and others facing serious barriers to employment who are in special need of such training to obtain productive employment. The regulations promulgated by DOL to implement JTPA are set forth at parts 626 through 638 of Title 20, Code of Federal Regulations (CFR).

The purpose of section 402 of JTPA, as set forth at 29 U.S.C. 1672 and 20 CFR 633.102, is to provide job training, employment opportunities, and other services for those individuals who suffer chronic seasonal unemployment and underemployment in the agriculture industry. These conditions have been substantially aggravated by continual advancements in technology and mechanization resulting in displacement and contribute significantly to the Nation's rural employment problem. These factors substantially affect the entire national economy. Because of the special nature of farmworker employment and training problems, such programs are centrally administered at the national level. Programs and activities supported under this section shall, in accordance with section 402(c)(3) of JTPA:

(1) Enable farmworkers and their dependents to obtain or retain employment;

(2) Allow participation in other program activities leading to their eventual placement in unsubsidized agricultural or nonagricultural employment;

(3) Allow activities leading to stabilization in agricultural employment; and

(4) Include related assistance and supportive services.

Regulations promulgated by DOL to implement the provisions of Title IV, section 402, of JTPA are set forth in 20 CFR part 633 and part 636. In addition, State and local governments and Native American applicants must conform to Administrative Requirements at 29 CFR part 97. Non-profit organizations must conform to Administrative Regulations at 29 CFR part 95. Migrant and other seasonally employed farmworker programs are also subject to 29 CFR parts 93 (Restrictions on Lobbying), 96 (Audit Requirements for Grants, Contracts and other agreements), and 98 (Disbarment, Suspension and Drug-free Workplace requirements).

Pursuant to 20 CFR 633.201, DOL will not consider any funding application when fraud or criminal activity has been proven to exist within the applicant organization, or when efforts by the DOL to recover debts established by final agency action have been unsuccessful. Prior to the final selection of an applicant as a potential grantee, DOL will conduct a Responsibility Review of the available records to establish an organization's overall responsibility to administer Federal funds in accordance with 20 CFR 633.204. Any applicant which is not considered or selected as a potential grantee because of these provisions shall be advised of its appeal rights.

Comments From the States

Executive Order 12372, ''Intergovernmental Review of Federal Programs,'' and the implementing regulations at 29 CFR part 17, are applicable to this program. Pursuant to these requirements, in States which have established a consultation process expressly covering this program, applications shall be provided to the State for comment. Since States also may participate as competitors for this program, applications shall be submitted to the State upon the deadline for submission to DOL (20 CFR 633.202(d)).

To strengthen the implementation of E.O. 12372, DOL specifies the following timeframe for its treatment of comments from the State's Single Point of Contact (SPOC) on JTPA section 402 applications:

1. As required by 29 CFR 17, the SPOC must submit comments, if any, to DOL no later than 60 days after the deadline date for applications;

2. DOL will forward those comments to the applicant within 10 days of their receipt from the SPOC; and

3. DOL will notify the SPOC of its decision regarding the comments and response, but, under normal circumstances, will not implement that decision for at least 10 days after the SPOC has been notified.

Planning Estimates

Planning estimates for the five jurisdictions are provided below. The stated amounts are solely for the purpose of developing the funding applications and are the same as the PY 1996 allocations. Final allocation levels for PY 1997 will be published for all State service areas at a later date.

Minnesota: $1,243,685
Mississippi: $1,413,704
North Dakota: $456,939
Puerto Rico: $2,867,153
South Dakota: $675,971

Part II—Solicitation for Grant Applications

A. Funding Applications

Program Year 1997 section 402 funds are available for grants to serve all State service areas except Alaska, Rhode Island and the District of Columbia. As stated in the preceding portion of this notice, funds will be awarded through competition to serve the five State service areas listed above.

Applications for Statewide programs are encouraged, but are not necessary.

Applicants applying for grants shall submit:

(1) A Standard From 424 Facesheet found in OMB Circular No. A–102;

(2) An attachment identifying, by State or county, the proposed service area; and

(3) For a private nonprofit organization, a recent (within the last six months) certification from a Certified Public Accountant that its financial management system is capable of properly accounting for and safeguarding Federal funds; or, for a public agency, a recent (within the last six months) certification by its Chief Fiscal Officer attesting to the adequacy of the agency's accounting system to properly account for and safeguard Federal funds.

The Preapplication for Federal Assistance shall be submitted as part of the application package and should also include the following:

(1) A statement indicating the legally constituted authority under which the organization functions. An applicant which is a nonprofit organization shall submit a copy of its Charter or Articles of Incorporation to satisfy this requirement;

(2) An employer identification number (EIN) from the Internal Revenue Service and, for nonprofit applicants, proof of the organization's nonprofit status.

B. Review of Funding Applications

Applications will be reviewed and rated by a review panel applying the review standards cited at 20 CFR 633.203. Panel results are advisory in nature and are not binding on the Grant Officer. In addition, prior to the final selection of an applicant as a potential grantee, DOL will conduct a Responsibility Review of available records pursuant to 20 CFR 633.204. This review is intended to establish overall responsibility to administer Federal funds and is independent of the competitive process. Applicants failing to meet the requirements of that or other sections of the regulations will not be selected as potential grantees irrespective of their standing in the competition.

C. Rating Criteria

The rating criteria and the weights assigned to each are described below:

(1) *An understanding of the problems of migrant and seasonal farmworkers.* Range 0 to 20 points. This factor rates the applicant's analysis of the needs of the target group, including socio-economic characteristics of the client population and the proposed program's potential to address those needs. Ratings are based on a clear and concise narrative demonstrating this understanding; appropriateness of the proposed program mix of training and supportive services meeting the identified needs; and responsiveness to JTPA goals of targeting the hard-to-serve for training which leads to skills acquisition, long-term employability and increased earnings.

(2) *A familiarity with the area to be served.* Range 0 to 15 points. This factor rates the applicant's knowledge of the resources of the service area, and the proposed linkages, coordination, and partnerships with different segments of the community within a designated service delivery area in order to further the training and placement of farmworkers into new and better jobs; *i.e.*, plans for involving appropriate area agencies and programs in the design and delivery of training and other services proposed to meet the needs of participants. It includes a demonstrated knowledge of approximate size and location within the State of the eligible client population, current and changing market place needs, including areas of emerging technologies, and how the changing skill requirements will be reflected in the proposed program activities. Ratings are based on a clear and concise narrative demonstrating this familiarity, and documented programmatic ties to appropriate area agencies and programs.

(3) *A previously demonstrated capability to administer effectively a diversified employability development program, including program outcomes.* Range 0 to 30 points. This factor rates program experience, and capability to meet or exceed planned goals. Ratings are based on a previously demonstrated capability to administer effectively a diversified employability development program for migrant and seasonal farmworkers; documentation that planned performance goals were either met or exceeded during the period of performance; and satisfactory description of the employment and training components and procedures necessary to undertake the goals of this grant solicitation.

(4) *General administrative and financial management capability, including audit outcomes.* Range 0 to 25 points. This factor rates the applicant's managerial experience, and the potential for efficient and effective administration of the proposed program. In the case of applicants competing for two or more States or sub-State areas, the application for each State or sub-State area should contain a statement describing the manner in which the grant recipient will conduct monitoring and provide technical assistance and support to each of the State's operations for which it achieves responsibility to the Department of Labor. Ratings are based on consideration of the administrative expertise of present and proposed managerial and decision-making staff, and the extent to which the management plan demonstrates the ability to capably and economically operate a multi-activity delivery system. Finally, the applicant should expound on those cost benefits which will accrue to the Department of Labor through a multi-jurisdiction (State) approach over that offered through the management of a single venue grant.

D. Content and Format of Funding Application (Statement of Work)

Exclusive of letters of support and commitment, the funding application should not exceed 50 pages of double-spaced unreduced type. Cost issues should not be addressed in an applicant's submission. Detailed budgets and program planning estimates are not to be part of the application. These will be negotiated later with applicants selected for grant awards.

The required application format shall be followed and contain the sections listed below. The sections correspond to the rating criteria listed in the preceding subpart of this notice.

(1)—Target Populations and Program Approach

This section should describe the applicant's approach to fulfilling the intent of JTPA section 402. Elements to be included are:

(a) A description of the needs and problems of migrant and seasonal farmworkers in the service area, including the socio-economic characteristics of the farmworker population in the State or sub-State area to be served;

(Note: For applicants which are current JTPA section 402 grant recipients, a sole recapitulation of the socio-economic characteristics of their past or current participants *will not* satisfy this requirement); and

(b) The rationale for the proposed program mix of training for job placement, training for employability enhancement, and stabilization in agriculture through supportive services activities, including a discussion of targeting the hard-to-serve for long-term training leading to skills acquisition, long-term employment and increased earnings.

(2)—Service Environment

This section should describe the applicant's current programmatic ties

within the proposed service area to appropriate State and local agencies, private nonprofit organizations, and other groups—particularly JTPA Service Delivery Area grant recipients, JTPA Title II sub-State area grantees, the Offices of Migrant Education and Migrant Health, and Farmworker Housing Programs—providing resources and services to farmworkers such as basic education, health and child care.

Elements to be included are:

(a) A description of existing linkages to agencies, organizations and institutions within the service area that will result in the coordinated delivery of services to the disadvantaged farmworker population. Further, the applicant should detail any partnerships developed within the service delivery area and delineate the nature of these agreements noting the various assets brought by each party which in turn will tend to better serve the farmworker target population.

(Note: Letters of commitment documenting appropriate programmatic ties should be attached to the application.);

(b) A description of the proposed delivery system, including a list of the applicant's field/regional office locations and any other delivery agents, and the services to be provided by each;

(c) A labor market assessment of the State or sub-State areas to be served, with projections for current employment needs, projected skill shortages based on new or changing industry growth as well as those created by emerging technologies, and specific job opportunities known to the applicant which are available in the service area; and

(d) A discussion of the approximate size and location of the eligible client population which draws on information collected by the applicant and from other service providers identified at the beginning of this section.

(3)—Program Experience

This section should describe the applicant's capability and experience in administering employment and training programs. Elements to be included are:

(a) The types of programs operated in the proposed service area during the past two years, including the contract, grant, or agreement number, the name of the funding agency, the amount of funding, the period of performance and program outcomes;

(b) The types of programs operated outside the service area during the past two years, including the contract, grant or agreement number, the name of the funding agency, the amount of funding and the period of performance;

(c) The nature of the training, employability development, and supportive services activities which were provided.

(Note: Applicants should clearly identify those activities undertaken within the service area.)

(d) The actual versus the planned number of participants and their placement into unsubsidized employment for each program activity.

(Note: Applicants should clearly identify those performance standards failed, met and exceeded within the service area.)

(e) A detailed description of each major activity and component of the program proposed for funding under this grant solicitation to meet the identified needs; this description should include a discussion of:

(1) Outreach to and recruitment of the hard-to-serve;

(2) The process of eligibility determination and verification;

(3) Assessment and the criteria used for placement in training or referral to other service providers;

(4) The role of grantee staff in the employment and training process, including efforts to make training-related placements;

(5) The role of vendors in the employment and training process; and

(6) Participant tracking during training and as a follow-up after placement;

(f) An analysis of the extent to which the proposed employment and training program, including linkages and delivery system, is consistent with the labor market assessment in Section II of this notice.

(4)—Administration and Staff

This section should describe the applicant's organizational and staffing plans. Elements to be included are:

(a) Total number of people presently involved in the administration of the organization and the number of people who will be directly involved in the administration and delivery of the proposed JTPA section 402 program services, including position titles and the number of persons in each position; abstracts of position descriptions of managerial and decision-making positions should be attached;

(b) A description of the management and administration plan including:

(1) Organizational structure;

(2) Personnel management procedures, including but not limited to, capacity building, in-service training and planning;

(3) Fiscal accounting system, including a plan for maintaining cash on hand in an amount which comports with acceptable government requirements; the allowance payment system, if applicable; fiscal reporting procedures; the process employed to insure the proper expenditure of Federal funds; and the process employed to reduce to a minimum carryover of program funds from one Program Year to the next;

(4) Internal monitoring system (for applicants applying for multiple-State or sub-State areas, this includes a plan for monitoring each proposed service area);

(5) Provisions for hiring members of the client population; and

(6) In the case of multiple-State or sub-State applicants, a management plan which delineates the process and manner in which the applicant will provide oversight, technical support, management, fiscal procedures and communications over several distinct service areas. This section should demonstrate how these activities will be accomplished in an efficient manner and result in reduction of costs to the Federal Government; and

(7) A statement describing the applicant's experience with audits, including the results of recent audits.

E. Submission of Funding Application

Three copies of the funding applications shall be submitted either by mail or hand-delivery. As noted earlier in this announcement, mailings shall be mailed by registered or certified mail, return receipt requested, no later than April 14, 1997. All hand-delivered applications will be accepted daily between the hours of 8:15 a.m. and 4:45 p.m., Eastern Time. A receipt will be provided bearing the time and date of delivery. No hand-deliveries will be accepted after 4:45 p.m., Eastern Time, on April 14, 1997. No exceptions to these mailing and hand-delivery conditions will be granted. Applications not meeting these conditions will not be accepted.

Funding applications shall be mailed or hand-delivered to: James DeLuca, Grant Officer, ETA, 200 Constitution Avenue, NW., room C–4305, Washington, DC 20210.

F. Notification of Selection

(a) Respondents to this SGA which are selected as potential grantees will notified by DOL in writing. The notification will invite each potential grantee to negotiate the final terms and conditions of the grant; will establish a reasonable time and place for the negotiation; and will indicate the State or sub-State area to be covered by the grant. Grants will be awarded for the performance period July 1, 1997 to June

30, 1998. Applicants selected will not have to recompete for funding for PY 1998 (July 1, 1998 to June 30, 1999) if the grant recipient has met all applicable regulatory requirements, has performed satisfactorily under the terms of its existing grant for PY 1997, submits an acceptable training plan or PY 1998, and funds are available.

(b) In the event that no grant applications will received for a specific State or sub-State area or those received are deemed to be unacceptable, or where a grant agreement is not successfully negotiated, DOL may give the Governor first right to submit an acceptable application pursuant to the precondition for Grant Application and Responsibility Review tests at 20 CFR 633.201 and 633.204, respectively. Should the Governor not accept the offer within 15 days after being notified, the Department may then: (1) designate another organization or organizations, (2) reopen the area for competitive bidding, or (3) use the allocated funds for national account activities.

(c) An applicant whose grant application is not selected by DOL to receive JTPA section 402 funds will be notified in writing.

(d) Any applicant whose grant application is denied in whole or part by DOL will be advised of its appeal rights.

Signed at Washington, DC, this 4th day of February, 1997.

James DeLuca,

Grant Officer, Division of Acquisition and Assistance.

[FR Doc. 97–3347 Filed 2–10–97; 8:45 am]

BILLING CODE 4510–30–M

NUCLEAR REGULATORY COMMISSION

[Docket Nos. 50–327 AND 50–328]

Sequoyah Nuclear Plant, Units 1 and 2; Notice of Consideration of Issuance of Amendments to Facility Operating Licenses, Proposed No Significant Hazards Consideration Determination, and Opportunity for a Hearing

The U.S. Nuclear Regulatory Commission (the Commission) is considering issuance of amendments to Facility Operating License No. DPR–77 and DPR–79 issued to the Tennessee Valley Authority (the licensee) for operation of the Sequoyah Nuclear Plant, Units 1 and 2, located in Soddy Daisy, Tennessee.

The proposed amendments would permanently incorporate requirements associated with steam generator tube inspections and repair in the Sequoyah Nuclear Plant, Units 1 and 2 Technical Specifications (TS). The new requirements establish alternate steam generator tube plugging criteria (APC) at the tube support plate intersections. These revised criteria, based on NRC Generic Letter 95–05, were incorporated into the TS by previous amendments to the operating licenses but only for Operating Cycle 8. The proposed amendments would remove the reference to Cycle 8, thereby making the requirements applicable to all future operating cycles.

Before issuance of the proposed license amendment, the Commission will have made findings required by the Atomic Energy Act of 1954, as amended (the Act) and the Commission's regulations.

The Commission has made a proposed determination that the amendment request involves no significant hazards consideration. Under the Commission's regulations in 10 CFR 50.92, this means that operation of the facility in accordance with the proposed amendment would not (1) involve a significant increase in the probability or consequences of an accident previously evaluated; or (2) create the possibility of a new or different kind of accident from any accident previously evaluated; or (3) involve a significant reduction in a margin of safety. As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

TVA has evaluated the proposed technical specification (TS) change and has determined that it does not represent a significant hazards consideration based on criteria established in 10 CFR 50.92(c). Operation of Sequoyah Nuclear Plant (SQN) in accordance with the proposed amendment will not:

1. Involve a significant increase in the probability or consequences of an accident previously evaluated.

The proposed TS change revises the SQN steam generator (S/G) Specification 3/4.4.5 to remove footnotes that limit the application of the alternate plugging criteria (APC) to Cycle 8 operation only. In addition, SQN TS 3.4.6.2, ''Operational Leakage,'' contains a similar footnote that limits application of S/G APC to Cycle 8 operation only. The removal of these footnotes allows TVA to apply APC to SQN S/Gs beyond Cycle 8 operation. TVA's proposed change is based on resolution of the industry issues concerning [eddy current test] probe wear and probe variability. APC was applied to the SQN S/Gs during the Cycle 7 refueling outages for Units 1 and 2.

The proposed changes provide TS requirements that are consistent with the guidance of NRC GL [Generic Letter] 95–05. This change does not involve a physical modification to the plant or affect any setpoints. Accordingly, the proposed changes do not involve an increase in the probability or consequences of an accident previously evaluated.

2. Create the possibility of a new or different kind of accident from any previously analyzed.

The proposed changes provide TS requirements for SQN S/Gs that are consistent with the guidance provided in GL 95–05. No new event initiator has been created, nor has any hardware been changed. This change does not involve a physical change to SQN S/Gs or any other system. Therefore, the proposed change will not create the possibility of a new or different kind of accident from any previously analyzed.

3. Involve a significant reduction in a margin of safety.

TVA's proposed change allows application of APC for SQN S/Gs to extend beyond Cycle 8 of operation. This change continues to provide requirements that maintain structural integrity of SQN S/G tubes during normal operating, transient, and postulated accident conditions. This change does not involve a setpoint change or physical modification to the plant. Accordingly, the margin of safety has not been reduced.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

The Commission is seeking public comments on this proposed determination. Any comments received within 30 days after the date of publication of this notice will be considered in making any final determination.

Normally, the Commission will not issue the amendment until the expiration of the 30-day notice period. However, should circumstances change during the notice period such that failure to act in a timely way would result, for example, in derating or shutdown of the facility, the Commission may issue the license amendment before the expiration of the 30-day notice period, provided that its final determination is that the amendment involves no significant hazards consideration. The final determination will consider all public and State comments received. Should the Commission take this action, it will publish in the Federal Register a notice of issuance and provide for opportunity for a hearing after issuance. The Commission expects that the need to take this action will occur very infrequently.

Written comments may be submitted by mail to the Chief, Rules Review and Directives Branch, Division of Freedom of Information and Publications

Services, Office of Administration, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, and should cite the publication date and page number of this Federal Register notice. Written comments may also be delivered to Room 6D22, Two White Flint North, 11545 Rockville Pike, Rockville, Maryland, from 7:30 a.m. to 4:15 p.m. Federal workdays. Copies of written comments received may be examined at the NRC Public Document Room, the Gelman Building, 2120 L Street, NW., Washington, DC.

The filing of requests for hearing and petitions for leave to intervene is discussed below.

By March 13, 1997, the licensee may file a request for a hearing with respect to issuance of the amendment to the subject facility operating license and any person whose interest may be affected by this proceeding and who wishes to participate as a party in the proceeding must file a written request for a hearing and a petition for leave to intervene. Requests for a hearing and a petition for leave to intervene shall be filed in accordance with the Commission's ''Rules of Practice for Domestic Licensing Proceedings'' in 10 CFR Part 2. Interested persons should consult a current copy of 10 CFR 2.714 which is available at the Commission's Public Document Room, the Gelman Building, 2120 L Street, NW., Washington, DC, and at the local public document room located at the Chattanooga-Hamilton County Library, 1001 Broad Street, Chattanooga, Tennessee 37402. If a request for a hearing or petition for leave to intervene is filed by the above date, the Commission or an Atomic Safety and Licensing Board, designated by the Commission or by the Chairman of the Atomic Safety and Licensing Board Panel, will rule on the request and/or petition; and the Secretary or the designated Atomic Safety and Licensing Board will issue a notice of hearing or an appropriate order.

As required by 10 CFR 2.714, a petition for leave to intervene shall set forth with particularity the interest of the petitioner in the proceeding, and how that interest may be affected by the results of the proceeding. The petition should specifically explain the reasons why intervention should be permitted with particular reference to the following factors: (1) the nature of the petitioner's right under the Act to be made party to the proceeding; (2) the nature and extent of the petitioner's property, financial, or other interest in the proceeding; and (3) the possible effect of any order which may be entered in the proceeding on the petitioner's interest. The petition should also identify the specific aspect(s) of the subject matter of the proceeding as to which petitioner wishes to intervene. Any person who has filed a petition for leave to intervene or who has been admitted as a party may amend the petition without requesting leave of the Board up to 15 days prior to the first prehearing conference scheduled in the proceeding, but such an amended petition must satisfy the specificity requirements described above.

Not later than 15 days prior to the first prehearing conference scheduled in the proceeding, a petitioner shall file a supplement to the petition to intervene which must include a list of the contentions which are sought to be litigated in the matter. Each contention must consist of a specific statement of the issue of law or fact to be raised or controverted. In addition, the petitioner shall provide a brief explanation of the bases of the contention and a concise statement of the alleged facts or expert opinion which support the contention and on which the petitioner intends to rely in proving the contention at the hearing. The petitioner must also provide references to those specific sources and documents of which the petitioner is aware and on which the petitioner intends to rely to establish those facts or expert opinion. Petitioner must provide sufficient information to show that a genuine dispute exists with the applicant on a material issue of law or fact. Contentions shall be limited to matters within the scope of the amendment under consideration. The contention must be one which, if proven, would entitle the petitioner to relief. A petitioner who fails to file such a supplement which satisfies these requirements with respect to at least one contention will not be permitted to participate as a party.

Those permitted to intervene become parties to the proceeding, subject to any limitations in the order granting leave to intervene, and have the opportunity to participate fully in the conduct of the hearing, including the opportunity to present evidence and cross-examine witnesses.

If a hearing is requested, the Commission will make a final determination on the issue of no significant hazards consideration. The final determination will serve to decide when the hearing is held.

If the final determination is that the amendment request involves no significant hazards consideration, the Commission may issue the amendment and make it immediately effective, notwithstanding the request for a hearing. Any hearing held would take place after issuance of the amendment.

If the final determination is that the amendment request involves a significant hazards consideration, any hearing held would take place before the issuance of any amendment.

A request for a hearing or a petition for leave to intervene must be filed with the Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, Attention: Docketing and Services Branch, or may be delivered to the Commission's Public Document Room, the Gelman Building, 2120 L Street, NW., Washington, DC, by the above date. Where petitions are filed during the last 10 days of the notice period, it is requested that the petitioner promptly so inform the Commission by a toll-free telephone call to Western Union at 1 (800) 248–5100 (in Missouri 1 (800) 342–6700). The Western Union operator should be given Datagram Identification Number N1023 and the following message addressed to Frederick J. Hebdon: Petitioner's name and telephone number, date petition was mailed, plant name, and publication date and page number of this Federal Register notice. A copy of the petition should also be sent to the Office of the General Counsel, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, and to General Counsel, Tennessee Valley Authority, ET 11H 400 West Summit Hill Drive, Knoxville, Tennessee 37902, attorney for the licensee.

Nontimely filings of petitions for leave to intervene, amended petitions, supplemental petitions and/or requests for hearing will not be entertained absent a determination by the Commission, the presiding officer or the presiding Atomic Safety and Licensing Board that the petition and/or request should be granted based upon a balancing of the factors specified in 10 CFR 2.714(a)(1) (i)–(v) and 2.714(d).

For further details with respect to this action, see the application for amendment dated October 18, 1996, which is available for public inspection at the Commission's Public Document Room, the Gelman Building, 2120 L Street, NW., Washington, DC, and at the local public document room located at the Chattanooga-Hamilton County Library, 1001 Broad Street, Chattanooga, Tennessee 37402.

Dated at Rockville, Maryland, this 5th day of February 1997.

Ronald W. Hernan,

Senior Project Manager, Project Directorate II–3, Division of Reactor Projects—I/II, Office of Nuclear Reactor Regulation.

[FR Doc. 97–3321 Filed 2–10–97; 8:45 am]

BILLING CODE 7590–01–P

[Docket 70–7002]

Notice of Amendment to Certificate of Compliance GDP–2 for the U.S. Enrichment Corporation, Portsmouth Gaseous Diffusion Plant, Portsmouth, OH

The Director, Office of Nuclear Material Safety and Safeguards, has made a determination that the following amendment request is not significant in accordance with 10 CFR 76.45. In making that determination, the staff concluded that: (1) There is no change in the types or significant increase in the amounts of any effluents that may be released offsite; (2) there is no significant increase in individual or cumulative occupational radiation exposure; (3) there is no significant construction impact; (4) there is no significant increase in the potential for, or radiological or chemical consequences from, previously analyzed accidents; (5) the proposed changes do not result in the possibility of a new or different kind of accident; (6) there is no significant reduction in any margin of safety; and (7) the proposed changes will not result in an overall decrease in the effectiveness of the plant's safety, safeguards, or security programs. The basis for this determination for the amendment request is described below.

The NRC staff has reviewed the certificate amendment application and concluded that it provides reasonable assurance of adequate safety, safeguards, and security and compliance with NRC requirements. Therefore, the Director, Office of Nuclear Material

Safety and Safeguards, is prepared to issue an amendment to the Certificate of Compliance for the Portsmouth Gaseous Diffusion Plant (PORTS). The staff has prepared a Compliance Evaluation Report which provides details of the staff's evaluation.

The NRC staff has determined that this amendment satisfies the criteria for a categorical exclusion in accordance with 10 CFR 51.22. Therefore, pursuant to 10 CFR 51.22(b), no environmental impact statement or environmental assessment need be prepared for this amendment.

USEC or any person whose interest may be affected may file a petition, not exceeding 30 pages, requesting review of the Director's Decision. The petition must be filed with the Commission not later than 15 days after publication of this Federal Register Notice. A petition for review of the Director's Decision shall set forth with particularity the interest of the petitioner and how that interest may be affected by the results of the decision. The petition should specifically explain the reasons why review of the Decision should be permitted with particular reference to the following factors: (1) The interest of the petitioner; (2) how that interest may be affected by the Decision, including the reasons why the petitioner should be permitted a review of the Decision; and (3) the petitioner's areas of concern about the activity that is the subject matter of the Decision. Any person described in this paragraph (USEC or any person who filed a petition) may file a response to any petition for review, not to exceed 30 pages, within 10 days after filing of the petition. If no petition is received within the designated 15-day period, the Director will issue the final amendment to the Certificate of Compliance without further delay. If a petition for review is received, the decision on the amendment application will become final in 60 days, unless the Commission grants the petition for review or otherwise acts within 60 days after publication of this Federal Register Notice.

A petition for review must be filed with the Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, Attention: Docketing and Services Branch, or may be delivered to the Commission's Public Document Room, the Gelman Building, 2120 L Street, NW, Washington, DC, by the above date.

For further details with respect to the action see: (1) The application for amendment and (2) the Commission's Compliance Evaluation Report. These items are available for public inspection at the Commission's Public Document Room, the Gelman Building, 2120 L Street, NW, Washington, DC, and at the Local Public Document Room.

Date of amendment request: November 8, 1996, as modified by USEC responses dated December 13, 1996, and January 16, 1997, to NRC requests for additional information dated November 29, 1996, and December 31, 1996, respectively.

Brief description of amendment: The amendment changes the Technical Safety Requirement (TSR) Standby Operational Mode definition for the UF6 Withdrawal Stations by allowing the compression loop vent path to the cascade to be open. It should be noted that venting of the Withdrawal Station compression loop to the cascade is routinely done at PORTS. However, accounting for this procedure was inadvertently left out of the Standby Operational Mode definition by USEC from its proposed TSRs which have been approved by the NRC.

Basis for finding of no significance:

1. The proposed amendment will not result in a change in the types or significant increase in the amounts of any effluents that may be released offsite.

The proposed change to TSR 2.5.1 permits evacuating UF6 from the compression loop in the UF6 withdrawal station to the cascade, which acts as a low pressure sink, in the Standby Operational Mode. This change will not result in significantly increasing the potential for unconfinement of UF6 which could lead to an increase in effluents that may be released offsite since it only involves venting of UF6 from one portion of process piping, which confines UF6 in the Withdrawal Station, to another portion of process piping which confines UF6 in the enrichment cascade. Confinement of UF6 within the cascade is primarily provided by maintaining the cell high-side (compressor discharge) gas pressure below 25 psia (TSR 2.2.3.13) and by applying appropriate quality assurance requirements to process gas piping and equipment (Safety Analysis Report Section 3.8.2.2). Therefore, this TSR amendment will not result in significant amounts of effluents that may be released offsite.

2. The proposed amendment will not result in a significant increase in individual or cumulative occupational radiation exposure.

Evacuating UF6 from the compression loop to the cascade in the Standby Operational Mode will not significantly impart additional occupational radiation exposure. The cascade or the withdrawal loops do not result in significant occupational radiation exposures. Some of the reasons being that: (1) The occupancy factor is low, (2) distance from the source is generally high, (3) significant shielding is provided by piping and equipment, (4) depleted and low enriched uranium has low specific activities and are also comparatively low gamma radiation emitters, (5) most of the uranium is in gaseous form (low density), and (6) UF6 is confined within quality controlled equipment and piping. Therefore, any transfer of confined UF6 from the withdrawal station to the cascade would not measurably modify individual or

cumulative occupational radiation exposures.

3. The proposed amendment will not result in a significant construction impact.

Since the proposed changes do not involve any construction, therefore, there will be no construction impacts.

4. The proposed amendment will not result in a significant increase in the potential for, or radiological or chemical consequences from, previously analyzed accidents.

The proposed changes which involve evacuating UF6 from the compression loop to the cascade (low pressure sink) in the Standby Operational Mode will not result in a significant increase in the potential for UF6 releases. In fact, venting the compression loop to the cascade may enhance safety by minimizing the potential for over-pressurization of the UF6 withdrawal loop with subsequent confinement rupture. To avoid enrichment losses, UF6 is vented back to the A-suction of a compressor in the cascade that has UF6 of similar enrichment. All A-suction pressures in lines that would receive the vented UF6 are subatmospheric. Therefore, any confinement failure would likely result in inleakage as opposed to outleakage. In addition, cascade units that would receive vented UF6 would likely be comprised of relatively smaller sized equipment containing relatively smaller quantities of UF6 since they would be located near the top and at the bottom of the cascade. Therefore, the proposed change will not result in a significant increase in the potential for UF6 releases.

Going from a closed compression loop vent path to an open compression loop vent path will not result in a significant increase for, or radiological consequences from, previously evaluated criticality accidents. The likelihood of an accidental criticality in the cascade due to wet-air (moderator) inleakage would not be increased significantly for the following reasons:

a. This amendment involves a valve that is internal to several valves even when the pigtail is not attached to the withdrawal manifold. These valves would be in the closed position. Therefore, several misvalving errors would be required to permit significant wet-air inleakage into the cascade through the compression loop vent valve.

b. To maintain the integrity of the UF6 pressure boundary, USEC is committed to applying appropriate quality assurance requirements to process gas piping and equipment (including valves) with diameters of 2 inches or larger.

c. Formation of UO2F2 in the cascade due to significant inleakage of wet-air would result in compressor vibration and would reduce barrier permeability thus affecting cascade compressor performance which would be observed in the control rooms via motor load indications. Changes in compressor A-suction pressures would also be detected.

d. Introduction of wet-air into the cascade would be detected on the line recorders that continuously indicate nitrogen and oxygen concentrations.

Based on the primary reasons provided above, the proposed TSR change will also not significantly raise the probability or consequences of a criticality accident.

5. The proposed amendment will not result in the possibility of a new or different kind of accident.

For similar reasons provided in the assessment of criterion 4, evacuating UF6 from the compression loop to the cascade in the Standby Operational Mode will not result in a new potential accident involving UF6 releases or criticality. In fact, venting the compression loop to the cascade may enhance safety by minimizing the potential for over-pressurization of the UF6 withdrawal loop with subsequent confinement rupture.

6. The proposed amendment will not result in a significant reduction in any margin of safety.

As discussed above, from a UF6 release accident standpoint, venting to the cascade may enhance safety, and from a criticality accident standpoint, the safety impact is insignificant. This procedure, which is routine operation at PORTS, will not result in the violation of any limiting condition of operation. Therefore, the opening of the vent pathway in the Standby Operational Mode will not significantly reduce any margin of safety.

7. The proposed amendment will not result in an overall decrease in the effectiveness of the plant's safety, safeguards, or security programs.

As discussed above, from a UF6 confinement standpoint venting to the cascade may enhance the plant's safety program and from a criticality safety program standpoint, the safety impact is insignificant.

The staff has not identified any safeguards or security related implications from the proposed amendment. Therefore, the opening of the vent pathway in the Standby Operational Mode will not result in an overall decrease in the effectiveness of the plant's safety, safeguards, or security programs.

Effective date: This amendment becomes effective at 12:00 noon on the day following the day issued.

Certificate of Compliance No. GDP–2: Amendment will revise the Technical Safety Requirements.

Local Public Document Room location: Portsmouth Public Library, 1220 Gallia Street, Portsmouth, Ohio 45662.

Dated at Rockville, Maryland, this 4th day of February 1997.

For the Nuclear Regulatory Commission.

Carl J. Paperiello,

Director, Office of Nuclear Material Safety and Safeguards.

[FR Doc. 97–3322 Filed 2–10–97; 8:45 am]

BILLING CODE 7590–01–P

[Docket 70–7001]

Notice of Amendment to Certificate of Compliance GDP–1 for the U.S. Enrichment Corporation, Paducah Gaseous Diffusion Plant, Paducah, KY

The Director, Office of Nuclear Material Safety and Safeguards, has made a determination that the following amendment request is not significant in accordance with 10 CFR 76.45. In making that determination the staff concluded that (1) there is no change in the types or significant increase in the amounts of any effluents that may be released offsite; (2) there is no significant increase in individual or cumulative occupational radiation exposure; (3) there is no significant construction impact; (4) there is no significant increase in the potential for, or radiological or chemical consequences from, previously analyzed accidents; (5) the proposed changes do not result in the possibility of a new or different kind of accident; (6) there is no significant reduction in any margin of safety; and (7) the proposed changes will not result in an overall decrease in the effectiveness of the plant's safety, safeguards or security programs. The basis for this determination for the amendment request is shown below.

The NRC staff has reviewed the certificate amendment application and concluded that it provides reasonable assurance of adequate safety, safeguards, and security, and compliance with NRC requirements. Therefore, the Director, Office of Nuclear Material Safety and Safeguards, is prepared to issue an amendment to the Certificate of Compliance for the Paducah Gaseous Diffusion Plant. The staff has prepared a Compliance Evaluation Report which provides details of the staff's evaluation.

The NRC staff has determined that this amendment satisfies the criteria for a categorical exclusion in accordance with 10 CFR 51.22. Therefore, pursuant to 10 CFR 51.22(b), no environmental impact statement or environmental assessment need be prepared for this amendment.

USEC or any person whose interest may be affected may file a petition, not exceeding 30 pages, requesting review of the Director's Decision. The petition must be filed with the Commission not later than 15 days after publication of this Federal Register Notice. A petition for review of the Director's Decision shall set forth with particularity the interest of the petitioner and how that interest may be affected by the results of the decision. The petition should specifically explain the reasons why review of the Decision should be permitted with particular reference to the following factors: (1) The interest of the petitioner; (2) how that interest may be affected by the Decision, including the reasons why the petitioner should be permitted a review of the Decision; and (3) the petitioner's areas of concern about the activity that is the subject matter of the Decision. Any person described in this paragraph (USEC or any person who filed a petition) may file a response to any petition for review, not to exceed 30 pages, within 10 days after filing of the petition. If no petition is received within the designated 15-day period, the Director will issue the final amendment to the Certificate of Compliance without further delay. If a petition for review is received, the decision on the amendment application will become final in 60 days, unless the Commission grants the petition for review or otherwise acts within 60 days after publication of this Federal Register Notice.

A petition for review must be filed with the Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, Attention: Docketing and Services Branch, or may be delivered to the Commission's Public Document Room, the Gelman Building, 2120 L Street, NW, Washington, DC, by the above date.

For further details with respect to the action see (1) the application for amendment and (2) the Commission's Compliance Evaluation Report. These items are available for public inspection at the Commission's Public Document Room, the Gelman Building, 2120 L Street, NW, Washington, DC, and at the local public document room.

Date of amendment request: September 30, 1996.

Brief description of amendment: The amendment changes the Technical Safety Requirement for the cascade cell trip function and revises limiting specific values for battery performance.

Basis for finding of no significance:

1. The proposed amendment will not result in a change in the types or significant increase in the amounts of any effluents that may be released offsite.

The proposed changes to TSR 2.4.4.12 and SAR section 3.9.1.3.2 provide limits for battery voltage and air circuit breaker air pressure, improve the surveillance requirements for measuring battery cell specific gravity, as well as improved bases for the limits. These changes provide improved assurance that the cell trip function will be available, if required. As such, these changes enhance the ability of the cascade trip function to deenergize the process motors (''tripping the cell''), thus bringing the cell below atmospheric pressure. By enhancing the ability to perform the cell trip function, the ability to mitigate the consequences of postulated accidents has been improved. As such, these changes have no impact on plant effluents and will not result in any impact to the environment.

2. The proposed amendment will not result in a significant increase in individual or cumulative occupational radiation exposure.

The proposed changes provide enhanced assurance that the cell trip function will be available if necessary. The changes will not increase exposure.

3. The proposed amendment will not result in a significant construction impact.

The proposed changes will not result in any construction, therefore, there will be no construction impacts.

4. The proposed amendment will not result in a significant increase in the potential for, or radiological or chemical consequences from, previously analyzed accidents.

The proposed changes enhance the availability of the cascade cell trip function and affect no other equipment functions. The cascade cell trip function is not involved in any precursor to an evaluated accident; therefore, the potential of occurrence of an evaluated event is unaffected. The cell trip function is involved in the mitigation of the consequences of previously evaluated accidents by deenergizing the process motors, thus bringing the cell below atmospheric pressure. Revising the limiting specific values for battery performance and the air pressure requirements for the ''000'' air circuit breakers enhances the ability of the cell trip function by ensuring that adequate DC voltage and air pressure are available to effect cell trip. Since the proposed changes provide enhanced assurance that the function will be available if required, the consequences of previously evaluated accidents are not increased.

5. The proposed amendment will not result in the possibility of a new or different kind of accident.

The proposed changes establish new operating limits for plant equipment that are within the existing operating ranges of that equipment. The changes create no new operating conditions or new plant configuration that could lead to a new or different type of accident.

6. The proposed amendment will not result in a significant reduction in any margin of safety.

The minimum air pressures and battery voltages established by these proposed changes are within the existing operating ranges of the equipment and have been increased to enhance the cell trip function, which is the only safety function affected by these parameters. The proposed changes cause no reductions in the margins of safety.

7. The proposed amendment will not result in an overall decrease in the effectiveness of the plant's safety, safeguards or security programs.

The proposed changes enhance the availability of the cascade cell trip function and do not affect any other equipment functions or administrative requirements. The cell trip function is not addressed in the safeguards and security programs. The effectiveness of the safety, safeguards, and security programs is not decreased.

Effective date: 60 days after issuance.

Certificate of Compliance No. GDP–1: Amendment will revise the Technical Safety Requirements.

Local Public Document Room location: Paducah Public Library, 555 Washington Street, Paducah, Kentucky 42003.

Dated at Rockville, Maryland, this 4th day of February 1997.

For the Nuclear Regulatory Commission.

Carl J. Paperiello,

Director, Office of Nuclear Material Safety and Safeguards.

[FR Doc. 97–3323 Filed 2–10–97; 8:45 am]

BILLING CODE 7590–01–P

Sunshine Act Meeting

AGENCY HOLDING THE MEETING: Nuclear Regulatory Commission.

DATE: Weeks of February 10, 17, 24, and March 3, 1997.

PLACE: Commissioners' Conference Room, 11555 Rockville Pike, Rockville, Maryland.

STATUS: Public and Closed.

MATTERS TO BE CONSIDERED:

Week of February 10

Thursday, February 13

2:00 p.m.
Briefing on Operating Reactor Oversight Program and Status of Improvements in NRC Inspection Program (Public Meeting)
(Contact: Bill Borchardt, 301–415–1257)
3:30 p.m.
Affirmation Session (Public Meeting)
*(Please Note: These items will be affirmed immediately following the conclusion of the preceding meeting.)
a: Louisiana Energy Services (Claiborne Enrichment Center); Atomic Safety and Licensing Board Partial Initial Decision (Resolving Contentions J.4, K, and Q), LBP–96–25.

Week of February 17—Tentative

Tuesday, February 18

1:00 p.m.
Briefing on BPR Project on Redesigned Materials Licensing Process (Public Meeting)
(Contact: Don Cool, 301–415–7197)
2:30 p.m.
Briefing on Analysis of Quantifying Plant Watch List Indicators (Public Meeting)
(Contact: Rich Barrett, 301–415–7482)

Wednesday, February 19

2:00 p.m.
Briefing on Millstone and Maine Yankee Lessons Learned (Public Meeting)
(Contact: Steve Stein, 301–415–1296)
3:30 p.m.
Affirmation Session (Public Meeting) (if needed)

Thursday, February 20

2:00 p.m.
Briefing on EEO Program (Public Meeting)
(Contact: Ed Tucker, 301–415–7382)

Week of February 24—Tentative

Wednesday, February 26

11:30 a.m.
Affirmation Session (Public Meeting) (if needed)

Week of March 3—Tentative

There are no meetings scheduled for the Week of March 3.

*The schedule for Commission meetings is subject to change on short notice. To verify the status of meetings call (recording)—(301) 415–1292.

CONTACT PERSON FOR MORE INFORMATION: Bill Hill, (301) 415–1661.

The NRC Commission Meeting Schedule can be found on the Internet at:

http://www.nrc.gov/SECY/smj/schedule. htm

This notice is distributed by mail to several hundred subscribers; if you no longer wish to receive it, or would like to be added to it, please contact the Office of the Secretary, Attn: Operations Branch, Washington, D.C. 20555 (301–415–1661).

In addition, distribution of this meeting notice over the internet system is available. If you are interested in receiving this Commission meeting schedule electronically, please send an electronic message to wmh@nrc.gov or dkw@nrc.gov.

Dated: February 7, 1997.

William M. Hill, Jr.,

SECY Tracking Officer, Office of the Secretary.

[FR Doc. 97–3500 Filed 2–7–97; 1:40 p.m.]

BILLING CODE 7590–01–M

Final Memorandum of Understanding Between the U.S. Nuclear Regulatory Commission and the State of Vermont

AGENCY: Nuclear Regulatory Commission.

ACTION: Notice.

SUMMARY: This notice is to advise the public of the issuance of a Final Memorandum of Understanding (MOU) between the U.S. Nuclear Regulatory Commission (NRC) and the State of Vermont. The MOU provides the basis for mutually agreeable procedures whereby the State of Vermont may utilize the NRC Emergency Response Data System (ERDS) to receive data during an emergency at a commercial nuclear power plant in Vermont. Public comments were addressed in conjunction with the MOU with the State of Michigan published in the Federal Register, Vol. 57. No. 28, February 11, 1992.

EFFECTIVE DATE: This MOU is effective December 10, 1996.

ADDRESSES: Copies of all NRC documents are available for public inspection and copying for a fee in the NRC Public Document Room, 2120 L Street, N.W. (Lower Level), Washington, DC.

FOR FURTHER INFORMATION CONTACT: John R. Jolicoeur or Eric D. Weinstein, Office for Analysis and Evaluation of Operational Data, U.S. Nuclear Regulatory Commission, Washington, DC 20555. Telephone (301) 415–6402 or (301) 415–7559.

SUPPLEMENTARY INFORMATION: The attached MOU is intended to formalize and define the manner in which the NRC will cooperate with the State of Vermont to provide data related to plant conditions during emergencies at commercial nuclear power plants in Vermont.

Dated at Rockville, Maryland, this 28th day of January, 1997.

For the U.S. Nuclear Regulatory Commission.

Denwood F. Ross, Jr.,

Acting Director, Office for Analysis and Evaluation of Operational Data.

Agreement Pertaining to the Emergency Response Data System Between the State of Vermont and the U.S. Nuclear Regulatory Commission

I. Authority

The U.S. Nuclear Regulatory Commission (NRC) and the State of Vermont enter into this Agreement under the authority of Section 274i of the Atomic Energy Act of 1954, as amended.

The State of Vermont recognizes the Federal Government, primarily the NRC, as having the exclusive authority and responsibility to regulate the radiological and national security aspects of the construction and operation of nuclear production or utilization facilities, except for certain authority over air emissions granted to States by the Clean Air Act.

II. Background

A. The Atomic Energy Act of 1954, as amended, and the Energy Reorganization Act of 1974, as amended, authorize the Nuclear Regulatory Commission (NRC) to license and regulate, among other activities, the manufacture, construction, and operation of utilization facilities (nuclear power plants) in order to assure common defense and security and to protect the public health and safety. Under these statutes, the NRC is the responsible agency regulating nuclear power plant safety.

B. NRC believes that its mission to protect the public health and safety can be served by a policy of cooperation with the State governments and has formally adopted a policy statement on ''Cooperation with States at Commercial Nuclear Power Plants and Other Nuclear Production or Utilization Facilities'' (54 FR 7530, February 22, 1989). The policy statement provides that NRC will consider State proposals to enter into instruments of cooperation for certain programs when these programs have provisions to ensure close cooperation with NRC. This agreement is intended to be consistent with, and implement the provisions of the NRC's policy statement.

C. NRC fulfills its statutory mandate to regulate nuclear power plant safety by, among other things, responding to emergencies at the licensee's facilities and monitoring the status and adequacy

of the licensee's responses to emergency situations.

D. The State of Vermont fulfills its statutory mandate to provide for preparedness, response, mitigation, and recovery in the event of an accident at a nuclear power plant through the State of Vermont Emergency Management, Radiological Emergency Response Program.

III. Scope

A. This Agreement defines the way in which NRC and Vermont Emergency Management will cooperate in planning and maintaining the capability to transfer reactor plant data via the Emergency Response Data System (ERDS) during emergencies at nuclear power plants in the State of Vermont.

B. It is understood by the NRC and the State of Vermont that ERDS data will only be transmitted by a licensee during emergencies classified at the Alert level or above, during scheduled tests, or during exercises when available.

C. Nothing in this Agreement is intended to restrict or expand the statutory authority of NRC, the State of Vermont, or to affect or otherwise alter the terms of any agreement in effect under the authority Section 274b of the Atomic Energy Act of 1954, as amended; nor is anything in this Agreement intended to restrict or expand the authority of the State of Vermont on matters not within the scope of this Agreement.

D. Nothing in this Agreement confers upon the State of Vermont authority to (1) interpret or modify NRC regulations and NRC requirements imposed on the licensee; (2) take enforcement actions; (3) issue confirmatory letters; (4) amend, modify, or revoke a license issued by NRC; or (5) direct or recommend nuclear power plant employees to take or not to take any action. Authority for all such actions is reserved exclusively to the NRC.

IV. NRC's General Responsibilities

Under this agreement, NRC is responsible for maintaining the Emergency Response Data System. ERDS is a system designed to receive, store and retransmit data from in-plant data systems at nuclear power plants during emergencies. The NRC will provide user access to ERDS data to one user terminal for the State of Vermont during emergencies at nuclear power plants which have implemented an ERDS interface and for which any portion of the plant's 10 mile Emergency Planning Zone (EPZ) lies within the State of Vermont. The NRC agrees to provide unique software already available to NRC (not commercially available) that was developed under NRC contract for configuring an ERDS workstation.

V. Vermont Emergency Management's General Responsibilities

A. Vermont Emergency management will, in cooperation with the NRC establish a capability to receive ERDS data. To this end, Vermont Emergency Management will provide the necessary computer hardware and commercially licensed software required for ERDS data transfer to users.

B. Vermont Emergency management agrees not to use ERDS to access data from nuclear power plants for which a portion of the 10 mile Emergency Planning Zone does not fall within its State boundary.

C. For the purpose of minimizing the impact on plant operators, clarification of ERDS data will be pursued through the NRC.

VI. Implementation

Vermont Emergency Management and the NRC agree to work in concert to assure that the following communications and information exchange protocol regarding the NRC ERDS are followed.

A. Vermont Emergency Management and the NRC agree in good faith to make available to each other information within the intent and scope of this Agreement.

B. NRC and Vermont Emergency Management agree to meet as necessary to exchange information on matters of common concern pertinent to this Agreement. Unless otherwise agreed, such meetings will be held in the NRC Operations Center. The affected utilities will be kept informed of pertinent information covered by this Agreement.

C. To preclude the premature public release of sensitive information, NRC and Vermont Emergency Management will protect sensitive information to the extent permitted by the Federal Freedom of Information Act, the State Freedom of Information Act, 10 CFR 2.790, and other applicable authority.

D. NRC will conduct periodic tests of licensee ERDS data links. A copy of the test schedule will be provided to Vermont Emergency Management by the NRC. Vermont Emergency Management may test its ability to access ERDS data during these scheduled tests, or may schedule independent tests of the State link with the NRC.

E. NRC will provide access to ERDS for emergency exercises with reactor units capable of transmitting exercise data to ERDS. For exercises in which the NRC is not participating, Vermont Emergency Management will coordinate with NRC in advance to ensure ERDS availability. NRC reserves the right to preempt ERDS use for any exercise in progress in the event of an actual event at any licensed nuclear power plant.

VII. Contacts

A. The principal senior management contacts for this Agreement will be the Director, Incident Response Division, Office for Analysis and Evaluation of Operational Data, and the Director, Vermont Emergency Management. These individuals may designate appropriate staff representatives for purpose of administering this Agreement.

B. Identification of these contacts is not intended to restrict communication between NRC and Vermont Emergency Management staff members on technical and other day-to-day activities.

VIII. Resolution of Disagreements

A. If disagreements arise about matters within the scope of this Agreement, NRC and Vermont Emergency Management will work together to resolve these differences.

B. Resolution of differences between the State and NRC staff over issues arising out of this Agreement will be the initial responsibility of the NRC Incident Response Division management.

C. Differences which cannot be resolved in accordance with Sections VIII.A and VIII.B will be reviewed and resolved by the Director, Office of Analysis and Evaluation of Operational Data.

D. The NRC's General Counsel has the final authority to provide legal interpretation of the Commission's regulations.

IX. Effective Date

The Agreement will take effect after it has been signed by both parties.

X. Duration

A formal review, not less than 1 year after the effective date, will be performed by the NRC to evaluate implementation of the Agreement and resolve any problems identified. This Agreement will be subject to periodic reviews and may be amended or modified upon written agreement by both parties, and may be terminated upon 30 days written notice by either party.

XI. Separability

If any provision(s) of this Agreement, or the application of any provision(s) to any person or circumstances is held invalid, the remainder of this Agreement and the application of such

provisions to other persons or circumstances will not be affected.

For the U.S. Nuclear Regulatory Commission.

Dated: December 2, 1996.

James M. Taylor,

Executive Director for Operations.

For the State of Vermont.

Dated: December 10, 1996.

George L. Lowe,

Director, Vermont Emergency Management.

[FR Doc. 97–3320 Filed 2–10–97; 8:45 am]

BILLING CODE 7590–01–M

SECURITIES AND EXCHANGE COMMISSION

[Release No. IC–22492; 812–10396]

John Nuveen & Co. Incorporated and Nuveen Tax-Free Unit Trusts; Notice of Application

February 4, 1997.

AGENCY: Securities and Exchange Commission (''SEC'').

ACTION: Notice of Application for Exemption under the Investment Company Act of 1940 (the ''Act'').

APPLICANTS: John Nuveen & Co. Incorporated (the ''Sponsor''), Nuveen Tax-Free Unit Trusts (the ''Nuveen Trust''), and any future trusts sponsored by the Sponsor (together with the Nuveen Trust, the ''Trusts''), and their respective series (each, a ''Series'' or a ''Trust Series'').

RELEVANT ACT SECTIONS: Order requested under section 6(c) for an exemption from sections 2(a)(32), 2(a)(35), 12(d)(3), 14(a), 19(b), 22(d), and 26(a)(2) of the Act, and rules 19b–1 and 22c–1 thereunder; under section 11(a) for an exemption from section 11(c); and under sections 6(c) and 17(b) for an exemption from section 17(a).

SUMMARY OF APPLICATION: Applicants request an order to permit: (a) the Trust to impose sales charges on a deferred basis, and to waive the deferred sales charge in certain circumstances; (b) certain offers of exchange involving the Trusts; (c) units of the Trusts to be publicly offered without requiring the Sponsor to take for its own account or place with others $100,000 worth of units in those Trusts; (d) certain Trusts to distribute capital gains resulting from the sale of portfolio securities within a reasonable time after receipt; (e) a terminating Series of a Trust to sell portfolio securities to a new Series of the Trust; and (f) certain Trust Series to invest up to 10.5%, and certain other Trust Series to invest up to 20.5% of their assets in the securities of issuers that derived more than 15% of their gross revenues in their most recent fiscal year from securities related activities.

FILING DATE: The application was filed on October 15, 1996.

HEARING OR NOTIFICATION OF HEARING: An order granting the application will be issued unless the SEC orders a hearing. Interested persons may request a hearing by writing to the SEC's Secretary and serving applicants with a copy of the request, personally or by mail. Hearing requests should be received by the SEC by 5:30 p.m. on March 3, 1997, and should be accompanied by proof of service on applicants, in the form of an affidavit or, for lawyers, a certificate of service. Hearing requests should state the nature of the writer's request, the reason for the request, and the issues contested. Persons may request notification of a hearing by writing to the SEC's Secretary.

ADDRESSES: Secretary, SEC, 450 Fifth Street N.W., Washington, D.C. 20549. Applicants: 333 West Wacker Drive, Chicago, IL 60606.

FOR FURTHER INFORMATION CONTACT: Christine Y. Greenlees, Senior Counsel, at (202) 942–0581, or Mary Kay Frech, Branch Chief, at (202) 942–0564 (Division of Investment Management, Office of Investment Company Regulation).

SUPPLEMENTARY INFORMATION: The following is a summary of the application. The complete application may be obtained for a fee at the SEC's Public Reference Branch.

Applicants' Representations

1. Each Trust is or will be a unit investment trust registered as an investment company under the Act. Each of the Trusts is sponsored by the Sponsor, and is made up of one or more Series of separate unit investment trusts issuing securities registered or to be registered under the Securities Act of 1933. Each Series is created by a Trust Indenture (the ''Indenture'') between the Sponsor and a banking institution or trust company as trustee (the ''Trustee''). The Sponsor is a wholly-owned subsidiary of The John Nuveen Company, of which approximately 78% is owned by The St. Paul Companies, Inc.

2. The fundamental structures of the Trusts and the various Series are similar in most respects, however, the investment objectives may differ. In all cases, the Sponsor will acquire a portfolio of securities which it then deposits with the Trustee in exchange for certificates representing units of fractional undivided interest (''Units'') in the deposited portfolio. The Units are then offered to the public through the Sponsor and dealers at a public offering price which, during the initial offering period, is based upon the aggregate offering side evaluation of the underlying securities plus a front-end sales charge. This sales charge is the maximum amount applicable to any particular Series of a Trust and currently ranges from 4.9% to 2.5% of the public offering price, depending on the term of the underlying securities. The Sponsor may reduce the sales charge under certain circumstances, which will be disclosed in the prospectus. Any such reduction will be made in accordance with rule 22d–1.

3. The Sponsor maintains a secondary market for Units of outstanding Series, and continually offers to purchase these Units at prices based upon the bid side evaluation of the underlying securities. Investors may purchase Units on the secondary market at the current public offering price plus a front-end sales charge. If the Sponsor discontinues maintaining such a market at any time for any Series, holders of Units (''Unitholders'') of such a Series may redeem their Units through the Trustee.

A. Deferred Sales Charge

1. The Sponsor proposes to implement a program for one or more Trust Series under which part or all of the sales charge would be deferred. Under applicants' deferred sales charge (''DSC'') proposal, the Sponsor will determine both the maximum amount of the sales charge per Unit, and whether to defer the collection of all or part of the sales charge over a period (the ''Collection Period'') subsequent to the settlement date for the purchase of Units. The Sponsor will in no event add to the deferred amount of the sales charge any additional amount for interest or any similar or related charge to reflect or adjust for such deferral.

2. The Sponsor anticipates collecting a portion of the total sales charge immediately upon the purchase of Trust Units. The balance of the sales charge will be collected over the Collection Period for the particular Trust Series. A ratable portion of the sales charge remaining to be collected will be deducted from each Unitholder's distributions on the Units (''Distribution Deductions'') during the Collection Period until the total amount of the sales charge per Unit is collected. If distribution income is insufficient to pay a DSC installment, the Trustee, pursuant to the powers granted in the Indenture, will have the ability to sell portfolio securities in an amount

necessary to provide the requisite payments. If a Unitholder redeems his or her Units before the total sales charge has been collected from installment payments, the Sponsor intends to deduct any amount of unpaid DSC from sale or redemption proceeds. Applicants represent that the total of all these amounts will in no event exceed the maximum sales charge per Unit.

3. For purposes of determining whether a DSC applies to a particular redemption or sale of Units, the Sponsor will assume that Units on which the total aggregate of Distribution Deductions has been collected are liquidated first. Any Units disposed of over and above such amounts will be subject to the DSC, which will be applied on the assumption that Units held for the longest time are redeemed first. Therefore, the DSC will be the balance of the sales charge per Unit, determined as of the date of purchase, which remains owing and uncollected. The Sponsor may in the future choose to waive the DSC in connection with redemption or sales of Units under certain circumstances. Any such waiver of the DSC will be disclosed in the prospectus and will be implemented in accordance with rule 22d–1.

4. The Sponsor believes that the DSC program will be adequately disclosed to potential investors as well as Unitholders. The prospectus for each Trust Series will describe the operation of the DSC, including the amount and date of each Distribution Deduction, and the duration of the Collection Period. The prospectus also will disclose that the Trustee may sell Trust securities in the event that income generated by the Trust portfolio is insufficient to pay for DSC expenses. Applicants also state that each annual report will provide Unitholders with information as to the aggregate amount of annual DSC payments made by the Trust during the previous fiscal year on both a Series and per Unit basis. Further, the securities confirmation statement for each Unitholder's purchase transaction will state both the front-end sales charge and the DSC that will be imposed, and that the DSC will be withdrawn in regular installments from distribution payments made to Unitholders.

B. Exchange Option and Rollover Option

1. Applicants also seek an exemption to permit offers of exchange among Series of the Trusts (the ''Exchange Option''), and offers of exchange made in connection with the termination of Trust Series (the ''Rollover Option''). The Exchange Option will extend to all exchanges of Units sold either with a front-end sales charge or with a DSC. The Rollover Option will give Unitholders the ability to ''roll over'' any or all of their Units in a Series of a Trust (each, a ''Rollover Trust'') that is terminating for Units of a new Trust Series of the same type (a ''New Trust'') at a reduced sales charge.

2. An investor who purchases Units under either the Exchange Option or the Rollover Option will pay a lower sales charge than that which would be paid by a new investor. The reduced sales charge imposed will be reasonably related to the expenses incurred in connection with the administration of the program, which may include an amount that will fairly and adequately compensate the Sponsor and the participating underwriters and brokers for their services in providing the program.

3. The sales charge on Units acquired pursuant to the Exchange option generally will be reduced from maximum sales charges ranging from 4.9% to 2.5% of the public offering price (5.5% to 0% for sales on the secondary market) to a flat fee (*e.g.*, $25 per 100 Units for Units of a Series whose initial cost was approximately $10 per Unit, or $25 per 1,000 Units for Units of a Series whose initial cost was approximately $1.00 per Unit) or a percentage of the public offering price. An adjustment will be made if Units of any Trust Series are exchanged within five months of their acquisition for Units of a Trust Series with a higher sales charge (the ''Five Months Adjustment''). An adjustment also will be made if Units that impose Distribution Deductions are exchanged for Units of a Trust Series that imposes a front-end sales charge at any time before the Distribution Deductions (plus any portion of the sales charge on the exchanged Units collected up front) have at least equaled the per Unit sales charge then applicable on the acquired Units (the ''DSC Front-end Exchange Adjustment''). In cases involving either the Five Months or the DSC Front-end Exchange Adjustment, the exchange fee will be the greater of: (a) the reduced sales charge, or (b) an amount which, together with the sales charge already paid on the Units being exchanged, equals the normal sales charge on the Units of the Trust Series being acquired through such exchange (the ''Exchange Trust''), determined as of the date of the exchange. The Sponsor may waive, with appropriate disclosures, such exchange fee, and reserves the right to vary the sales charge normally applicable to a Series, to vary the charge applicable to exchanges, and to modify, suspend, or terminate the Exchange Option as set forth in the conditions to the application.

4. Under the Exchange Option, if DSC Units are exchanged for DSC Units of another Series, the reduced sales charge will be collected in connection with such an exchange. The Distribution Deductions will continue to be taken from the investment income generated by the newly acquired Units, or proceeds from the sale of Trust portfolio securities, as the case may be, until the original balance of the sales charge owed on the initial investment has been collected. The DSC due on the initial investment will not be collected at the time of exchange, except in the case of any exchange to a Series not having a DSC.

5. Under the Rollover Option, Unitholders of Rollover Trusts may elect by a certain date (the ''Rollover Notification Date'') to redeem their Units in a terminating Rollover Trust, and invest in Units of a New Trust, which is created on or about the Rollover Notification Date, at a reduced sales charge. Unitholders making such an election will be referred to as ''Rollover Unitholders.'' The applicable sales charge upon the initial investment in a Rollover Trust typically is 2.9% of the public offering price, while the reduced sales charge applicable to a Rollover Unitholder's investment in a New Trust usually will be 1.9% of the public offering price.

C. Purchase and Sale Transactions Between a Rollover Trust and a New Trust

1. Applicants also request an exemption to permit any Rollover Trust to sell their portfolio securities to a New Trust, and the New Trust to purchase these securities. Each Rollover Trust will contain a portfolio of equity securities (the ''Equity Securities'') representing a portion of a specific published index (an ''Index''). The Equity Securities in each portfolio will be: (a) Actively traded (*i.e.*, have had an average daily trading volume in the preceding six months of a least 500 shares equal in value to at least U.S. $25,000) on (i) an exchange (an ''Exchange'') which is either a national securities exchange that meets the qualifications of section 6 of the Securities Exchange Act of 1934, or a foreign securities exchange (''Foreign Exchange'') that meets the qualifications set forth in a proposed amendment to rule 12d3–1(d)(6) under the Act,[1] and

[1] Investment Company Act Release No. 17096 (Aug. 3, 1989) (proposing amendments to rule 12d3–1). The proposed amendment defined a ''Qualified Foreign Exchange'' to mean a foreign

which releases daily closing prices, or (ii) the Nasdaq-National Market System (''Nasdaq-NMS''); and (b) included in an Index.

2. The investment objective of each Rollover Trust is to seek a greater total return than that achieved by the stocks comprising the entire Index over the life of the Rollover Trust. To achieve this objective, each Rollover Trust will consist of a specified number of the highest dividend yielding securities in such Rollover Trust's respective Index, or in a specified number of the lowest dollar price per share of the highest dividend yielding securities in such Rollover Trust's respective Index. For example, certain Rollover Trusts (the ''Ten Series'') will invest for a specified period in approximately equal values in the ten common stocks contained in the Dow Jones Industrial Average (the ''DJIA''), the Financial Times Industrial Ordinary Share Index (the ''FT Index''), or the Hang Seng Index, having the highest yields as of no more than three business days prior to the Ten Series' initial date of deposit. In addition, other Rollover Trusts (the ''Five Series'') will pursue their objective by investing for a specified period in approximately equal values in the common stocks of the five companies with the lowest dollar price per share of the ten companies in the DJIA, the FT Index, or the Han Seng Index, having the highest dividend yields as of no more than three business days prior to the Five Series' initial date of deposit.

3. The securities deposited in each Rollover Trust are chosen solely according to the formulas described above and set forth in the prospectus for the Rollover Trust. The Sponsor will not have any discretion as to which securities are purchased, because securities are initially purchased in accordance with the formulas described above. The Rollover Trust's portfolios will not be actively managed and will not be altered to reflect changes to those stocks comprising the top dividend yielding stocks (or lowest priced stocks of the top dividend yielding stocks) in an Index on a date after the Rollover Trust's initial date of deposit. The Sponsor does not have discretion as to when securities will be sold, except that the Sponsor is authorized to sell securities in extremely limited circumstances, such as a default by the issuer on the payment on any of its outstanding obligations, a decline in the price of an Equity Security, or other credit factors that, in the opinion of the Sponsor, would cause the retention of the securities to be detrimental to the Rollover Trust.

4. Each Rollover Trust will hold its securities for a specified period, generally one year. As the Rollover Trust terminates, the Sponsor intends to create a New Trust for the next period. With respect to the Rollover Trusts, the New Trust will be based on the same Index, using the same number of current top dividend yielding securities (or of the lowest price per share securities of the highest dividend yielding securities, whichever is applicable) in the Index.

5. There normally is some overlap from year to year of the highest dividend yielding securities (or the lowest dollar price per share stocks of the highest dividend yielding securities) in an Index and, therefore, between the portfolios of each terminating Rollover Trust and the related New Trust. For example, of the ten highest dividend yielding securities on the DJIA as of May 1995, eight were among the top ten dividend yielding securities at approximately the same time the following year.

6. In connection with its termination, each Rollover Trust will sell all of its portfolio securities on an Exchange or Nasdaq-NMS as quickly as practicable, but over a period of time so as to minimize any adverse impact on the market price. Similarly, a New Trust will acquire its portfolio securities in purchase transactions on an exchange or non Nasdaq-NMS. This procedure will result in substantial brokerage commissions on portfolio securities of the same issue that are borne by the Unitholders of both the Rollover Trust and the New Trust.

7. In light of these costs, applicants request exemptive relief to permit any Rollover Trust having the characteristics described above to sell Equity Securities to a New Trust, and to permit the New Trust to purchase Equity Securities at the closing sales price of such securities on the applicable Exchange or on Nasdaq-NMS on the sale date, *provided* that applicants comply with rule 17a–7 under the Act, except for paragraph (e) thereof, as discussed below.

8. In order to minimize overreaching, the Sponsor will certify to the Trustee, within five days of each sale from a Rollover Trust to a New Trust: (a) That the transaction is consistent with the policy of both the Rollover Trust and the New Trust, as recited in their respective registration statements and reports filed under the Act; (b) the date of such transaction; and (c) the closing sales price on the Exchange or on Nasdaq-NMS for the sale date of the securities subject to such sale. The Trustee will then countersign the certificate, unless the Trustee disagrees with the price listed on the certificate, in which event the Trustee will immediately inform the Sponsor orally of any such disagreement and returns the certificate within five days to the Sponsor with corrections duly noted. Upon the Sponsors receipt of a corrected certificate, if the Sponsor can verify the corrected price by reference to an independently published list of closing sales prices for the date of the transactions, the Sponsor will ensure that the price of Units of the New Trust, and distributions to Unitholders of the Rollover Trust with regard to redemption of their Units or termination of the Rollover Trust, accurately reflect the corrected price. If the Sponsor disagrees with the Trustee's corrected price, the Sponsor and the Trustee will jointly determine the correct sales price by reference to a mutually agreeable, independently published list of closing sales prices for the date of the transaction.

D. Investments in Securities Related Issuers on Certain Indexes

1. Applicants also request an exemption to permit the Ten Series to acquire securities of an issuer that derives more than 15% of its gross revenues from ''securities related activities'' (as defined in rule 12d3–1(d)(1)), provided that: (a) Those securities are included in the DJIA, the FT Index, or the Hang Seng Index; (b) they have one of the ten highest yields of stocks comprising the DJIA, the FT Index, or the Hang Seng Index no more than three business days prior to the initial date of deposit; and (c) the value of the securities deposited of each securities related issuer represents no more than approximately 10%, but in no event more than 10.5%, of the value of that Ten Series' total assets as of its initial date of deposit. In addition, Applicants request an exemption to permit the Five Series to acquire securities of an issuer that derives more than 15% of its gross revenues from ''securities related activities'' (as defined in rule 12d3–1(d)(1)), provided that: (a) those securities are included in the DJIA, the FT Index, or the Hang Seng Index; (b) they are securities of one of the five companies with the lowest dollar price per share of the ten stocks in the DJIA, the FT Index, or the Hang Seng Index having the highest dividend yield as of no more than three business days prior to the initial date of deposit; and (c) the value of the securities deposited of each securities related issuer represents no more than

stock exchange meeting certain standards with respect to trading volume and other matters. As subsequently amended, however, the rule omitted that proposed definition.

approximately 20%, but in no event more than 20.5%, of the value of that Five Series' total assets as of its initial date of deposit.

2. As noted above, the Ten Series and the Five Series will contain a portfolio of Equity Securities which represents a portion of the DJIA, the FT Index, or the Hang Seng Index. The DJIA comprises 30 widely-held common stocks listed on the New York Stock Exchange that are chosen by the editors of *The Wall Street Journal.* The FT Index comprises widely-held common stocks listed on the London Stock Exchange that are chosen by the editors of the *The Financial Times* (London). The FT Index is an unweighted average of 30 companies representative of British industry and commerce. The Hang Seng Index is a weighted average of 33 companies representative of Hong Kong industry. The publishers of the Dow Jones & Company, Inc. (owner of the DJIA), the FT Index, and the Hang Seng Index are unaffiliated with any Series or the Sponsor and do not participate in any way in the creation of any Series or the selection of its stocks.

3. Certain of the stocks currently comprising the DJIA, the FT Index, and the Hang Seng Index are issued by companies with subsidiaries engaged in ''securities related activities'' (as defined in rule 12d3–1(d)(1)), revenues of which may from time to time represent more than 15% of the issuer's gross revenues. It also is possible that additional companies in the DJIA, the FT Index, and the Hang Seng Index may acquire companies engaged in or enter into those business in the future.

Applicants' Legal Analysis

1. Applicants request an exemption under section 6(c) granting relief from sections 2(a)(32), 2(a)(35), 22(d), 26(a)(2), and rule 22c–1 to permit them to assess a DSC, and to waive the DSC under certain circumstances. Applicants also request an exemption under section 11(a) granting relief from section 11(c) to enable them to implement the Exchange and Rollover Options. In addition, applicants request an exemption under sections 6(c) and 17(b) granting relief from section 17(a) to permit a terminating Series of a Trust to sell portfolio securities to a new Series of the Trust. Finally, applicants seek an exemption under section 6(c) granting relief from sections 12(d)(3), 14(a), 19(b), and rule 19b–1 to the extent described below.

2. Section 2(a)(32) of the Act defines a ''redeemable security'' as a security that, upon its presentation to the issuer, entities the holder to receive approximately his or her proportionate share of the issuer's current net assets. or the cash equivalent of those assets. Because the imposition of a DSC may cause a redeeming Unitholder to receive an amount less than the net asset value of the redeemed Units, applicants request an exemption from section 2(a)(32) so that Units subject to a DSC are considered redeemable securities for purposes of the Act.[2]

3. Section 2(a)(35) of the Act, in relevant part, defines the term ''sales load'' to be the difference between the public selling price of a security and that portion of the sale proceeds invested or held for investment by the depositor or trustee. Because a DSC is not charged at the time of purchase, applicants request an exemption from section 2(a)(35).

4. Rule 22c–1, in relevant part, prohibits a registered investment company issuing a redeemable security from selling, redeeming, or repurchasing any such security, except at a price based on the current net asset value of such security. Because the imposition of a DSC may cause a redeeming Unitholder to receive an amount less than the net asset value of the redeemed Units, applicants request an exemption from rule 22c–1.

5. Section 22(d) of the Act requires an investment company and its principal underwriter and dealers to sell securities issued by such investment company only at the current public offering price as described in the investment company's prospectus. Because sales charges traditionally have been a component of the public offering price, section 22(d) historically required that all investors be charged the same load. Rule 22d–1 was adopted to permit the sale of redeemable securities with scheduled variations in the sales load. Applicants submit that waivers, deferrals or other scheduled variations, if disclosed in the relevant prospectus, would be consistent with section 22(d), and that rule 22d–1 contemplates and permits such waivers, deferrals or other scheduled variations if disclosed in the relevant prospectus. In the interest of clarity, however, applicants seek relief from section 22(d) to permit scheduled variations or waivers of the DSC under certain circumstances.

6. Section 26(a)(2) of the Act, in relevant part, prohibits a trustee or custodian of a unit investment trust from collecting from the trust as an expense any payment to a depositor or principal underwriter thereof. Because of this prohibition, applicants request an exemption to permit the trustee to collect the charge from income distributions on the Units and disburse them to the Sponsor as contemplate by the DSC program.

7. Section 6(c) of the Act provides, in relevant part, that the SEC, by order upon application may exempt any person or transaction, or any class or classes of persons or transactions, from any provision of the Act or any rule thereunder if such exemption is appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the Act. Applicants believe that granting the requested relief from sections 2(a)(32), 2(a)(35), 22(d), 26(a)(2), and rule 22c–1 would meet the requirements for an exemption established by section 6(c).

8. Section 11(c) of the Act prohibits any offer of exchange of the securities of a registered unit investment trust for the securities of any other investment company, unless the terms of the offer have been approved by the SEC. Applicants request an exemption under section 11(a) from the provisions of section 11(c) to permit exchanges of Units of Trust Series sold with front-end or deferred sales charges at reduced sales charges, and to permit exchange transactions made in connection with the termination of a Series at a reduced sales charge. Applicants believe that the reduced sales charge imposed at the time of exchange is a reasonable and justifiable expense to be allocated for the professional assistance and operational expenses which are contemplated in connection with the Exchange and the Rollover Option. Applicants further believe that the requirement that a person who has acquired Units at a lower sales charge pay the difference, if greater than the reduced fixed charge, upon exercising the Exchange Option when the Five Months Adjustment or the DSC Front-end Exchange Adjustment applies is appropriate in order to maintain the equitable treatment of various investors in each Trust Series.

9. Section 14(a) of the Act requires in substance that investment companies have $100,000 of net worth prior to making a public offering. Applicants believe that each Series will comply with this requirement because the Sponsor will deposit substantially more than $100,000 of debt or equity securities or a combination thereof, depending on the objective of the particular Series. Applicants assert, however, that the SEC has interpreted

[2] Without an exemption, a Trust selling Units subject to a DSC could not meet the definition of a unit investment trust under section 4(2) of the Act. As here relevant, section 4(2) defines a unit investment trust as an investment company that issues only ''redeemable securities.''

section 14(a) as requiring that the initial capital investment in an investment company be made without any intention to dispose of the investment. Applicants state that, under this interpretation, a Trust Series would not satisfy section 14(a) because of the Sponsor's intention to sell all the Units thereof. Rule 14a–3 exempts unit investment trusts from this provision if certain conditions are complied with, one of which is that the trust invest only in ''eligible trust securities,'' as defined in the rule. Applicants intend that certain future Series of the Trusts (collectively, the ''Equity Trusts'') will invest all or a portion of their assets in Equity Securities, and therefore may not rely on this rule because Equity Securities are not eligible trust securities. Applicants, therefore, request an exemption under section 6(c) from the net worth requirement of section 14(a). Applicants will comply in all respects with rule 14a–3, except that the Equity Trusts will not restrict their portfolio investments to ''eligible trust securities.''

10. Section 19(b) of the Act and rule 19b–1 provide that, except under limited circumstances, no registered investment company may distribute long-term gains more than once every twelve months. Rule 19b–1(c), under certain circumstances, excepts a unit investment trust investing in ''eligible trust securities'' (as defined in rule 14a–3) from the requirements of rule 19b–1. Because the Equity Trusts do not limit their investments to ''eligible trust securities,'' such Trusts will not qualify for the exemption in paragraph (c) of rule 19b–1. Therefore, applicants request an exemption under section 6(c) from section 19(b) and rule 19b–1 to the extent necessary to permit capital gains earned in connection with the sale of portfolios securities to be distributed to Unitholders along with the Equity Trust's regular distributions. In all other respects, applicants will comply with section 19(b) and rule 19b–1.

11. Applicants believe that the dangers which section 19(b) and rule 19b–1 are designed to prevent do not exist in the Equity Trusts. Any gains from the sale of portfolio securities would be triggered by the need to meet Trust expenses, DSC installments, or by requests to redeem Units, events over which the Sponsor and the Equity Trusts have no control. Applicants acknowledge that the Sponsor has control over the actual redemption of Units to the extent it makes a market in Units. Applicants assert, however, that the Sponsor has no incentive to redeem or permit the redemption of Units in order to generate capital gains for the purpose against which section 19(b) and rule 19b–1 were designed to protect. Moreover, since principal distributions must be clearly indicated in accompanying reports to Unitholders as a return of principal and will be relatively small in comparison to normal dividend distributions, there is little danger of confusion from failure to differentiate among distributions.

12. Section 17(a) of the Act makes it unlawful for an affiliated person of a registered investment company to purchase securities from, or sell securities to such registered investment company. Investment companies under common control may be considered affiliated persons of one another. Each Series will have an identical or common Sponsor, John Nuveen & Co. Incorporated. As the Sponsor of each Series might be considered to control each Series, it is likely that each Series would be considered an affiliated person of the others.

13. Section 17(b) of the Act provides that the SEC may exempt a proposed transaction from section 17(a) if evidence establishes that: (a) the terms of the proposed transaction are reasonable and fair and do not involve overreaching; (b) the proposed transaction is consistent with the policies of each registered investment company involved; and (c) the proposed transaction is consistent with the general purposes of the Act. As noted above, under section 6(c), the SEC may exempt classes of transactions if, and to the extent that, such exemption is necessary or appropriate in the public interest, and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the Act. Because section 17(b) applies to a specific proposed transaction and not to ongoing series of future transactions, applicants also request relief from section 17(a) under section 6(c). Applicants believe that the proposed transactions satisfy the requirements of sections 6(c) and 17(b).

14. Rule 17a–7 under the Act permits registered investment companies that might be deemed affiliates solely by reason of common investment advisers, directors, and/or officers, to purchase securities from, or sell securities to, one another at an independently determined price, *provided* certain conditions are met. Paragraph (e) of the rule requires an investment company's board of directors to adopt and monitor the procedures for these transactions to assure compliance with the rule. A unit investment trust does not have a board of directors and, therefore, may not rely on the rule. Applicants represent that they will comply with all of the provisions of rule 17a–7, other than paragraph (e).

15. Applicants submit that the proposed transactions will be consistent with the policy of the Trust, as only securities that otherwise would be bought and sold on the open market pursuant to the policy of each Trust Series will be involved in the proposed transactions. In addition, applicants state that such purchases from and/or sales to such affiliated investment companies will take place only upon the occurrence of a redemption of Units or the termination of a Rollover Trust and the creation of a New Trust. Applicants further believe that the current practice of buying and selling on the open market leads to unnecessary brokerage fees, and is therefore contrary to the general purposes of the Act.

16. Section 12(d)(3) of the Act prohibits an investment company from acquiring any security issued by any person who is a broker, dealer, underwriter, or investment adviser. Rule 12d3–1, in relevant part, exempts from section 12(d)(3) purchases by an investment company of securities of an issuer that derived more than 15% of its gross revenues in its most recent fiscal year from securities related activities, provided that, among other things, immediately after such acquisition, the acquiring company has invested not more than 5% of the value of its total assets in securities of the issuer.

17. Applicants seek an exemption under section 6(c) from the provisions of section 12(d)(3) to permit each Ten Series to invest up to approximately 10%, but in no event more than 10.5%, of the value of any Ten Series' assets in the securities of an issuer of any of the ten highest dividend yielding stocks in the DJIA, the FT Index, or the Hang Seng Index that derives more than 15% of its gross revenues from securities related activities. Similarly, applicants seek an exemption to permit each Five Series to invest up to approximately 20%, but in no event more than 20.5%, of the value of any Five Series' assets in the securities of an issuer of any of the five stocks having the lowest dollar price per share of the ten highest yielding stocks in the DJIA, the FT Index, or the Hang Seng Index, that derives more than 15% of its gross revenues from securities related activities. Applicants represent that each Ten Series and Five Series will comply with all of the conditions of rule 12d3–1, except the condition prohibiting an investment company from investing more than 5% of the value of its total assets in securities of a securities related issuer.

18. Applicants submit that the purpose of section 12(d)(3) was to: (a) prevent investment companies from exposing their assets to the entrepreneurial risks of securities related businesses; (b) prevent potential conflicts of interest; (c) eliminate certain reciprocal practices between investment companies and securities related businesses; and (d) ensure that investment companies maintain adequate liquidity in their portfolios. Applicants assert that the proposed transaction does not give rise to the type of abuses section 12(d)(3) was designed to address. Applicants also believe that the requested relief meets the standards for an exemption set forth in section 6(c).

Applicants' Conditions

Applicants agree that any order granting the requested relief shall be subject to the following conditions:

A. Conditions With Request to DSC Relief and Exchange and Rollover Options

1. Whenever the Exchange Option or Rollover Option is to be terminated or its terms are to be amended materially, any holder of a security subject to that privilege will be given prominent notice of the impending termination or amendment at least 60 days prior to the date of termination or the effective date of the amendment, *provided that:* (a) no such notice need be given if the only material effect of an amendment is to reduce or eliminate the sales charge payable at the time of an exchange, to add one or more new Series eligible for the Exchange Option or the Rollover Option, or to delete a Series which has terminated; and (b) no notice need be given if, under extraordinary circumstances, either: (i) there is a suspension of the redemption of Units of the Trust under section 22(e) of the Act and the rules and regulations promulgated thereunder, or (ii) a Trust temporarily delays or ceases the sale of its Units because it is unable to invest amounts effectively in accordance with applicable investment objectives, policies, and restrictions.

2. An investor who purchases Units under the Exchange Option or the Rollover Option will pay a lower sales charge than that which would be paid for the Units by a new investor.

3. The prospectus of each Trust offering exchanges or rollovers and any sales literature or advertising that mentions the existence of the Exchange Option or the Rollover Option will disclose that such Exchange Option or Rollover Option is subject to modification, termination, or suspension, without notice except in certain limited cases.

4. Each Series offering Units subject to a DSC will include in its prospectus the table required by item 2 of Form N–1A (modified as appropriate to reflect the differences between unit investment trusts and open-end management investment companies), and a schedule setting forth the number and date of each installment payment.

B. Condition for Exemption From Section 12(d)(3)

No company held in the Ten Series' portfolio or the Five Series' portfolio, nor any affiliate thereof, will act as broker for any Ten Series or Five Series in the purchase or sale of any security for such Series' portfolio.

C. Condition for Exemption From Section 14(a)

Applicants will comply in all respects with the requirements of rule 14a–3, except that the Equity Trusts will not restrict their portfolio investments to ''eligible trust securities.''

D. Conditions for Exemption From Section 17(a)

1. Each sale of Equity Securities by a Rollover Trust to a New Trust will be effected at the closing price of the securities sold on the applicable Exchange or the Nasdaq-NMS on the sale date, without any brokerage charges or other remuneration except customary transfer fees, if any.

2. The nature and conditions of such transactions will be fully disclosed to investors in the appropriate prospectus of each future Rollover Trust and New Trust.

3. The Trustee of each Rollover Trust and New Trust will: (a) review the procedures discussed in the application relating to the sale of securities from a Rollover Trust and the purchase of those securities for deposit in a New Trust, and (b) make such changes to the procedures as the Trustee deems necessary that are reasonably designed to comply with paragraphs (a) through (d) of rule 17a–7.

4. A written copy of these procedures and a written record of each transaction pursuant to any order granting the application will be maintained as provided in rule 17a–7(f).

For the SEC, by the Division of Investment Management, under delegated authority.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 97–3266 Filed 2–10–97; 8:45 am]

BILLING CODE 8010–01–M

Issuer Delisting; Notice of Application To Withdraw From Listing and Registration; (Mitcham Industries, Inc., Common Stock, $0.01 Par Value) File No. 1–13490

February 5, 1997.

Mitcham Industries, Inc. (''Company'') has filed an application with the Securities and Exchange Commission (''Commission''), pursuant to Section 12(d) of the Securities Exchange 1934 (''Act'') and Rule 12d2–2(d) promulgated thereunder, to withdraw the above specified security (''Security'') from listing and registration on the Pacific Stock Exchange, Inc. (''PSE'').

The reasons alleged in the application for withdrawing the Security from listing and registration include the following:

The Company originally listed on the PSE when its Security was listed on the Nasdaq SmallCap Market in order to obtain the blue sky secondary market trading exemptions afforded by the PSE listing. Since April 26, 1996, the Company's Security has been listed on the Nasdaq National Market System, which provides secondary market trading exemptions for all states. In addition, the Company believes that there is insignificant trading of its Security on the PSE.

Any interested person may, on or before February 27, 1997, submit by letter to the Security of the Securities and Exchange Commission, 450 Fifth Street, N.W., Washington, D.C. 20549, facts bearing upon whether the application has been made in accordance with the rules of the exchanges and what terms, if any, should be imposed by the Commission for the protection of investors. The Commission, based on the information submitted to it, will issue an order granting the application after the date mentioned above, unless the Commission determines to order a hearing on the matter.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.

Jonathan G. Katz,

Secretary.

[FR Doc. 97–3265 Filed 2–10–97; 8:45 am]

BILLING CODE 8010–01–M

Sunshine Act Meeting

Notice is hereby given, pursuant to the provisions of the Government in the Sunshine Act, Pub. L. 94–409, that the Securities and Exchange Commission will hold the following meeting during the week of February 10, 1997.

A closed meeting will be held on Friday, February 14, 1997, at 10:00 a.m.

Commissioners, Counsel to the Commissioners, the Secretary to the Commission, and recording secretaries will attend the closed meeting. Certain staff members who have an interest in the matters may also be present.

The General Counsel of the Commission, or his designee, has certified that, in his opinion, one or more of the exemptions set forth in 5 U.S.C. 552b(c)(4), (8), (9)(A) and (10) and 17 CFR 200.402(a)(4), (8), (9)(i) and (10), permit consideration of the scheduled matters at the closed meeting.

Commissioner Hunt, as deputy officer, voted to consider the items listed for the closed meeting in a closed session.

The subject matter of the closed meeting scheduled for Friday, February 14, 1997, at 10:00 a.m., will be:

Institution and settlement of injunctive actions.

Institution and settlement of administrative proceedings of an enforcement nature.

Regulatory matter bearing enforcement implications.

At times, changes in Commission priorities require alterations in the scheduling of meeting items. For further information and to ascertain what, if any, matters have been added, deleted or postponed, please contact:

The Office of the Secretary at (202) 942–7070.

Dated: February 7, 1997.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 97–3540 Filed 2–7–97; 3:53 pm]

BILLING CODE 8010–01–M

[Release No. 34–38242; File No. SR–MBSCC–96–06]

Self-Regulatory Organizations; MBS Clearing Corporation; Order Approving a Proposed Rule Change Relating to the Satisfaction of Participants Fund Deposit Requirements

February 5, 1997.

On October 7, 1996, MBS Clearing Corporation (''MBSCC'') filed with the Securities and Exchange Commission (''Commission'') a proposed rule change (File No. SR–MBSCC–96–06) pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'') to eliminate the depository receipt as an acceptable form of collateral to satisfy its participants fund deposit requirements.[1] Notice of the proposal was published in the Federal Register on December 12, 1996.[2] No comment letters were received. For the reasons discussed below, the Commission is approving the proposed rule change.

I. Description

MBSCC presently requires each of its participants to pledge or to provide collateral to MBSCC to satisfy MBSCC's participants fund deposit requirements.[3] These deposits form a nonmutualized pool of collateral that is designed to reflect each participant's aggregate projected obligations to its counterparties and to MBSCC. MBSCC currently accepts cash, certain securities, and letters of credit issued by an approved issuer as collateral in satisfaction of its participants' deposit obligations. Previously, MBSCC's participants that used securities to satisfy their deposit requirements were required only to provide evidence of the pledge of securities to MBSCC by using a depository receipt; however, participants were not required to effect a book-entry transfer of such securities to an MBSCC account.[4] The rule change eliminates the use of the depository receipt and instead requires participants that choose to use securities to satisfy their participants deposit requirements to deliver the securities by book-entry to an MBSCC account at an entity approved by MBSCC. In connection with this rule change, MBSCC also will be responsible for the payment of any fees associated with the establishment of a pledge account at a trust company approved by MBSCC's board of directors for use in connection with the book-entry method.

II. Discussion

Section 17A(b)(3)(F)[5] of the Act requires that the rules of a clearing agency be designed to assure the safeguarding of securities and funds which are in the custody or control of the clearing agency or for which it is responsible. The Commission believes that MBSCC's proposed rule change is consistent with MBSCC's obligations under Section 17A of the Act. The replacement of depository receipts with the book-entry method should reduce the risks associated with the use of depository receipts.[6] The exclusive use of book-entry method as a means for participants to pledge securities to MBSCC as participants fund collateral should enhance MBSCC's ability to access the collateral in the event of a participant default. This should enable MBSCC to better fulfill its obligation under the Act to assure the safeguarding of securities and funds which are in its custody or control. Furthermore, because MBSCC will be responsible for all fees associated with the establishment of the pledge account, the rule change should help reduce any burdens on MBSCC's participants that result from the elimination of depository receipts as an acceptable form of participants fund deposit.

III. Conclusion

On the basis of the foregoing, the Commission finds that the proposal is consistent with the requirements of the Act and in particular with the requirements of Section 17A of the Act and the rules and regulations thereunder.

It is therefore ordered, pursuant to Section 19(b)(2) of the Act, that the proposed rule change (File No. SR–MBSCC–96–06) be, and hereby is, approved.

For the Commission by the Division of Market Regulation, pursuant to delegated authority.[7]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 97–3325 Filed 2–10–97; 8:45 am]

BILLING CODE 8010–01–M

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[1] 15 U.S.C. 78s(b)(1).

[2] Securities Exchange Act Release No. 38021 (December 5, 1996), 61 FR 65424.

[3] For a complete description of the participants fund, refer to Securities Exchange Act Release Nos. 37294 (June 10, 1996), 61 FR 30268 [File No. SR–MBSCC–96–01] (notice of filing of proposed rule change] and 37512 (August 1, 1996), 61 FR 41437 [File No. SR–MBSCC–96–01] (order approving proposing rule change).

[4] A depository receipt evidences the pledge of specified securities held by a custodian for the account of a pledgee. MBSCC advised the Commission that as of October 1996, the year to date average daily dollar value of the securities pledged to MBSCC through the use of depository receipts was $1.05 billion.

[5] 15 U.S.C. 78q–1(b)(3)(F).

[6] MBSCC has stated that the use of the depository receipt presents certain risks to MBSCC, including: (1) Forgery, (2) unauthorized individuals executing on behalf of the participant or the custodian, (3) improper segregation of the pledged securities from other securities, (4) unauthorized releases of the pledged securities, and (5) the possibility that the custodian will not release the securities to MBSCC upon MBSCC's proper demand for such a release.

[7] 17 CFR 200.30–3(a)(12).

[Release No. 34–38240; File No. SR–NASD–96–52]

Self-Regulatory Organizations; National Association of Securities Dealers, Inc.; Order Granting Accelerated Approval of Proposed Rule Change Relating to the Reporting of Short Sale Transactions by Market Makers Exempt From the NASD's Short Sale Rule

February 5, 1997.

I. Introduction

On December 17, 1996, the National Association of Securities Dealers, Inc. (''NASD'' or ''Association'') filed with the Securities and Exchange Commission (''Commission'' or ''SEC'') pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder[2] a proposed rule change to the Automated Confirmation Transaction (''ACT'') Service rules that would require all Primary Market Makers (''PMM'') to mark their ACT reports to denote when they have relied on the PMM exemption to NASD's short sale rule. The proposed rule change was published for comment in Securities Exchange Act Release No. 38092 (December 27, 1996), 62 FR 776 (January 6, 1997) (''Notice of Proposed Rule Change''). The Commission received no comments on the proposal and is approving the proposed rule change on an accelerated basis.

II. Description of the Proposal

On June 29, 1994, the Commission approved the NASD's short sale rule on an eighteen-month pilot basis through March 5, 1996.[3] The Commission subsequently extended the termination date through October 1, 1997.[4] The NASD's short sale rule prohibits member firms from effecting short sales in Nasdaq National Market (''NNM'') securities at or below the current inside bid as disseminated by Nasdaq whenever the bid is lower than the previous bid.[5] The rule provides an exemption from the short sale rule to ''qualified'' Nasdaq market makers who can use the exemption only in connection with bona fide market making activity. To be a qualified market maker, a market maker must satisfy the Nasdaq PMM standards.[6] If a market maker is a PMM for a particular stock, there is a ''P'' indicator next to its quote in that stock.[7]

When the Commission approved the NASD's short-sale rule it also approved an NASD proposal to require NASD members to append a designator to their ACT reports to denote whether their sale transactions were long sales, short sales, or exempt short sales. At that time, however, market makers exempt from the short-sale rule were not required to append ''sell short'' or ''sell short exempt'' to their ACT reports.[8] Accordingly, in order to enhance the NASD's ability to surveil for potential abuses of the market maker exemption and examine and monitor the market impacts of the market maker exemption, the NASD's proposed rule change deletes the footnote to NASD Rule 6130(d)(6), thereby requiring all exempt market makers to mark their ACT reports to denote when they have relied on the market maker exemption.

The NASD will establish an effective date for the rule change in a Notice-to-Members announcing Commission approval of the proposal. The Notice will be published within thirty days of Commission approval of the proposal and the effective date of the proposal will be no longer than three weeks after the date of publication of the Notice.

III. Discussion

The Commission believes the NASD's proposed rule change is consistent with Section 15A(b)(6) of the Act,[9] and that it will promote efficiency, competition, and capital formation. Section 15A(b)(6) requires that the rules of a national securities association be designed to promote just and equitable principles of trade, to foster cooperation and coordination with person engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, and to remove impediments to and perfect the mechanism of a free and open market. The Commission believes that requiring exempt market makers to mark their ACT reports to denote when they have relied upon the PMM exemption will help to enhance the ability of NASD Regulation, Inc. to efficiently monitor whether market makers are abusing the exemption.[10] Furthermore, the Commission, in approving the short sale rule on a pilot basis, requested the NASD to study various aspects of the rule's effects, including the use of the PMM exemption to the rule. The Commission, therefore, believes that requiring PMMs to append a designator to their ACT reports will assist the NASD in assessing the market impacts of the PMM exemption from the short sale rule, as well as facilitate the preparation of a thorough analysis of such exemption.

The NASD requested that the Commission find good cause for approving the proposed rule change prior to the thirtieth day after the date of publication of notice of the filing in the Federal Register. The Commission finds good cause for so approving the proposed rule change because accelerated approval will allow the NASD to begin collecting the necessary data for a meaningful statistical analysis of the market impact of the PMM exemption from the short sale rule. Furthermore, the Commission believes it is prudent to allow the NASD to begin requiring PMMs to mark their ACT reports when they have relied on the PMM exemption as soon as possible in order that the NASD and PMMs will become familiar with the use of the ACT

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] See Securities Exchange Act Release No. 34277 (June 29, 1994), 59 FR 34885 (July 7, 1994) (''Short Sale Rule Approval Order'').

[4] *See* Securities Exchange Act Release Nos. 36171 (August 30, 1995), 60 FR 46651; 36532 (November 30, 1995), 60 FR 62519; 37492 (July 29, 1996), 61 FR 40693; and 37919 (November 1, 1996), 61 FR 57934.

[5] *See* NASD Rule 3350.

[6] Pursuant to NASD Rule 4612, the PMM standards require a market maker to satisfy at least two of the following four criteria to be eligible for an exemption from the short sale rule: (1) the market maker must be at the best bid or best offer as shown on Nasdaq no less than 35 percent of the time; (2) the market maker must maintain a spread no greater than 102 percent of the average dealer spread; (3) no more than 50 percent of the market maker's quotation updates may occur without being accompanied by a trade execution of at least one unit of trading; or (4) the market maker executes 1½ times its ''proportionate'' volume in the stock. Specifically, the proportionate volume test requires a market maker to account for volume of at least 1½ times its proportionate share of overall volume in the security for the review period. For example, if a security has 10 market makers, each market maker's proportionate share volume is 10 percent. Therefore, the proportionate share volume is one-and-a-half times 10, or 15 percent of overall volume. But, *see* Securities Exchange Act Release No. 38175 (January 15, 1997) (Commission approving NASD rule proposal to waive the PMM qualification standards in conjunction with the adoption of the Commission's Order Execution Rules); and File No. SR–NASD–97–07 (January 31, 1997) (Proposed rule change to temporarily suspend the use of the Primary Market Maker qualification criteria for all Nasdaq market maker securities for the remainder of the current pilot period of the Nasdaq short sale rule).

[7] *See* Securities Exchange Act Release no. 38175 (January 15, 1997), stating that the NASD will, upon suspension of the PMM qualification criteria for NNM securities, deem all registered market makers in such securities PMMs.

[8] Specifically, the footnote to NASD Rule 6130(d)(6) provides that ''[t]he 'sell short' and 'sell short exempt' indicators must be entered for all customer short sales, including cross transactions, and for short sales effected by members that are not qualified market markers pursuant to Rule 3350.''

[9] 15 U.S.C. 78o–3(b)(6).

[10] *See* footnote 6, supra; and Letter from Howard Kramer, Associate Director, Division of Market Regulation, Commission, to Eugene A. Lopez, Assistant General Counsel, NASD (February 3, 1997) (No-action letter regarding suspension of the Primary Market Maker standards).

denotation, thereby aiding in efficient data collection.

IV. Conclusion

For the foregoing reasons, the Commission finds that the proposed rule change is consistent with the Act and the rules and regulations thereunder applicable to the NASD, and in particular Section 15A(b)(6).

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[11] that the proposed rule change (File No. SR–NASD–96–52) be and hereby is approved on an accelerated basis.

For the Commission by the Division of Market Regulation, pursuant to delegated authority.[12]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 97–3326 Filed 2–10–97; 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 within 60 days of this publication in the Federal Register.

FOR FURTHER INFORMATION CONTACT: Curtis B. Rich, Management Analyst, Small Business Administration, 409 3rd Street, S. W., Suite 5000, Washington, D. C. 20416. Phone Number: 202–205–6629.

SUPPLEMENTARY INFORMATION:

Title: ''Surety Bond Guaranty Agreement, Preferred Lenders Program''.

Type of Request: Extension of a Currently Approved Collections.

Form No's.: SBA Forms 990, 991, 994, 994, 994B, 994C, 994F, 994H.

Description of Respondents: Small Business Contractors Applying for the Surety Bond Guarantee Program.

Annual Responses: 55,000.

Annual Burden: 28,837.

Comments: Send all comments regarding this information collection to William Berry, Deputy Associate Administrator, Office of Surety Guarantees, Small Business Administration, 409 3rd Street, S. W., Suite 8600 Washington, D.C. 20416. Phone No.: 202–205–6549.

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.

Title: ''Questionnaires for section 503 Development Company and Company doing Business with a Section 503 Development Company''.

Type of Request: Extension of Currently Approved Collections.

Form No's.: SBA Forms 1301, 1302.

Description of Respondents: State and Local Development Companies.

Annual Responses: 90.

Annual Burden: 180.

Title: ''Statement of Personal History''.

Type of Request: ''Extension of Currently Approved Collections''.

Form No. SBA Form 912.

Description of Respondents: Applicants for Assistance or Temporary Employment in Disaster Office.

Annual Responses: 30,000.

Annual Burden: 2,500.

Comments: Send all comments regarding these information collections to Pat Anderson, Administrative Officer, Office of the Inspector General, Small Business Administration, 409 3rd Street, S.W., Suite 7150 Washington, D.C. 20416. Phone No. 202–205–6580.

Send comments regarding whether these information collections are 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.

Title: ''SBIR Mailing List and Confirmation Request and STTR Mailing List and Confirmation''.

Type of Request: Extension of Currently Approved Collections.

Description of Respondents: Small Businesses Interested Participating in the SBIR/STTR Solicitation Process.

Form No's.: SBA Forms 1386, 1906.

Annual Responses: 60,000.

Annual Burden: 500.

Comments: Send all comments to Shirley F. Smith, Program Analyst, Office of Technology, Small Business Administration, 409 3rd Street, S.W., Suite 8150 Washington, D.C. 20416. Phone No. 202–205–7295.

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.

Title: ''Guidelines for Small Business Award Nominations''.

Type of Request: Extension of Currently Approved Collections.

Description of Respondents: Organizations Nominating a Small Business Leader for Small Business Advocacy Awards.

Form No. N/A.

Annual Responses: 500.

Annual Burden: 1,083.

Comments: Send all comments regarding this information collection to Janie Dymond, Administrative Assistant, Office Public Communications, Marketing and Customer Service, Small Business Administration, 409 3rd Street, S.W., Suite 7600 Washington, D.C. 20416. Phone No. 202–205–6740.

Title: ''Loan Closing Documents''.

Type of Request: Extension of Currently Approved Collections.

Description of Respondents: SBA Loan Applicants.

Form No's.: SBA Forms 147, 148, 159, 160, 160A, 529B, 928, 1059.

Annual Responses: 25,451.

Annual Burden: 152,706.

Comments: Send all comments regarding this information collection to Michael J. Dowd, Director, Office of Loan Programs, Small Business Administration, 409 3rd Street, S.W. Suite 8300, Washington, D.C. 20416. Phone No. 202–205–6570.

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.

Vanessa K. Smith,

Acting Chief, Administrative Information Branch.

[FR Doc. 97–3279 Filed 2–10–97; 8:45 am]

BILLING CODE 8025–01–P

[Declaration of Disaster Loan Area #2925]

California; Declaration of Disaster Loan Area, (Amendment #1)

In accordance with a notice from the Federal Emergency Management Agency, dated January 24, 1997, the above-numbered Declaration is hereby amended to include Alameda and San Francisco Counties in the State of California, as well as the City of Morgan Hill which was previously omitted as a disaster area due to damages caused by severe storms, flooding, and mud and land slides beginning on December 28, 1996 and continuing.

All counties contiguous to the above-named counties have been previously declared.

All other information remains the same, i.e., the termination date for filing

[11] 15 U.S.C. 78s(b)(2) (1988).

[12] 17 CFR 200.30–3(a)(12) (1995).

applications for physical damage is March 5, 1997, and for loans for economic injury the deadline is October 6, 1997.

(Catalog of Federal Domestic Assistance Program Nos. 59002 and 59008.)

Dated: January 30, 1997.

Bernard Kulik,

Associate Administrator for Disaster Assistance.

[FR Doc. 97–3277 Filed 2–10–97; 8:45 am]

BILLING CODE 8025–01–M

[Declaration of Disaster Loan Area #2924

Idaho; Declaration of Disaster Loan Area (Amendment #1)

In accordance with a notice from the Federal Emergency Management Agency, dated January 22, 1997, the above-numbered Declaration is hereby amended to include Kootenai and Benewah Counties in the State of Idaho as a disaster area due to damages caused by severe storms, flooding, and mud and land slides beginning on December 27, 1996 and continuing.

All counties contiguous to the above-named counties have been previously declared.

All other information remains the same, i.e., the termination date for filing applications for physical damage is March 5, 1997, and for loans for economic injury the deadline is October 6, 1997.

(Catalog of Federal Domestic Assistance Program Nos. 59002 and 59008.)

Dated: January 30, 1997.

Bernard Kulik,

Associate Administrator for Disaster Assistance.

[FR Doc. 97–3268 Filed 2–10–97; 8:45 am]

BILLING CODE 8025–01–P

[Declaration of Disaster Loan Area #2928]

Oregon; Declaration of Disaster Loan Area

As a result of the President's major disaster declaration on January 23, 1997, and an amendment thereto on January 27, I find that Jackson, Josephine, Klamath, and Wallowa Counties in the State of Oregon constitute a disaster area due to damages caused by severe winter storms, land and mud slides, and flooding beginning on December 25, 1996 and continuing through January 6, 1997. Applications for loans for physical damages may be filed until the close of business on March 24, 1997, and for loans for economic injury until the close of business on October 23, 1997 at the address listed below:

U.S. Small Business Administration, Disaster Area 4 Office, P. O. Box 13795, Sacramento, CA 95853–4795

or other locally announced locations. In addition, applications for economic injury loans from small businesses located in the following contiguous counties may be filed until the specified date at the above location: Baker, Curry, Deschutes, Douglas, Lake, Lane, Umatilla, and Union Counties in Oregon, and Asotin, Columbia, Garfield, and Walla Walla Counties in Washington.

Interest rates are:

	Percent
For Physical Damage:	
HOMEOWNERS WITH CREDIT AVAILABLE ELSEWHERE	8.000
HOMEOWNERS WITHOUT CREDIT AVAILABLE ELSEWHERE	4.000
BUSINESSES WITH CREDIT AVAILABLE ELSEWHERE	8.000
BUSINESSES AND NON-PROFIT ORGANIZATIONS WITHOUT CREDIT AVAILABLE ELSEWHERE	4.000
OTHERS (INCLUDING NON-PROFIT ORGANIZATIONS) WITH CREDIT AVAILABLE ELSEWHERE	7.250
For Economic Injury:	
BUSINESSES AND SMALL AGRICULTURAL COOPERATIVES WITHOUT CREDIT AVAILABLE ELSEWHERE	4.000

The number assigned to this disaster for physical damage is 292811 and for economic injury the numbers are 935500 for Oregon and 935700 for Washington.

(Catalog of Federal Domestic Assistance Program Nos. 59002 and 59008.)

Dated: January 30, 1997.

Bernard Kulik,

Associate Administrator for Disaster Assistance.

[FR Doc. 97–3269 Filed 2–10–97; 8:45 am]

BILLING CODE 8025–01–P

[Declaration of Disaster Loan Area #2929]

Tennessee; Declaration of Disaster Loan Area

Rutherford County and the contiguous counties of Bedford, Cannon, Coffee, Davidson, Marshall, Williamson, and Wilson in the State of Tennessee constitute a disaster area as a result of tornadoes which occurred on January 24, 1997. Applications for loans for physical damage as a result of this disaster may be filed until the close of business on April 4, 1997 and for economic injury until the close of business on November 3, 1997 at the address listed below:

U.S. Small Business Administration, Disaster Area 2 Office, One Baltimore Place, Suite 300, Atlanta, GA 30308

or other locally announced locations.

The interest rates are:

	Percent
For Physical Damage:	
HOMEOWNERS WITH CREDIT AVAILABLE ELSEWHERE	7.625
HOMEOWNERS WITHOUT CREDIT AVAILABLE ELSEWHERE	3.875
BUSINESSES WITH CREDIT AVAILABLE ELSEWHERE	8.000
BUSINESSES AND NON-PROFIT ORGANIZATIONS WITHOUT CREDIT AVAILABLE ELSEWHERE	4.000
OTHERS (INCLUDING NON-PROFIT ORGANIZATIONS) WITH CREDIT AVAILABLE ELSEWHERE	7.250
For Economic Injury:	
BUSINESSES AND SMALL AGRICULTURAL COOPERATIVES WITHOUT CREDIT AVAILABLE ELSEWHERE	4.000

The number assigned to this disaster for physical damage is 292912 and for economic injury the number is 937500.

Catalog of Federal Domestic Assistance Program Nos. 59002 and 59008.)

Dated: February 3, 1997.

Philip Lader,

Administrator.

[FR Doc. 97–3278 Filed 2–10–97; 8:45 am]

BILLING CODE 8025–01–P

[Declaration of Disaster Loan Area #2927]

Washington; Declaration of Disaster Loan Area; (Amendment #1)

In accordance with a notice from the Federal Emergency Management Agency, dated January 27, 1997, the above-numbered Declaration is hereby amended to include the Counties of Clallam, Grays Harbor, Island, Kitsap, Kittitas, Mason, Pierce, Skagit, Skamania, Spokane, Thurston, and Yakima in the State of Washington as a disaster area due to damages caused by winter storms, land and mud slides, and flooding beginning on December 26, 1996 and continuing.

In addition, applications for economic injury loans from small businesses located in the following contiguous counties may be filed until the specified date at the previously designated location: Benton, Clark, Cowlitz, Klickitat, Douglas, Grant, Jefferson, Lewis, Lincoln, Okanogan, Pacific, Pend Oreille, San Juan, Stevens, Whatcom,

and Whitman Counties in Washington, and Multnomah and Hood River Counties in Oregon. Any counties contiguous to the above-named counties and not listed herein have been previously declared.

All other information remains the same, i.e., the termination date for filing applications for physical damage is March 18, 1997, and for loans for economic injury the deadline is October 17, 1997. The economic injury number for the State of Oregon is 935600.

(Catalog of Federal Domestic Assistance Program Nos. 59002 and 59008.)

Dated: January 30, 1997.

Bernard Kulik,

Associate Administrator for Disaster Assistance.

[FR Doc. 97–3276 Filed 2–10–97; 8:45 am]

BILLING CODE 8025–01–P

First Interstate Equity Corporation (License No. 09/09–0397); Notice of Surrender of License

Notice is hereby given that First Interstate Equity Corporation (First Interstate), 100 West Washington Street, Phoenix, Arizona 58003, has surrendered their license to operate as a small business investment company under the Small Business Investment Act of 1958, as amended (the Act). First Interstate was licensed by the Small Business Administration on February 1, 1989.

Under the authority vested by the Act and pursuant to the Regulations promulgated thereunder, the surrender was accepted on this date, and accordingly, all rights, privileges, and franchises derived therefrom have been terminated.

(Catalog of Federal Domestic Assistance Program No. 59.11, Small Business Investment Companies.)

Dated: January 28, 1997.

Donald A. Christensen,

Associate Administrator for Investment.

[FR Doc. 97–3281 Filed 2–10–97; 8:45 am]

BILLING CODE 8025–01–P

DEPARTMENT OF TRANSPORTATION

Office of the Secretary

Reports, Forms and Recordkeeping Requirements Agency Information Collection Activity Under OMB Review

AGENCY: Department of Transportation.

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995 and its implementing regulations, the Department of Transportation (DOT) announces in this notice that the 11 previously approved information collection activities and 5 currently approved information collection activities have been forwarded to the Office of Management and Budget (OMB) for review and approval. Each summary of the 16 information collection requests (ICRs) identified below describes the nature of the information collection and its expected burden. The Federal Railroad Administration (FRA) issued a 60-day notice that was published in the Federal Register on December 2, 1996, inviting the regulated community to comment on these ICRs. 61 FR 63917, Dec. 2, 1996. This notice further informs all interested parties that they have 30 days to submit comments to these paperwork packages before OMB renders a decision.

DATES: Comments must be submitted no later than March 13, 1997.

ADDRESSES: Submit written comments on any or all of the following proposed activities by mail to either: Office of Information and Regulatory Affairs, Office of Management and Budget, 725 17th Street, NW., Washington, DC 20503, Attention: Desk Officer for FRA. Please refer to the assigned OMB control number in any correspondence submitted. DOT suggests that all interested respondents submit their respective comments to OMB within 30 days of publication to best ensure of having their full effect.

FOR FURTHER INFORMATION CONTACT: Ms. Gloria Eutsler, Office of Planning and Evaluation Division, RRS–21, Federal Railroad Administration, 400 Seventh Street, SW., Washington, DC 20590 (telephone: (202) 632–3318). (This telephone number is not toll-free.)

SUPPLEMENTARY INFORMATION: The Paperwork Reduction Act of 1995 (PRA), Pub. L. No. 104–13, Section 2, 109 Stat. 163 (1995) (codified as revised at 44 U.S.C. 3501–3520), and its implementing regulations, 5 CFR Part 1320, require Federal agencies to issue two notices seeking public comment on information collection activities before OMB may approve paperwork packages. 44 U.S.C. 3506, 3507; 5 CFR 1320.5, 1320.8(d)(1), 1320.12. On December 2, 1996, FRA published a 60-day notice in the Federal Register soliciting comment on 16 ICRs that the agency was seeking OMB approval for reinstatement or renewal. 61 FR 63917, Dec. 2, 1996. FRA received no comments after issuing this notice. Accordingly, DOT announces that these information collection activities have been reevaluated and certified under 5 CFR 1320.5(a) and forwarded to OMB for review and approval pursuant to 5 CFR 1320.12(c).

Before OMB decides whether to approve these proposed collections of information, it must provide 30 days for public comment. 44 U.S.C. 3507(b); 5 CFR 1320.12(d). Federal law requires OMB to approve or disapprove paperwork packages between 30 and 60 days after the 30-day notice is published. 44 U.S.C. 3507 (b)–(c); 5 CFR 1320.12(d); *see also* 60 FR 44978, 44983, Aug. 29, 1995. OMB believes that the 30-day notice informs the regulated community to file relevant comments and affords the agency adequate time to digest public comments before it renders a decision. 60 FR 44983, Aug. 29, 1995. Therefore, respondents should submit their respective comments to OMB within 30 days of publication to best ensure of having their full effect. 5 CFR 1320.12(c); *see also* 60 FR 44983, Aug. 29, 1995.

Specifically, DOT and OMB invite interested parties to comment on the following summary of proposed information collection activities regarding (i) Whether the information collection activities are necessary for FRA to properly execute its functions, including whether the activities will have practical utility; (ii) the accuracy of FRA's estimates of the burden of the information collection activities, including the validity of the methodology and assumptions used to determine the estimates; (iii) ways for FRA to enhance the quality, utility, and clarity of the information being collected; and (iv) ways for FRA to minimize the burden of information collection activities on the public by automated, electronic, mechanical, or other technological collection techniques or other forms of information technology (*e.g.*, permitting electronic submission of responses). *See* 44 U.S.C. 3506(c)(2)(A) (i)–(iv). DOT believes that soliciting public comment will promote FRA's efforts to reduce the administrative and paperwork burdens associated with the collection of information mandated by Federal regulations. In summary, DOT reasons that comments received will advance three objectives: (i) Reduce reporting burdens; (ii) ensure that the agency organizes information collection requirements in a ''user friendly'' format to improve the use of such information; and (iii) accurately assess the resources expended to retrieve and produce information requested. *See* 44 U.S.C. 3501. Below are brief summaries of 11 previously approved information collection activities and 5 currently

approved information collection activities submitted for clearance by OMB as required by the PRA. Each summary sets out the ICR title, information collection abstract, agency's need and use of the collected information, and annual reporting and recordkeeping burden of the information collection activity. *See* 44 U.S.C. 3507(a)(1)(D)(ii); 5 CFR 1320.5(a)(1)(iv), 1320.12(c).

Title: Bridge Worker Safety Rules.

OMB Control Number: 2130–0535.

Abstract: Section 20139 of title 49 of the United States Code required FRA to issue rules, regulations, orders, and standards for the safety of maintenance-of-way employees on railroad bridges, including standards for ''bridge safety equipment, [such as] nets, walkways, handrails, and safety lines, and requirements for the use of vessels when work is performed on bridges located over bodies of water.'' FRA has added 49 CFR Part 214 to establish minimum workplace safety standards for railroad employees as they apply to railroad bridges.

Specifically, Section 214.105(c) establishes standards and practices for safety net systems. Safety nets and net installations are to be drop-tested at the job site after initial installation and before being used as a fall-protection system, after major repairs, and at six-month intervals if left at one site. If a drop-test is not feasible and is not performed, then a written certification must be made by the railroad or railroad contractor, or a designated certified person, that the net does comply with the safety standards of this section. FRA and State inspectors use the information to enforce the Federal regulations. The information that is maintained at the job site also promotes safe bridge worker practices.

Form Number(s): N/A.

Affected Public: Businesses.

Respondent Universe: 575 railroads.

Frequency of Submission: On occasion.

Total Responses: 6 annually.

Average Time Per Response: 2 minutes.

Estimated Total Annual Burden Hours: 12 minutes.

Status: Reinstatement of a previously approved collection of information which has expired.

Title: Filing of Dedicated Cars.

OMB Control Number: 2130–0502.

Abstract: Title 49, part 215 of the Code of Federal Regulations prescribes certain conditions to be followed for the movement of freight cars that are not in compliance with this part. These cars must be identified in a written report to FRA before they are assigned to dedicated service, and the words ''Dedicated Service'' must be stenciled on each side of the freight car body. FRA uses the information to determine whether the equipment is safe to operate and that the operation qualifies for dedicated service. See 49 CFR 215.5(c)(2), 215.5(d).

Form Number(s): N/A.

Affected Public: Businesses.

Respondent Universe: 400 railroads.

Frequency of Submission: On occasion.

Total Responses: 6.

Average Time Per Response: 1 hour.

Estimated Total Annual Burden Hours: 6 hours.

Status: Reinstatement of a previously approved collection of information which has expired.

Title: Stenciling Reporting Mark on Freight Cars.

OMB Control Number: 2130–0520.

Abstract: Title 49, section 215.301 of the Code of Federal Regulations sets forth certain requirements that must be followed by railroad carriers and private car owners relative to identification marks on railroad equipment. FRA, railroads, and the public refer to the stenciling to identify freight cars.

Form Number(s): N/A.

Affected Public: Businesses.

Respondent Universe: 620 railroads.

Frequency of Submission: On occasion.

Total Responses: 31,000 cars.

Average Time Per Response: 45 minutes per car.

Estimated Total Annual Burden Hours: 23,250 hours.

Status: Reinstatement of a previously approved collection of information which has expired.

Title: Bad Order and Home Shop Card.

OMB Control Number: 2130–0519.

Abstract: Under 49 CFR Part 215, each railroad is required to inspect freight cars placed in service and take the necessary remedial action when defects are identified. Part 215 defects are specific in nature and relate to items that have or could have caused accidents or incidents. Section 215.9 sets forth specific procedures that railroads must follow when it is necessary to move defective cars for repair purposes. For example, railroads must affix a ''bad order'' tag describing each defect to each side of the freight car. It is imperative that a defective freight car be tagged ''bad order'' so that it may be readily identified and moved to another location for repair purposes only. At the repair point, the ''bad order'' tag serves as a repair record. Railroads must retain each tag for 90 days to verify that proper repairs were made at the designated location. FRA and State inspectors review all pertinent records to determine whether defective cars presenting an immediate hazard are being moved in transportation.

Form Number(s): N/A.

Affected Public: Businesses.

Respondent Universe: 400 railroads.

Frequency of Submission: On occasion.

Total Responses: 40,000 tags.

Average Time Per Response: 10 minutes.

Estimated Total Annual Burden Hours: 6,667 hours.

Status: Reinstatement of a previously approved collection of information which has expired.

Title: Disqualification Proceedings.

OMB Control Number: 2130–0529.

Abstract: Under 49 U.S.C. 20111(c), FRA is authorized to issue orders disqualifying railroad employees, including supervisors, managers, and other agents, from performing safety-sensitive service in the rail industry for violations of rail safety rules, regulations, standards, orders, or laws evidencing unfitness. FRA's regulations, 49 CFR Part 209, Subpart D, implement the statutory provision by requiring (I) a railroad employing or formerly employing a disqualified individual to disclose the terms and conditions of a disqualification order to the individual's new or prospective employing railroad; (ii) a railroad considering employing an individual in a safety-sensitive position to ask the individual's previous employing railroad whether the individual is currently serving under a disqualification order; and (iii) a disqualified individual to inform his new or prospective employer of the disqualification order and provide a copy of the same. Additionally, the regulations prohibit a railroad from employing a person serving under a disqualification order to work in a safety-sensitive position. This information serves to inform a railroad whether an employee or prospective employee is currently disqualified from performing safety sensitive service based on the issuance of a disqualification order by FRA. Furthermore, it prevents an individual currently serving under a disqualification order from retaining and obtaining employment in a safety-sensitive position in the rail industry.

Form Number(s): N/A.

Affected Public: Businesses.

Frequency of Submission: Recordkeeping requirement.

Reporting Burden:

CFR

Respondent Universe

Total
Responses
Average Time Per Response
Total
Burden
Hours
Provide copy of disqualification order to new or prospective employer
620 railroads
3 orders
30 minutes
1.5
Provide copy of disqualification order to prospective employer
1 employee
1 notification
30 minutes
.5
Request copy of disqualification order from previous employer
620
railroads
Usual & customary procedure
N/A
N/A

Total Estimated Burden Hours: 2 hours.

Status: Reinstatement of a previously approved collection of information which has expired.

Title: New Locomotive Certification (Noise Compliance Regulations)

OMB Control Number: 2130–0527.

Abstract: On January 14, 1976, the Environmental Protection Agency (EPA) issued railroad noise emission standards pursuant to the Noise Control Act of 1972 (Act). The standards, 40 CFR Part 201, establish limits on the noise emissions generated by railroad locomotives under both stationary and moving conditions and railroad cars under moving conditions. Section 17 of the Act also requires the Secretary of Transportation to enforce these regulations and promulgate separate regulations to ensure compliance with the same. On December 23, 1983, FRA published 49 CFR Part 210 to ensure compliance with the EPA standards. The certification and testing data ensures that locomotives built after December 31, 1979, have passed prescribed decibel standards for noise emissions under EPA regulations.

Form Number(s): N/A

Affected Public: Businesses

Frequency of Submission: On occasion; one-time

Reporting Burden:

CFR

Respondent Universe

Total
Responses
Average Time Per Response
Total
Burden
Hours
Request for certification information
2
40
30 minutes
20
Apply badge or tag to cab of locomotive
2
40
30 minutes
20
Noise emission measurement
2
40
3 hours
120

Total Estimated Burden Hours: 160 hours.

Status: Reinstatement of a previously approved collection of information which has expired.

Title: Railroad Signal System Requirements.

OMB Control Number: 2130–0006.

Abstract: The regulations pertaining to railroad signal systems are contained in 49 CFR Parts 233 (Signal System Reporting Requirements), 235 (Instructions Governing Applications for Approval of a Discontinuance or Material Modification of a Signal System), and 236 (Rules, Standards, and Instructions Governing the Installation, Inspection, Maintenance, and Repair of Systems, Devices and Appliances). Section 233.5 provides that each railroad must report to FRA within 24 hours after learning of an accident or incident arising from the failure of a signal appliance, device, method, or system as required by Part 236 that results in a more favorable aspect than intended or other condition hazardous to the movement of a train. Section 233.7 sets forth the specific requirements for reporting signal failures within 15 days in accordance with the instructions printed on Form FRA F 6180.14. Finally, Section 233.9 sets forth the specific requirements for the ''Signal System Five-year Report.'' It requires that on or before April 1, 1997, and every five calender years thereafter, each railroad must file a signal systems status report. 61 FR 33872, July 1, 1996. The report is to be prepared on a form issued by FRA in accordance with the instructions and definitions provided. *Id.*

Title 49, part 235 of the Code of Federal Regulations sets forth the specific conditions under which FRA approval of modification or discontinuance of railroad signal systems is required and prescribes the methods available to seek such approval. The application process prescribed under Part 235 provides a vehicle enabling FRA to obtain the necessary information to make logical and informed decisions concerning carrier requests to modify or discontinue signaling systems. Section 235.5 requires railroads to apply for FRA approval to discontinue or materially modify railroad signaling systems. Section 235.7 defines ''material modifications'' and identifies those changes that do not require agency approval. Section 235.8 provides that any railroad may petition FRA to seek relief from the requirements provided under 49 CFR Part 236. Sections 235.10, 235.12, and 235.13 describe where the petition must be submitted, what information must be included, the organizational format, and the official authorized to sign the application. Section 235.20 sets forth the process for protesting the granting of a carrier application for signal changes or relief from the rules, standards, and instructions. This section provides the information that must be included in the protest, the address for filing the protest, the time limit for filing the protest, and the requirement that a person requesting a public hearing explain the need for such a forum.

Section 236.110 requires that the test results of certain signaling apparatus be recorded and specifically identify the tests required under Sections 236.102–236.109; Sections 236.376 to 236.387; Sections 236.576, 236.577, and Sections 236.586–2236.589. Section 236.110 further provides that the test results must be recorded on preprinted or computerized forms provided by the carrier and that the forms show the name of the railroad, place and date of the test conducted, equipment tested, test results, repairs, replacements, and adjustments made, and the condition of the apparatus. This section also requires the employee making the test must sign the form, and that the record be retained at the office of a supervisory official having proper authority. Results of tests made in compliance with Section 236.587 must be retained for 92 days, and results of all other tests must be retained until the next record is filed, but in no case less than one year.

Additionally, Section 236.587 requires each railroad to make a departure test of cab signal, train stop, or train control devices on locomotives before that locomotive enters the equipped territory. This section further requires that whoever performs the test must certify in writing that the test was properly performed. The certification and the tests results must be posted in the locomotive cab with a copy of the certification and test results retained at the office of a supervisory official having proper authority. However, if it is impractical to leave a copy of the certification and test results at the

location of the test, the test results must be transmitted to either the dispatcher or another designated official at the test location, who must keep a written record of the test results and the name of the person performing the test. All records prepared under this section are required to be retained for at least 92 days. Finally, Section 236.590 requires the carrier to clean and inspect the pneumatic apparatus of automatic train stop, train control, or cab signal devices on locomotives every 736 days, and to stencil, tag, or otherwise mark the pneumatic apparatus indicating the last cleaning date.

Form Number(s): FRA F 6180.14; 6180.47.

Affected Public: Businesses.

Frequency of Submission: On occasion; every five years, recordkeeping.

Reporting Burden:

CFR Section

Respondent Universe

Total Responses

Average Time Per Response

Total Burden Hours

233.5—Reporting of accidents
620
10
30 minutes
5

233.7—False proceed signal failures report
620
224
15 minutes
56

233.9—5-year signal system report
260
52
30 minutes
26

235.5—Block signal applications
82
111
10 hours
1,110

235.8—Applications for relief
82
24
2.5 hours
60

235.20—Protest letters
84
84
30 minutes
42

236.110—Recordkeeping
82
1,965,464 records
.2177 hour
427,881

236.587—Departure tests
18
730,000 tests
4 minutes
48,667

236.590—Pneumatic valves
18
6,697 locomotives
22.5 minutes
2,511

Total Estimated Burden Hours: 480,358 hours.

Status: Reinstatement of a previously approved collection of information which has expired.

Title: Remotely Controlled Railroad Switch Operations Log.

OMB Control Number: 2130–0516.

Abstract: Title 49, section 218.30 of the Code of Federal Regulations ensures that remotely controlled switches are lined to protect workers who are vulnerable to being struck by moving cars as they inspect or service equipment on a particular track or, alternatively, occupy camp cars. FRA believes that production of notification requests promotes safety by minimizing mental lapses of workers who are simultaneously handling several tasks. Sections 218.30 and 218.67 require the operator of remotely controlled switches to maintain a record of each notification requesting blue signal protection for 15 days. Operators of remotely controlled switches use the information as a record documenting blue signal protection of workers or camp cars. This record also serves as a valuable resource for railroad supervisors and FRA inspectors monitoring regulatory compliance.

Form Number(s): N/A.

Affected Public: Businesses.

Frequency of Submission: On occasion; recordkeeping.

Reporting Burden:

CFR

Respondent Universe

Total Responses

Average Time Per Response

Total Burden Hours

Blue signal protection
400 RRs
3,600,000 records
4 minutes
240,000

Camp cars
620 RRs
4,500 records
4 minutes
300

Total Estimated Burden Hours: 240,300 hours.

Status: Reinstatement of a previously approved collection of information which has expired.

Title: Railroad Power Brakes and Drawbars.

OMB Control Number: 2130–0008.

Abstract: Title 49, part 232 of the Code of Federal Regulations requires that an initial terminal air brake test be made by a person designated as qualified by the inspecting railroad. It also requires that a qualified person participating in the test or a person having knowledge that the test was conducted notify the road crew of the train that the test was satisfactorily performed. Under Section 232.12(a)(2), FRA requires that the notice be made in writing to the road crew if (i) the qualified person goes off duty before the road crew reports or (ii) the train that has been inspected is to be moved in excess of 500 miles without being subjected to another test pursuant to either this section or Section 232.13.

The rule also requires that an intermediate train air brake test be made to determine that the basic integrity of the train air line has not been disturbed by an incident encountered en route, such as picking up or setting out cars at which time a train's air line could have been disconnected and reconnected several times. To ensure continuity of the train brake pipe, railroads must determine that the brakes on the rear car apply and release. For tests required by Section 232.13(b)–(d), FRA now permits railroads to employ end-of-train telemetry devices to determine the status of the train brake pipe at the rear of the train and transmit that information to the lead locomotive. Specifically, Section 232.19(h)(3) requires that railroads using this device must calibrate it for accuracy at least every 92 days and record the date of the last calibration, identify the location where the calibration was made, and provide the name of the person doing the calibration on a tag, sticker, or other method of information storage affixed to the rear unit. The label is necessary to determine whether the end-of-train device has been tested within the time prescribed. Crew members use the information to verify that the initial terminal air brake test was satisfactorily performed by a qualified person.

Form Number(s): N/A.

Affected Public: Businesses.

Frequency of Submission: On occasion; recordkeeping.

Reporting Burden:

CFR

Respondent Universe

Total Responses

Average Time Per Response

Total Burden Hours

Written notification by departing qualified persons
30 RRs
60,000 notifications
15 seconds
250

Written notification in excess of 500 miles before receiving another test
620 RRs
380,000 notifications
15 seconds
1,500
Testing and stenciling of telemetry devices
620 RRs
20,000 tests
10 seconds
56

Total Estimated Burden Hours: 1,806 hours.

Status: Reinstatement of a previously approved collection of information which has expired.

Title: U.S. DOT–AAR Crossing Inventory Form.

OMB Control Number: 2130–0017.

Abstract: The U.S. DOT–AAR Crossing Inventory Form (FRA F 6180.71) is used to provide data on new highway-rail grade crossings (grade crossings) or changes to the Highway-Rail Grade Crossing Inventory (Inventory) form. The form is used for reporting all types of changes, especially the establishment of a new grade crossing, closing of an existing grade crossing, or changes in the characteristics of a grade crossing. Many public and private entities use the data provided on the Inventory form for program assessment and research.

Form Number(s): FRA Form 6180.71.

Affected Public: Businesses.

Frequency of Submission: On occasion.

Reporting Burden:

Voluntary Compliance

Respond. Universe

Total
Responses
Average Time Per Response
Total
Burden
Hours
U.S. DOT–AAR crossing inventory form (FRA F 6180.71)
620 RRs
10,213 forms
15 minutes
2,553
Mass update form and inventory computer printout
620 RRs
250 lists
30 minutes
125
Magnetic tape
620 RRs
16
30 minutes
8
GX computer program
620 RRs
58,680 updates
2 minutes
1,956

Total Estimated Burden Hours: 4,642 hours.

Status: Reinstatement of a previously approved collection of information which has expired.

Title: Railroad Locomotive Safety Standards.

OMB Control Number: 2130–0004.

Abstract: Under regulations issued pursuant to Congressional mandate, 49 U.S.C. 20137, trains must be equipped with event recorders. Event recorders are devices that record train speed, hot box detection, throttle position, brake application, brake operations, time and signal indications, and any other function that FRA considers necessary to monitor the safety of train operations. Event recorders provide FRA with information about how trains are operated and, if a train is involved in an accident, the devices afford data to FRA and other investigators necessary to determine the probable causes of the accident.

Under 49 CFR Part 229, railroads are required to conduct daily, periodic, annual, and biennial tests of locomotives to measure the level of compliance with the Federal regulations. The collection of information requires railroads to prepare written records indicating the repairs needed, the person making the repairs, and the type of repairs made. This information provides a locomotive engineer with information that the locomotive has been inspected and is in proper condition for use in service, and enables FRA to monitor compliance with the regulatory standards. Other information collection requirements in Part 229 are indicated in the chart below.

Form Number(s): FRA Form 6180.49A.

Affected Public: Businesses.

Frequency of Submission: On occasion; annually, biennially, recordkeeping.

Reporting Burden:

CFR Section

Respondent Universe

Total
Responses
Average Time Per Response
Total
Burden
Hours
229.9—Movement of noncomplying locomotive
620 RRs
21,000 tags
1 minute
350
229.17—Accident reports
620 RRs
20 reports
15 minutes
5
229.21—Daily inspection
620 RRs
5,460,000 inspections
3 minutes
273,000
229.113—Steam generator warning notice
1 RR
1 notice
1 minute
1 minute
FRA form F 6180.49A
620 RRs
21,000 forms
2 minutes
700
210.31—Locomotive noise emission test
620 RRS
100 tests
15 minutes
25
229.23—Periodic inspection
229.27, 229.29—Annual and biennial tests
229.31—Main reservoir tests
620 RRs
84,000 tests
10 hours
840,000
229.33—Out-of-use credit
620 RRs
2,400 out-of-use credits
2 minutes
80
Written copy of instructions
620 RRs
200 amendments
15 minutes
50
Data verification readout record
620 RRs
72,000 tests
30 minutes
36,000
Written record when an event recorder is removed from service
620 RRs
6,000 removals
1 minute
100
Record of event recorder data
620 RRs
100 accidents
15 minutes
25

Total Estimated Burden Hours: 1,150,350.

Status: Reinstatement of a previously approved collection of information which has expired.

Title: Grade Crossing Signal System Safety Regulations.

OMB Control Number: 2130–0534.

Abstract: FRA believes that highway-rail grade crossing (grade crossing) accidents resulting from warning system failures can be reduced. Motorists lose faith in warning systems that constantly warn of an oncoming train when none is present. Therefore, the fail-safe feature of a warning system loses its effectiveness if the system is not repaired within a reasonable period of time. A greater risk of an accident is present when a warning system fails to activate as a train approaches a grade

crossing. FRA's regulations require railroads to take specific responses in the event of an activation failure. FRA uses the information to develop better solutions to the problems of grade crossing device malfunctions. With this information, FRA is able to correlate accident data and equipment malfunctions with the types of circuits and age of equipment. FRA can then identify the causes of grade crossing system failures and investigate them to determine whether periodic maintenance, inspection, and testing standards are effective. FRA also uses the information collected to alert railroad employees and appropriate highway traffic authorities of warning system malfunctions and take necessary measures to protect motorists and railroad employees at the grade crossing until repairs have been made.

Form Number(s): FRA Form 6180.83.

Affected Public: Businesses.

Frequency of Submission: On occasion; recordkeeping.

Reporting Burden:

CFR Section

Respondent Universe

Total
Responses
Average Time Per Response
Total
Burden
Hours
234.7—Telephone notification
605 RRs
4
15 minutes
1
234.9—Grade crossing signal system failure reports
620 RRS
400
15 minutes
100
Notification to train crew and highway traffic control authority
620 RRs
400
15 minutes
100
Recordkeeping
620 RRs
400
15 minutes
100

Total Estimated Burden Hours: 301 hours.

Status: Regular Review.

Title: Railroad Police Officers.

OMB Control Number: 2130–0537.

Abstract: Under 49 CFR Part 207, railroads are required to notify states of all designated railroad police officers who are discharging their duties outside of their respective jurisdictions. This requirement is necessary to verify proper police authority.

Form Number(s): N/A.

Affected Public: Businesses.

Respondent Universe: 30 railroads.

Frequency of Submission: Recordkeeping.

Total Responses: 300 annual responses.

Average Time Per Response: 5 hours.

Total Annual Burden Hours: 1,500 hours.

Status: Regular Review.

Title: Control of Alcohol and Drug Use in Railroad Operations.

OMB Control Number: 2130–0526.

Abstract: The information collection requirements contained in pre-employment and ''for cause'' testing regulations are intended to ensure a sense of fairness and accuracy for railroads and their employees. The principal information—evidence of unauthorized alcohol or drug use—is used to prevent accidents by screening personnel who perform safety-sensitive service. FRA uses the information to measure the level of compliance with regulations governing the use of alcohol or controlled substances. Elimination of this problem is necessary to prevent accidents, injuries, and fatalities of the nature already experienced and further reduce the risk of a truly catastrophic accident. Lastly, FRA analyzes the data provided in the Management Information System annual report to monitor the effectiveness of a railroad's alcohol and drug testing program.

Form Number(s): FRA F 6180.73, 6180.74, 6180.94A, 6180.94B.

Affected Public: Businesses.

Frequency of Submission: On occasion; annually, recordkeeping.

Reporting Burden:

CFR Section

Respondent Universe

Total
Responses
Average Time Per Response
Total
Burden
Hours
219.7
620 RRs
2 waivers
2 hours
4
219.9(b)(2)
620 RRs
25 times
4 hours
100
219.11(b)(2)
200 medical facilities
1
15 minutes
.25
219.11(g)
219.301(c)(2)(ii)
620 RRs
250 classes
3 hours
750
Notice of educational material available to employees
15 new RRs
15 notices
1 hour
15
219.104
219.107
40.67
20 employees
20 letters
1 hour
20
219.201(c)
200 RRs
10 reports
30 minutes
5
219.203/207/209
200 RRs
104 calls
10 minutes
17
219.205
200 RRs
400 tests
15 minutes
100
219.205—Form 6180.73
200 RRS
100 forms
10 minutes
17
219.209(c)
200 RRs
40 records
30 minutes
20
219.211(b)
200 MROs
8 reports
15 minutes
2
219.211(e)
400 employees
1 response
1 hour
1
219.211(h)
200 RRs
400 records
30 minutes
200
219.211(I)
400 employees
1 letter
1 hour
1
219.213(b)
200 RRs
4 notices
30 minutes
2
219.302(f)
200 RRs
200 records
30 minutes
100
219.401/403/405
5 RRs
5 policies
40 hours
200
219.405(c)(1)
200 RRs

200 reports
5 minutes
17
219.407
200 RRs
1 policy
2 hours
2
1 amend.
1 hour
1
219.403/405
200 SAPs
2,000 reports
10 minutes
333
219.601(a)
5 RRs
5 programs
80 hours
400
219.601(a)
200 RRs
5 amend.
5 hours
25
219.601(b)(4)/601.(d)
200 RRs
4,000 notices
.5 min.
33
5 RRs
5 notices
10 hours
50
200 RRs
40,000 notices
5 minutes
3,333
219.601(b)(1)
200 RRs
200 docs.
8 hours per month
19,200
219.603(a)
40,000 employees
400 docs.
15 minutes
100
219.607
5 RRs
5 programs
80 hours
400
200 RRs
5 amend.
5 hours
25
219.607(b)(1)
200 RRs
200 documents
8 hours per month
19,200
219.607(c)(1)
200 RRs
5 RRs
4,000 notices
5 notices
5 minutes
10 hours
33
50
219.609
20,000 employees
200 requests
15 minutes
50
219.703(a)
40.23
200 RRs
52,920 forms
15 minutes
13,230
219.705(c)
200 RRs
2 requests
10 hours
20
219.707(c)(d)
40.33—Positive test
200 MROs
980 tests
2 hours
1,960
200 RRs
980 notifications
15 minutes
245
219.707(c)(d)
40.33—Negative test
200 MROs
48,020 letters
20 minutes
16,007
219.709
200 RRs
980 employees
10 letters
30 minutes
5
219.711(c)
40.25(f)(22)(ii)
60 employees
51,450 employees
60 letters
12,893 forms
5 minutes
5 minutes
5
1,072
219.715
40.57/59/61
80,000 employees
20,000 tests
15 minutes
5,000
40.59(c)
200 RRs
500 entries
2 minutes
17
40.65
200 BATs
20 tests
30 minutes
10
200 RRs
200 notices
1 hour
200
200 RRs
20 confirm. tests
15 minutes
5
40.69
200 RRs
10 cases
12 minutes
2
200 RRs
1 case
1 hour
1
1 physician
1 response
1 hour
1
40.81
200 RRs
60 letters
5 minutes
5
20 employees
4 letters
30 minutes
2
40.83
200 RRs
138,100 records
5 minutes
11,508
219.801
60 RRs
40 forms
8 hours
320
60 RRs
20 forms
4 hours
80
219.803
60 RRs
40 forms
65 hours
2,600
60 RRs
20 forms
25 hours
500
219.901
200 RRs
100,500 records
5 minutes
8,375
200 RRs
200 summaries
2 hours
400
40.23(d)(2)(ii)
5 RRs
5 written instruct.
40 hours
200
40.29(a)(2) & (b)
25 lab.
58,212 forms
15 minutes
14,553
40.31(c)(1)
25 lab.
1,176 certifications
1 minute
20
40.29(g)(1) & (5)
25 lab.
52,920 reports
30 minutes
26,460
40.29(g)(6)
25 lab.
200 reports
2 hours per month
4,800
40.29(g)(8) & (m)
25 lab.
25 records
240 hours
6,000

40.31(d)(6)
25 lab.
2 reports
10 hours
20
40.31(d)(7) & (8)
25 lab.
1 notification
50 hours
50
25 lab.
1 statement
50 hours
50
40.33
200 MROs
18 letters
30 minutes
9
200 MROs
2 letters
30 minutes
1
40.37
30 employees
30 requests
30 minutes
15

Total Estimated Burden Hours: 158,554.25 hours.

Status: Regular Review.

Title: Steam Locomotive Inspection.

OMB Control Number: 2130–0505.

Abstract: The specific sections describing the reporting, testing, and recordkeeping requirements are found at 49 CFR Part 230. Railroads use the information to ensure that steam locomotives are safe for use in service. Further, FRA's Office of Safety Assurance and Compliance uses the information to monitor regulatory compliance, investigate accidents to determine possible causes, and consider waiver petitions.

Form Number(s): Form 1, Form 3, Form 4, and Form 19.

Affected Public: Businesses.

Frequency of Submission: On occasion; recordkeeping.

Reporting Burden:

CFR Section

Respondent Universe

Total
Responses
Average Time Per Response
Total
Burden
Hours
230.10
48
26 waivers
1 hour
26
230.51—Form 1
48
968 reports
5 minutes
81
230.53—Form 3
48
880 reports
7 minutes
10
230.54—Form 4
48
1 report
1 hour
1
230.54—Form 19
48
1 report
30 minutes
.5
230.32—Badge plate
48
1 plate
30 minutes
.5
230.45—Boiler number
48
1 number
15 minutes
.25
230.48—Office record—boiler washing
48
243 records
1 minute
4
230.52—Posting of copy
48
1,056 forms
1 minute
18
230.104—Locomotive inspection report
48
7,290 reports
3 minutes
365
230.111—Stenciling dates of tests and cleaning
48
108 tests
1 minute
2
230.127(b)—Pistons and piston rods
48
1 stamp
15 minutes
.25
230.133—Driving, trailing and engine truck axles
48
1 stamp
15 minutes
.25
230.136—Crank pins
48
1 stamp
15 minutes
.25
230.158—Modification of rules
48
2 requests
1 hour
2

Total Estimated Burden Hours: 511 hours.

Status: Regular Review.

Title: Identification of Cars Moved in Accordance with Order 13528.

OMB Control Number: 2130–0506.

Abstract: This collection of information identifies a freight car being moved within the scope of Order 13528 (order). *See* 49 CFR Part 232, Appendix B. Otherwise, an exception will be taken, and the car will be set out of the train and not delivered. The information that must be recorded is specified at 49 CFR Part 232, Appendix B, requiring that a car be properly identified by a card attached to each side of the car and signed stating that such movement is being made under the authority of the order. The order does not require retaining cards or tags. When a car bearing a tag for movement under the order arrives at its destination, the tags are simply removed.

Form Number(s): None.

Affected Public: Businesses.

Frequency of Submission: On occasion.

Total Responses: 1,320 tags.

Average Time Per Response: 5 minutes per tag.

Estimated Total Annual Burden Hours: 110 hours.

Status: Regular Review.

Pursuant to 44 U.S.C. 3507(a) and 5 CFR 1320.5(b), 1320.12(e)(3), DOT informs all interested parties that it may not conduct or sponsor, and a respondent is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

Issued in Washington, DC on January 30. 1997.

Phillip A. Leach,

Clearance Officer, United States Department of Transportation.

[FR Doc. 97–3302 Filed 2–10–97; 8:45 am]

BILLING CODE 4910–62–P

Federal Transit Administration

[FTA Docket No. 97–2117]

Notice of Request for the Extension of Currently Approved Information Collection

AGENCY: Federal Transit Administration, DOT.

ACTION: Notice of request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, this notice announces the intention of the Federal Transit Administration (FTA) to request the Office of Management and Budget (OMB) to extend the following currently approved information collection:

Prevention of Prohibited Drug Use in Transit Operations.

DATES: Comments must be submitted before April 14, 1997.

ADDRESSES: All written comments must refer to the docket number that appears at the top of this document and be submitted to the United States

Department of Transportation, Central Dockets Office, PL–401, 400 Seventh Street, SW., Washington, DC 20590. All comments received will be available for examination at the above address from 10:00 a.m. to 5:00 p.m., e.t., Monday through Friday, except Federal holidays. Those desiring notification of receipt of comments must include a self-addressed, stamped postcard/envelope.

FOR FURTHER INFORMATION CONTACT: *Prevention of Prohibited Drug Use in Transit Operations*—Ms. Judy Meade, Office of Program Management, (202) 366–2896.

SUPPLEMENTARY INFORMATION: Interested parties are invited to send comments regarding any aspect of this information collection, including: (1) The necessity and utility of the information collection for the proper performance of the functions of the FTA; (2) the accuracy of the estimated burden; (3) ways to enhance the quality, utility, and clarity of the collected information; and (4) ways to minimize the collection burden without reducing the quality of the collected information. Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval of this information collection.

Title: Prevention of Prohibited Drug Use in Transit Operations (OMB Number: 2132–0557)

Background: The Omnibus Transportation Employee Testing Act of 1991 (Pub. L. 102–143, October 28, 1991, now codified in relevant part at 49 U.S.C. 5331) requires any recipient of Federal financial assistance under 49 U.S.C. Sections 5309, 5307, or 5311 or under 23 U.S.C. Section 103(e) (4) to establish a program designed to help prevent accidents and injuries resulting from the misuse of drugs and alcohol by employees who perform safety-sensitive functions. FTA's regulation, 49 CFR Part 653, ''Prevention of Prohibited Drug Use in Transit Operations,'' effective March 17, 1994, requires recipients to submit to FTA annual reports containing data which summarize information concerning the recipients' drug testing program, such as the number and type of tests given, number of positive test results, and the kinds of safety-sensitive functions the employees perform. FTA uses these data to ensure compliance with the rule, to assess the misuse of drugs in the transit industry, and to set the random testing rate. The data will also be used to assess the effectiveness of the rule in reducing the misuse of drugs among safety-sensitive transit employees and making transit safer for the public.

Respondents: State and local government, business or other for-profit institutions, non-profit institutions, and small business organizations.

Estimated Annual Burden on Respondents: 26.5 hours for each of the 1,615 respondents.

Estimated Total Annual Burden: 42,799 hours.

Frequency: Annual.

Issued: February 4, 1997.

Gordon J. Linton,

Administrator.

[FR Doc. 97–3304 Filed 2–10–97; 8:45 am]

BILLING CODE 4910–57–U

Surface Transportation Board

[STB Docket No. 41987]

Western Fuels Service Corporation v. the Burlington Northern and Santa Fe Railway Company

AGENCY: Surface Transportation Board.

ACTION: Notice of exemption.

SUMMARY: Under 49 U.S.C. 10502, the Board is granting the request of both the complainant and the defendant that this proceeding be exempted from the statutory requirement that it be completed within 180 days. The Board is extending the time limit to 270 days pursuant to the request of the parties.

DATES: The exemption is effective on February 11, 1997.

ADDRESSES: An original and 10 copies of all pleadings referring to the exemption granted in STB Docket No. 41987 must be filed with the Surface Transportation Board, Office of the Secretary, Case Control Branch, 1201 Constitution Ave., N.W., Washington DC 20423. In addition, a copy of all pleadings must be served on the parties' representatives: (1) For Western Fuels Service Corporation, Peter Glaser, Doherty, Rumble & Butler, Suite 1100, 1401 New York Avenue, NW, Washington, DC 20005; and (2) for The Burlington Northern and Santa Fe Railway Company, Samuel M. Sipe, Jr., Steptoe & Johnson, 1330 Connecticut Avenue, NW, Washington, DC 20036, and Richard E. Weicher, The Burlington Northern and Santa Fe Railway Company, Suite 3800, 777 Main Street, Fort Worth, TX 76102–5384.

FOR FURTHER INFORMATION CONTACT: Joseph H. Dettmar, (202) 927–5660. [TDD for the hearing impaired (202) 927–5721.]

SUPPLEMENTARY INFORMATION: This proceeding involves a request for access to certain terminal facilities and trackage by Western Fuels Service Corporation (complainant) pursuant to 49 U.S.C. 11102. Under section 11102(d), the Board must complete the proceeding within 180 days after the filing of the request for relief. As complainant filed its complaint on December 9, 1996, the deadline for completion of the proceeding is June 7, 1997. Complainant has filed a request for a 90-day extension of the deadline until September 5, 1997, and The Burlington Northern and Santa Fe Railway Company (defendant) has joined in the request. Acting under 49 U.S.C. 10502, the Board has granted an exemption from the statutory deadline. The Board will establish a procedural schedule to govern the processing of the proceeding, if necessary, when it rules on a pending motion by defendant to dismiss the proceeding.

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: February 3, 1997.

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams,

Secretary.

[FR Doc. 97–3384 Filed 2–10–97; 8:45 am]

BILLING CODE 4915–00–P

Bureau of Transportation Statistics

Agency Information Collection; Activity Under OMB Review; Report of Financial and Operating Statistics for Small Aircraft Operators—Form 298–C

AGENCY: Bureau of Transportation Statistics (BTS), DOT.

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act of 1995, Public Law 104–13, the Bureau of Transportation Statistics (BTS) invites the general public, industry and other Federal Agencies to comment on the continuing need and usefulness of BTS collecting financial, traffic and operating statistics from small certificated and commuter air carriers. Small certificated air carriers (operate aircraft with 60 seats or less or with 18,000 pounds of payload capacity or less) must file the five quarterly schedules listed below:

A–1 Report of Flight and Traffic Statistics in Scheduled Passenger Operations,

E–1 Report of Nonscheduled Passenger Enplanements by Small Certificated Air Carriers,
F–1 Report of Financial Data,
F–2 Report of Aircraft Operating Expenses and Related Statistics, and
T–1 Report of Revenue Traffic by On-Line Origin and Destination.

Commuter air carriers must file the three quarterly schedules listed below:

A–1 Report of Flight and Traffic Statistics in Scheduled Passenger Operations,
F–1 Report of Financial Data, and
T–1 Report of Revenue Traffic by On-Line Origin and Destination.

Commenters should address whether BTS accurately estimated the reporting burden and if there are other ways to enhance the quality, utility and clarity of the information collected.

DATES: Written comments should be submitted by April 14, 1997.

ADDRESSES: Comments should be directed to: Office of Airline Information, K–25, Room 4125, Bureau of Transportation Statistics, Department of Transportation, 400 Seventh Street, S.W., Washington, DC 20590–0001.

COMMENTS: Comments should identify the OMB # 2138–0009 and submit a duplicate copy to the address listed above. Commenters wishing the Department to acknowledge receipt of their comments must submit with those comments a self-addressed stamped postcard on which the following statement is made: Comments on OMB # 2138–0009. The postcard will be date/time stamped and returned to the commenter.

FOR FURTHER INFORMATION CONTACT: Bernie Stankus, Office of Airline Information, K–25, Bureau of Transportation Statistics, 400 Seventh Street, S.W., Washington, DC 20590–0001, (202) 366–4387.

SUPPLEMENTARY INFORMATION:

OMB Approval No. 2138–0009.

Title: Report of Financial and Operating Statistics for Small Aircraft Operators—Form 298–C.

Form No.: 298–C.

Type of Review: Extension of a currently approved collection.

Respondents: Small certificated and commuter air carriers.

Number of Respondents: 100

Estimated Time Per Response: 16 hours for small certificated 7 hours for commuters.

Total Annual Burden: 5,000 hours.

Needs and Uses: Program Uses of Form 298–C Data.

Mail Rates

The Department of Transportation (DOT) sets and updates the Intra-Alaska Bush mail rates based on carrier expense, traffic, and operational data. Form 298–C cost data, especially fuel costs, terminal expenses, and line haul expenses are used in arriving at rate levels. DOT revises the established rates based on the percentage of unit cost changes in the carriers' operations. These updating procedures have resulted in the carriers receiving rates of compensation that more closely parallel their costs of providing mail service and contribute to the carriers' economic well-being.

Essential Air Service

DOT also must determine a community's eligibility as an essential air service (EAS) point. If the community qualifies as an EAS point, a determination is made as to what level of service the community is entitled and how much, if any, compensation must be paid to air carriers that provide the service.

After DOT has determined that a community is eligible to receive EAS, DOT often has to select a carrier to provide the service. Some of the carrier selection criteria are historic presence in the community, reliability of carrier service, financial stability of the carrier, and carrier cost structure.

Carrier Fitness

Fitness determinations are made for both new entrants and established U.S. domestic carriers proposing a substantial change in operations. A portion of these applications consists of an operating plan for the first year (14 CFR Part 204) and an associated projection of revenues and expenses. The carrier's operating cost, included in these projections, are compared against the cost data in the Form 298–C file for a carrier or carriers with the same aircraft type and similar operating characteristics. Such a review validates the reasonableness of the carrier's operating plan.

The quarterly financial submissions by commuter air carriers are used in determining each carrier's continuing fitness to operate. Section 41738 of Title 49 of the United States Code requires DOT to find all commuters fit, willing and able to conduct passenger service as a prerequisite to providing such service to an eligible essential air service point. In making a fitness determination, DOT reviews three areas of a carrier's operation: (1) The qualifications of its management team, (2) its disposition to comply with laws and regulations, and (3) its financial posture. DOT must determine whether or not a carrier has sufficient financial resources to conduct its operations without imposing undue risk on the traveling public. Moreover, once a carrier is operating as a commuter, DOT is required to monitor its continuing fitness.

Industry Analysis

The Secretary, Deputy Secretary and other senior DOT officials must be kept fully informed and advised of all current and developing economic issues affecting the airline industry. This is accomplished through the preparation of testimony given before Congressional committees, briefing and status papers, speech preparation, and memoranda recommending decisions or listing available options.

The program methodologies under this program are as varied as the nature of the particular aviation policy issues that confront senior DOT officials. In preparing financial condition reports or status reports on a particular airline, financial and traffic data are analyzed. Briefing papers may use the same information as well as airport activity data and market data. In summary, the nature of a particular aviation issue determines the particular methodology used to prepare the analysis.

Safety Analysis

The FAA evaluates the adequacy of aviation safety regulations, standards, policies and procedures. Problem areas are identified and recommendations are developed for appropriate solutions. Enplanement data are used in evaluating the safety status of carriers. Passenger-miles are used to calculate fatality and injury rates, while aircraft-miles are used in performing risk analysis and comparative analyses with other traffic modes. Departure data are used to calculate accident/incident rates, developing rates of near misses, and assessing the significance of the incident of operational errors.

Forecasting

Traffic schedules are used to derive air carrier operations at non-tower airports. Historical aircraft departure data are used to supplement and validate other sources of Terminal Area Forecasts (TAF). The aircraft operations data in the TAF are needed by the National Plan of Integrated Airports System (NPIAS) to prepare airport master plans. In addition, aircraft operations forecast data in TAF are used in developing benefit/cost ratios for tower establishment and tower discontinuance criteria, for supporting decisions on the purchase of safety-

related avionics equipment, and for the allocation of scarce resources for the construction or expansion of runways and other airport facilities.

Historical enplanement data are required to produce short, medium, and long range passenger demand forecasts for all airports with passenger service. These forecasts are presented in the TAF data base, which contains approximately 4,000 airports, including all airports in the NPIAS. TAF enplanement data are used in the preparation of various airport master plans and in response to requests for specific airport information from Congress, states, and the general public.

Historical passenger enplanement data, aircraft departure data, and freight and mail tons enplaned by airport are all used to project air carrier traffic and cargo activity levels for hub airports.

Cost/Benefit Analysis

Safety rules proposed by the FAA operating units are submitted for economic analysis. Under established costing methodologies, which use various cost and traffic data, accident data, and risk analysis, the proposed rules are evaluated on (1) a cost/benefit basis, (2) regulatory flexibility basis and, (3) an international trade impact basis.

Allocation of Airport and Airways Improvement Funds

A revenue passenger enplanement formula prescribed in the Airport and Airway Improvement Act of 1982 is used to determine the amount of funds to be allocated to each airport. Form 298–C schedules that identify revenue passengers enplaned at individual airports in the United States and Trust Territories, are used for the formula.

Since several airports in the national system are heavily involved in air freight, all-cargo data, such as revenue tons enplaned and aircraft departures, are used to plan for future needs of those airports. Scheduled aircraft departures by aircraft type by airport are used in determining the practical annual capacity (PANCAP) at airports, as prescribed in FAA Advisory Circular ''Airport Capacity Criteria Used in Preparing the National Airport Plan.'' PANCAP is a safety-related benchmark measure which indicates when airport management should be concerned about capacity problems, delays and possible needed airport expansion or runway construction.

Noise Abatement

Air carrier traffic data by airport are used in assessing the level and frequency of service at individual airports in order to determine the environmental noise impact of carrier operations. Also, aircraft operating data are used to assess carrier compliance with noise abatement agreements.

Timothy E. Carmody,

Director, Office of Airline Information, Bureau of Transportation Statistics.

[FR Doc. 97–3331 Filed 2–10–97; 8:45 am]

BILLING CODE 4910–FE–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

[CO–62–89]

Proposed Collection; Comment Request For Regulation Project

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)). Currently, the IRS is soliciting comments concerning an existing final regulation, CO–62–89 (TD 8407), Final Regulations Under Section 382 of the Internal Revenue Code of 1986; Limitations on Corporate Net Operating Loss Carryforwards (§ 1.382–3).

DATES: Written comments should be received on or before April 14, 1997 to be assured of consideration.

ADDRESSES: Direct all written comments to Garrick R. Shear, Internal Revenue Service, room 5571, 1111 Constitution Avenue NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection should be directed to Carol Savage, (202) 622–3945, Internal Revenue Service, room 5569, 1111 Constitution Avenue NW., Washington, DC 20224.

SUPPLEMENTARY INFORMATION:

Title: Final Regulations Under Section 382 of the Internal Revenue Code of 1986; Limitations on Corporate Net Operating Loss Carryforwards.

OMB Number: 1545–1260.

Regulation Project Number: CO–62–89.

Abstract: Internal Revenue Code section 382(l)(5) provides relief from the application of the section 382 limitation for bankruptcy reorganizations in which the pre-change shareholders and qualified creditors maintain a substantial continuing interest in the loss corporation. These regulations concern the election a taxpayer may make to treat as the change date the effective date of a plan of reorganization in a title 11 or similar case rather than the confirmation date of a plan.

Current Actions: There is no change to this existing regulation.

Type of Review: Extension of OMB approval.

Affected Public: Business or other for-profit organizations.

Estimated Number of Respondents: 10.

Estimated Time Per Respondent: 5 minutes.

Estimated Total Annual Burden Hours: 1.

The following paragraph applies to all of the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Request for Comments

Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the 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 collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (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; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: February 5, 1997.

Garrick R. Shear,

IRS Reports Clearance Officer.

[FR Doc. 97–3400 Filed 1–10–97; 8:45 am]

BILLING CODE 4830–01–U

[INTL–15–91]

Proposed Collection; Comment Request for Regulation Project

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)). Currently, the IRS is soliciting comments concerning an existing notice of proposed rulemaking, INTL–15–91, Taxation of Gain or Loss from Certain Nonfunctional Currency Transactions (Section 988 Transactions) (§ 1.988–5).

DATES: Written comments should be received on or before April 14, 1997 to be assured of consideration.

ADDRESSES: Direct all written comments to Garrick R. Shear, Internal Revenue Service, room 5571, 1111 Constitution Avenue NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection should be directed to Carol Savage, (202) 622–3945, Internal Revenue Service, room 5569, 1111 Constitution Avenue NW., Washington, DC 20224.

SUPPLEMENTARY INFORMATION:

Title: Taxation of Gain or Loss from Certain Nonfunctional Currency Transactions (Section 988 Transactions).

OMB Number: 1545–1312.

Regulation Project Number: INTL–15–91.

Abstract: This regulation provides that if a taxpayer identifies a hedge and a dividend, rent, or royalty payment as a hedged qualified payment, then the taxpayer may integrate such transactions. The regulation also allows taxpayers to elect a mark to market method of accounting for foreign currency gains and losses.

Current Actions: There is no change to this existing regulation.

Type of Review: Extension of OMB approval.

Affected Public: Individuals or households, and business or other for-profit organizations.

Estimated Number of Respondents: 1,500.

Estimated Time Per Respondent: 40 minutes.

Estimated Total Annual Burden Hours: 1,000.

The following paragraph applies to all of the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number.

Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Request for Comments

Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the 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 collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (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; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: February 5, 1997.

Garrick R. Shear,

IRS Reports Clearance Officer.

[FR Doc. 97–3401 Filed 2–10–97; 8:45 am]

BILLING CODE 4830–01–U

[LR–27–83; LR–54–85]

Proposed Collection; Comment Request for Regulation Project

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)). Currently, the IRS is soliciting comments concerning existing temporary regulations, LR–27–83 (TD 7882), Floor Stocks Credits or Refunds and Consumer Credits or Refunds With Respect to Certain Tax-Repealed Articles; Excise Tax on Heavy Trucks (§ 145.4051–1) and LR–54–85 (TD 8050), Excise Tax on Heavy Trucks, Truck Trailers and Semitrailers, and Tractors; Reporting and Recordkeeping Requirements (§ 145.4052–1).

DATES: Written comments should be received on or before April 14, 1997 to be assured of consideration.

ADDRESSES: Direct all written comments to Garrick R. Shear, Internal Revenue Service, room 5571, 1111 Constitution Avenue NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection should be directed to Carol Savage, (202) 622–3945, Internal Revenue Service, room 5569, 1111 Constitution Avenue NW., Washington, DC 20224.

SUPPLEMENTARY INFORMATION:

Title: (LR–27–83) Floor Stocks Credits or Refunds and Consumer Credits or Refunds With Respect to Certain Tax-Repealed Articles; Excise Tax on Heavy Trucks, and (LR–54–85) Excise Tax on Heavy Trucks, Truck Trailers and Semitrailers, and Tractors; Reporting and Recordkeeping Requirements.

OMB Number: 1545–0745.

Regulation Project Number: LR–27–83; LR–54–85.

Abstract: LR–27–83 requires sellers of trucks, trailers and semitrailers, and tractors to maintain records of the gross vehicle weights of articles sold to verify taxability. LR–54–85 requires that if the sale is to be treated as exempt, the seller and the purchaser must be registered and the purchaser must give the seller a resale certificate.

Current Actions: There is no change to these existing regulations.

Type of Review: Extension of OMB approval.

Affected Public: Business or other for-profit organizations.

Estimated Number of Respondents: 4,100.

Estimated Time Per Respondent: 1 hour, 1 minute.

Estimated Total Annual Burden Hours: 4,140.

The following paragraph applies to all of the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information

displays a valid OMB control number. Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Request for Comments

Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the 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 collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (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; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: February 5, 1997.

Garrick R. Shear,

IRS Reports Clearance Officer.

[FR Doc. 97–3402 Filed 2–10–97; 8:45 am]

BILLING CODE 4830–01–U

DEPARTMENT OF VETERANS AFFAIRS

Advisory Committee on the Readjustment of Veterans, Notice of Meeting

The Department of Veterans Affairs (VA) gives notice under Public Law 92–463 that a meeting of the Advisory Committee on the Readjustment of Veterans will be held February 20 and 21, 1997. This is a regularly scheduled meeting for the purpose of reviewing VA and other relevant services for veterans, to review Committee work in progress and to formulate Committee recommendations and objectives. The meeting on both days will be held at The American Legion, Washington Office, 1608 K Street, NW, Washington, DC. The agenda on both days will commence at 8:30 a.m. and adjourn at 4:30 p.m.

The agenda for February 20 will begin with a review of Committee special projects and pending reports. The agenda will also cover a review of the Readjustment Counseling Service Vet Centers, a discussion of VA special emphasis programs in relation to managed health care principles and a review of Persian Gulf veterans' health care problems.

On February 21, the Committee will review the programs and activities of VA's Center for Women Veterans, review available data regarding the level of post-traumatic stress disorder in Persian Gulf and Somalia veterans, and discuss access to care problems for Canadian and Mexican National veterans of the U.S. military. The agenda will also consist of a planning meeting to formulate specific objectives for the remainder of the year.

The meeting will be open to the public. Those who plan to attend or who have questions concerning the meeting should contact Alfonso R. Batres, Ph.D., M.S.S.W., Director, Readjustment Counseling Service, Department of Veterans Affairs (telephone number: 202–273–8967).

Dated: February 4, 1997.

By Direction of the Secretary:

Heyward Bannister,

Committee Management Officer.

[FR Doc. 97–3282 Filed 2–10–97; 8:45 am]

BILLING CODE 8320–01–M

Federal Register

Tuesday
February 11, 1997

Part II

Department of Education

34 CFR Part 361 et al.

The State Vocational Rehabilitation Services Program; Final Rule

DEPARTMENT OF EDUCATION

34 CFR Parts 361, 363, 376, and 380

RIN 1820–AB12

The State Vocational Rehabilitation Services Program

AGENCY: Department of Education.

ACTION: Final regulations.

SUMMARY: The Secretary amends the regulations governing The State Vocational Rehabilitation Services Program. These amendments are needed to implement changes to the Rehabilitation Act of 1973 (Act) made by the Rehabilitation Act Amendments of 1992, enacted on October 29, 1992, as amended by the 1993 technical amendments (hereinafter collectively referred to as the 1992 Amendments).

EFFECTIVE DATE: These regulations take effect March 13, 1997.

FOR FURTHER INFORMATION CONTACT: Beverlee Stafford, U.S. Department of Education, 600 Independence Avenue, SW., Room 3014, Mary E. Switzer Building, Washington, DC. 20202–2531. Telephone (202) 205–8831. Individuals who use a telecommunications device for the deaf (TDD) may call (202) 205–5538.

SUPPLEMENTARY INFORMATION: The State Vocational Rehabilitation Services Program (program) is authorized by Title I of the Act (29 U.S.C. 701–744). This program provides support to each State to assist it in operating a comprehensive, coordinated, effective, efficient, and accountable State program to assess, plan, develop, and provide vocational rehabilitation (VR) services to individuals with disabilities so that those individuals may prepare for and engage in gainful employment, consistent with their strengths, resources, priorities, concerns, abilities, capabilities, and informed choice.

On December 15, 1995, the Secretary published a notice of proposed rulemaking (NPRM) for this program in the Federal Register (60 FR 64476).

Additionally, pursuant to Executive Order 12866, which encourages Federal agencies to facilitate meaningful participation in the regulatory development process, the Rehabilitation Services Administration (RSA) made available draft proposed regulations (draft regulations) in accessible formats, including an electronic format, to a broad spectrum of parties for informal review and comment prior to publishing the December 15, 1995 NPRM. RSA also gathered public input on the draft regulations through public meetings and focus groups and analyzed over 600 letters of comments on the draft regulations.

These final regulations implement changes made to the program by the 1992 Amendments with the exception of the evaluation standards and performance indicator requirements in section 106 of the Act, which are being implemented in a separate rulemaking document, and incorporate some of the burden-reducing changes previously proposed in an NPRM for this program that was published on July 3, 1991 (56 FR 30620) (1991 NPRM). The 1991 NPRM was not finalized at the request of Congress. These regulations also implement changes that the Secretary believes are important to update, consolidate, clarify, and in other ways improve the regulations for this program.

The Supplementary Information section to the NPRM includes a discussion of the major changes to Title I of the Act made by the 1992 Amendments. These changes have far-reaching implications for the program. Individuals are encouraged to refer to the NPRM (60 FR 64476–64477) for a discussion of the major themes associated with the 1992 Amendments.

These final regulations contain a limited number of significant changes to the proposed regulations based on public comment and interdepartmental review. A detailed description of these changes follows. In addition, the final regulations have been reviewed and revised in accordance with the Department's Principles for Regulating, which were developed as part of the Administration's regulatory reinvention initiative under the National Performance Review II. The principles are designed to ensure that the Department regulates in the most flexible, most equitable, and least burdensome way possible.

The Secretary also notes that the changes to supported employment definitions included in these final regulations affect those definitions in 34 CFR parts 363, 376, and 380. Corresponding regulatory changes to those parts follow the final regulations amending 34 CFR part 361.

Goals 2000: Educate America Act

The Goals 2000: Educate America Act (Goals 2000) focuses the Nation's education reform efforts on the eight National Education Goals and provides a framework for meeting them. Goals 2000 promotes new partnerships to strengthen schools and expands the Department's capacities for helping communities to exchange ideas and obtain information needed to achieve the goals.

These regulations address the National Education Goal that every adult American, including individuals with disabilities, will possess the knowledge and skills necessary to compete in a global economy and exercise the rights and responsibilities of citizenship.

Executive Order 12866

These final regulations have been reviewed in accordance with Executive Order 12866. Under the terms of the order the Secretary has assessed the potential costs and benefits of this regulatory action.

The potential costs associated with the final regulations are those resulting from statutory requirements and those determined by the Secretary as necessary for administering this program effectively and efficiently.

In assessing the potential costs and benefits—both quantitative and qualitative—of these final regulations, the Secretary has determined that the benefits of the final regulations justify the costs.

The Secretary has also determined that this regulatory action does not unduly interfere with State, local, and tribal governments in the exercise of their governmental functions.

Summary of potential costs and benefits

The potential costs and benefits of these final regulations were summarized in the preamble to the NPRM under the following headings: Improved Organization of Regulations; Notes and Examples; Reduction of Grantee Burden; Enhanced Protections for Individuals with Disabilities (60 FR 64495); Increased Flexibility of Grantees to Satisfy Statutory Requirements; and Additional Benefits (60 FR 64496). Additional discussion of potential costs and benefits is included in the following Analysis of Comments and Changes section of this preamble.

Analysis of Comments and Changes

In response to the Secretary's invitation in the NPRM, more than 400 parties submitted comments on the proposed regulations. RSA gathered additional public input on the NPRM through a series of public meetings. An analysis of the comments and of the changes in the regulations since publication of the NPRM follows.

Major issues are grouped according to subject under appropriate sections of the regulations. Other substantive issues are discussed under the section of the regulations to which they pertain. Technical and other minor changes—and suggested changes the Secretary is not legally authorized to make under the

applicable statutory authority—generally are not addressed. However, some suggested changes that the Secretary is not authorized to make also raise important policy issues and, therefore, are discussed under the appropriate section of the analysis.

References in the analysis of comments to the ''proposed regulations'' refer to the regulatory provisions in the December 15, 1995 NPRM, whereas references to the ''draft regulations'' refer to provisions in the draft proposed regulations that were circulated for informal comment prior to publishing the NPRM.

Section 361.5(b) Applicable definitions

• Administrative Costs Under the State Plan

Comments: Some commenters requested that this definition be revised to specifically limit administrative costs to expenditures incurred by the Designated State Unit (DSU) in administering the VR program. One commenter recommended that the definition identify indirect costs as a type of administrative cost. Finally, one commenter sought to exclude costs incurred by DSUs in providing technical assistance to businesses and industries from the definition on the basis that those costs represent expenditures for the provision of services under § 361.49(a) of the proposed regulations.

Discussion: The Secretary agrees that administrative costs under the VR State plan are those costs that the DSU incurs in administering the VR program. While most indirect costs (those costs that cannot be allocated to a single cost objective and that benefit more than one program) are generally types of administrative expenditures, they need not be limited to administrative expenditures. The Secretary does not believe it is necessary to classify indirect costs in order to ensure their allowability under the program. All indirect costs that are approved under an indirect cost agreement or cost allocation plan are allowable. The Secretary emphasizes that indirect costs related to multiple State programs (e.g., operating expenses for State buildings occupied by DSU staff and staff from other State-administered programs) can be charged to the VR program only to the extent that the costs are attributable to the VR program.

In addition, the Secretary agrees that although technical assistance to businesses, in some cases, is considered an administrative cost, any technical assistance provided by a DSU to a business or industry that seeks to employ individuals with disabilities and that is not subject to the Americans with Disabilities Act (ADA) does not constitute an administrative cost. Technical assistance provided under these circumstances is authorized by section 103(b)(5) of the Act and § 361.49(a)(4) of the regulations as a service for groups of individuals with disabilities.

Changes: The Secretary has revised § 361.5(b)(2) to clarify that administrative costs are expenditures that are incurred by the DSU in performing administrative functions related to the VR program. The definition also has been amended to exclude technical assistance provided to businesses and industries as a service under the conditions in § 361.49(a)(4).

• Appropriate Modes of Communication

Comments: One commenter opposed defining ''appropriate modes of communication'' as specialized media systems and devices that facilitate communication on the basis that not all modes of communication used by persons with disabilities are ''media systems and devices.'' Several commenters requested that the definition identify graphic presentations, simple language, and other modes of communication used by individuals with cognitive impairments.

Discussion: The Secretary agrees that ''appropriate modes of communication'' are not limited to specific systems, devices, or equipment, as indicated by the proposed definition, and include any type of aid or support needed by an individual with a disability to communicate with others effectively. For example, the use of an interpreter by a person who is deaf is an appropriate mode of communication, but is not typically viewed as a system or device.

The Secretary believes it would be useful for the definition of appropriate modes of communication to include examples of communication methods used by individuals with cognitive impairments. However, the Secretary emphasizes that the examples of communication services and materials listed in the definition in the final regulations are not all-inclusive and that other appropriate modes of communication not specified in the definition are also available to address the particular communication needs of an individual with a disability.

Changes: The Secretary has amended § 361.5(b)(5) to clarify that appropriate modes of communication include any aid or support that enables an individual with a disability to comprehend and respond to information being communicated. In addition, the definition has been amended to include graphic presentations and simple language materials as examples of modes of communication that may be appropriate for individuals with cognitive impairments.

• Assistive Technology Service

Comments: Some commenters asked that particular services be identified in this definition as examples of permissible assistive technology services. For instance, one commenter suggested that the definition specifically identify modifications to vehicles used by individuals with disabilities as an assistive technology service.

Discussion: The definition of the term ''assistive technology service'' in both the proposed and final regulations tracks the definition of that term in the Technology-Related Assistance for Individuals with Disabilities Act of 1988 (Tech Act), as required by section 7(24) of the Act. The Tech Act defines assistive technology services generally to include any service that directly assists an individual with a disability in the selection, acquisition, or use of an assistive technology device. The definition in the regulations, therefore, is intended to address the scope of service-related needs of individuals who use assistive technology devices (e.g., the need to acquire a particular device or the need to receive training on the operation of a device) rather than to identify actual services that an individual might receive. Nevertheless, the Secretary recognizes that any modification to a vehicle that is necessary to enable an individual with a disability to use that vehicle is considered an adaptation or a customization of an assistive technology device under § 361.5(b)(7)(iii) and, therefore, constitutes an assistive technology service. This position is consistent with current RSA policy.

Changes: None.

• Community Rehabilitation Program

Comments: Some commenters requested that the definition of ''community rehabilitation program'' specify additional services, such as rehabilitation teaching services, that could be provided under a community rehabilitation program for individuals with disabilities.

Discussion: The definition of ''community rehabilitation program'' in both the proposed and final regulations is based on the statutory definition in section 7(25) of the Act. However, paragraph (i)(Q) of this definition, like section 7(25)(Q) of the Act, authorizes community rehabilitation programs that

provide services similar to the services specified in the definition. Thus, the Secretary believes that a community rehabilitation program could provide rehabilitation teaching services for individuals who are blind because those services are similar to orientation and mobility services for individuals who are blind, which are expressly authorized under paragraph (i)(K) of the definition.

Changes: None.

- Comparable Services and Benefits

Comments: Several commenters requested clarification of the requirement in the proposed regulations that comparable services and benefits be available to the individual within a reasonable period of time. Some commenters requested that the regulations allow DSUs to use comparable services and benefits only if they are currently available at the time the individual's Individualized Written Rehabilitation Program (IWRP) is developed. Other commenters suggested that comparable services and benefits should be available when necessary to meet the rehabilitation objectives identified in the individual's IWRP.

Discussion: The definition of ''comparable services and benefits'' is intended to support the statutory purpose of conserving rehabilitation funds, while ensuring the provision of appropriate and timely services. The proposed requirement in the NPRM that comparable services and benefits be available within a reasonable period of time was intended to enable DSUs to conserve VR funds by searching for alternative sources of funds without jeopardizing the timely provision of VR services to eligible individuals. The Secretary agrees that additional clarification in the regulations is required to ensure that VR services are provided to eligible individuals at the time they are needed.

Changes: The Secretary has revised § 361.5(b)(9)(ii) of the proposed regulations to require that comparable services and benefits be available to the individual at the time that the relevant service is needed to achieve the rehabilitation objectives in the individual's IWRP. This change is consistent with revisions made to § 361.53 of the proposed regulations, which are discussed in the analysis of comments to that section.

- Competitive Employment and Integrated Setting

Comments: Some commenters opposed the definition of ''competitive employment'' in the proposed regulations on the basis that it limited competitive employment outcomes to those in which an individual with a disability earns at least the minimum wage. Because the proposed definition applied to supported employment placements, these commenters believed that the minimum wage requirement would restrict employment opportunities for individuals with the most severe disabilities who need supported employment services in order to work. These commenters stated that some individuals with the most severe disabilities would be unable to obtain competitive employment unless the definition permitted employers to compensate employees in accordance with section 14(c) of the Fair Labor Standards Act (FLSA) (i.e., wages based on individual productivity that would be less than the minimum wage). Other commenters supported the proposed definition and the requirement that individuals in competitive employment earn at least the minimum wage.

Several commenters opposed the requirement in the proposed regulations that individuals in competitive employment earn at least the prevailing wage for the same or similar work in the local community performed by non-disabled individuals. The commenters believed that it would be unduly burdensome for DSUs to ascertain the relevant prevailing wage given the potential differences in wages provided by employers within the same community. In addition, these commenters stated that the prevailing wage standard would dissuade some employers from hiring individuals with disabilities when the wage to be provided, although at least the minimum wage, would have to be increased to be consistent with higher wages provided by other employers in the community for the same or similar work.

Several commenters on the proposed regulations opposed the requirement that competitive employment be performed in an integrated setting. Several other commenters questioned or requested clarification of the proposed definition of integrated setting with respect to the provision of services or the achievement of an employment outcome. In light of the interrelationship between the terms ''competitive employment'' and ''integrated setting'' and the fact that the Secretary considers integration to be an essential component of competitive employment, comments on both the proposed definition of ''integrated setting'' and the use of the term ''integrated setting'' as an element of competitive employment are addressed in the following paragraphs.

Commenters who opposed limiting competitive employment to placements in integrated settings believed that requiring individuals with disabilities to interact with non-disabled persons at the work site would preclude certain kinds of employment outcomes from the scope of competitive employment. Specifically, the commenters identified self-employment, home-based employment, and various forms of telecommuting as examples of employment outcomes that are competitive but are not located in integrated settings. The commenters stated that these placement options should be available to individuals with disabilities to same extent that they are available to non-disabled persons.

Some commenters believed that the definition of ''integrated setting'' in the proposed regulations was too weak. These commenters recommended that the proposed definition, which defined integrated setting as ''. . . a setting typically found in the community in which an applicant or eligible individual has an opportunity to interact regularly with non-disabled persons . . .,'' be amended to require actual interaction between the applicant or eligible individual and non-disabled individuals. Other commenters stated that individuals in competitive employment should be required to interact with non-disabled persons only to the extent that non-disabled individuals in similar positions interact with others. Finally, some commenters suggested that the definition clarify that sheltered workshops and other employment settings that are established specifically for the purpose of employing individuals with disabilities do not constitute integrated settings.

Discussion: The Secretary agrees with the commenters who believe that competitive employment outcomes should be limited to those in which individuals earn at least the minimum wage. Consequently, the Secretary does not consider placements in supported employment settings in which individuals receive wages below the minimum wage under section 14(c) of the FLSA to be competitive employment. This position, which would modify longstanding RSA regulatory policy, is consistent with the requirement in the 1992 Amendments (section 101(a)(16) of the Act) that DSUs annually review and reevaluate the status of each individual in an employment setting under section 14(c) of the FLSA in order to determine the individual's readiness for competitive employment. This statutory requirement indicates that supported employment

settings in which individuals are compensated below the minimum wage in accordance with the FLSA do not constitute competitive employment. The Secretary wishes to clarify that the minimum wage requirement for individuals placed in supported employment applies at the time of transition to extended services. If an individual is unable to obtain the minimum wage at this time, the individual would still be considered to have achieved an employment outcome but it would not be considered a supported employment outcome.

The Secretary agrees that requiring individuals in competitive employment to earn at least the prevailing wage for the same or similar work in the local community performed by non-disabled individuals is unduly restrictive and that requiring individuals with disabilities who achieve competitive employment outcomes to be compensated at the wage level typically paid to non-disabled individuals who perform the same or similar work for the same employer is a more reasonable standard. This standard requires that competitively employed individuals with disabilities receive the customary wage and level of benefits (e.g., insurance premiums, retirement contributions) received by non-disabled workers performing comparable jobs for the same employer. Clarification in the final regulations that comparable compensation includes both the wage and benefit level typically paid by the employer is necessary, the Secretary believes, in order to ensure that competitive employment outcomes for individuals with disabilities are truly ''competitive.'

A key purpose of the 1992 Amendments is to ensure that individuals with disabilities achieve employment outcomes in the most integrated settings possible, consistent with the individual's informed choice. Consequently, the Secretary believes that placement in an integrated setting is an essential component of ''competitive employment.'

The Secretary agrees with those commenters who believe that the definition of integrated setting in the proposed regulations did not sufficiently ensure actual interaction between individuals with disabilities and non-disabled persons. The Secretary also agrees with those commenters who contend that the best measure of integration in an employment setting for individuals with disabilities is to require parity with the integration experienced by non-disabled workers in similar positions. Consequently, the final regulations establish a standard of integration with respect to employment outcomes that is based on ensuring the same level of interaction by disabled individuals with non-disabled persons as that experienced by a non-disabled worker in the same or similar job. An integrated setting for purposes of a job placement is one in which an applicant or eligible individual interacts with non-disabled persons, excluding service providers, to the same extent that a non-disabled worker in a comparable position interacts with others.

The Secretary believes, however, that interaction between individuals with disabilities and non-disabled persons need not be face-to-face in order to meet this standard. Persons with disabilities who are self-employed or telecommute may interact regularly with non-disabled persons through a number of mediums (e.g., telephone, facsimile, or computer). Self-employment, home-based employment, and other forms of employment in which individuals communicate regularly from separate locations, therefore, would satisfy the integration requirement of competitive employment as long as the eligible individual interacts with non-disabled persons other than service providers to the same extent as a non-disabled person in a comparable job.

The Secretary, like many of the commenters, also believes that settings that are established specifically for the purpose of employing individuals with disabilities (e.g., sheltered workshops) do not constitute integrated settings since there are no comparable settings for non-disabled individuals.

Changes: The Secretary has amended § 361.5(b)(10) to define ''competitive employment,'' in part, as work for which an individual earns at least the minimum wage but not less than the customary wage and level of benefits provided by the same employer to non-disabled workers who perform the same or similar work. The Secretary also has amended § 361.5(b)(30) to define ''integrated setting'' with respect to an employment outcome as a setting typically found in the community in which applicants or eligible individuals interact with non-disabled individuals to the same extent that non-disabled individuals in comparable positions interact with other persons. The definition of ''integrated setting'' with respect to the provision of services has been similarly strengthened to require actual interaction between individuals with disabilities receiving services and non-disabled individuals.

- Designated State Unit

Comments: Some commenters requested that the regulatory definition of ''designated State unit'' prohibit DSUs from administering vocational and other rehabilitation programs other than those programs authorized or funded under the Act.

Discussion: Sections 101(a)(1) and (a)(2) of the Act require that the State VR Services Program be administered by a State entity that is primarily concerned with vocational rehabilitation or vocational and other rehabilitation of individuals with disabilities, but does not restrict this rehabilitation focus to only programs authorized or funded under the Act. The Secretary wishes to give States as much organizational flexibility as is permitted by statute.

Changes: None.

- Employment Outcome

Comments: Several commenters opposed the definition of ''employment outcome'' in the proposed regulations on the basis that it failed to exclude outcomes other than competitive employment (e.g., homemaker, self-employment). Other commenters disagreed with the emphasis in the definition on competitive employment.

Discussion: The definition of ''employment outcome'' in the final regulations, like the proposed definition, elaborates on the definition in section 7(5) of the Act by incorporating into the definition the statutory concept that an employment outcome must be consistent with an individual's strengths, resources, priorities, concerns, abilities, capabilities, interests, and informed choice. Although the definition does not contain a full list of permissible employment outcomes, it does not exclude any employment outcomes that have been permitted in the past. Thus, for example, homemaker, extended employment, and self-employment remain acceptable employment outcomes even though they are not specifically identified in the definition. The Secretary also believes, however, that competitive employment, which is the optimal employment outcome under the program, should be considered for each individual who receives services under the program and should, therefore, be highlighted in the definition.

Changes: None.

- Establishment, Development, or Improvement of a Public or Nonprofit Community Rehabilitation Program

Comments: Some commenters opposed that part of the proposed

definition of the term ''establishment, development, or improvement of a public or nonprofit community rehabilitation program'' that would reduce over a four-year period Federal financial support of staffing costs associated with operating a community rehabilitation program. Some of these commenters also opposed the prohibition in the definition of Federal support for ongoing operating expenses of a community rehabilitation program. The commenters were concerned that these provisions would make it difficult or impossible to develop new community rehabilitation programs.

Discussion: The definition elaborates on the statutory definition of the term ''establishment of a community rehabilitation program'' under section 7(6) of the Act by incorporating all of the types of expenditures for which a DSU can receive Federal financial support. The limitations on staffing costs in the proposed definition are based on the authorization in section 7(6) of the Act for the Secretary to include as part of the costs of establishment any additional staffing costs that the Secretary considers appropriate. The limitations are similar to those previously proposed in the 1991 NPRM. Specifically, the proposed regulations established a limitation on staffing costs by providing, after the first 12 months of staffing assistance, for an annual decrease in the percentage of staffing costs (from 100 percent to 45 percent) for which Federal financial participation (FFP) is available. This limitation, like the staffing cost requirements proposed in the 1991 NPRM, is influenced by and in part based on the conclusions of a 1979 General Accounting Office (GAO) report (HRD–79–84). The GAO Report to Congress recommended amending the Act to provide for a gradual reduction of Federal funding for staffing costs in the establishment authority. Legislative change is unnecessary to accomplish this purpose because section 7(6) of the Act vests the Secretary with the authority to determine what staffing costs are appropriate for Federal financial participation. The Secretary believes that the GAO recommendation is still relevant and needs to be implemented. The limitation on staffing costs is intended, in part, to ensure that facilities bear an increasing share of the responsibility for running community rehabilitation programs, while preserving VR funds needed to support necessary development or expansion of community rehabilitation facilities. More generally, the limitation on staffing costs is intended to preserve the amount of funds available to the DSU for providing VR services to eligible individuals.

The final regulations also authorize Federal support for other costs needed to establish, develop, or improve a community rehabilitation program as long as these costs are not ongoing operational expenses of the program. The Secretary believes that this prohibition is consistent with the Act, which limits Federal financial support to costs associated with setting up, renovating, converting, or otherwise improving community rehabilitation programs.

The Secretary also notes that recent audits of State agencies have indicated, in some cases, that VR funds have been used under the authority for establishing community rehabilitation programs for purposes other than providing services under the VR program. In response, the Secretary believes the proposed definition should be amended to ensure that Federal support for the establishment, development, or improvement of a public or nonprofit community rehabilitation program is provided only if the purpose of the expenditures is to provide services to applicants and eligible individuals under the VR program.

Changes: The Secretary has amended § 361.5(b)(16) to ensure that costs associated with the establishment, development, or improvement of a public or nonprofit community rehabilitation program must be necessary to the provision of VR services to applicants and eligible individuals. Changes to this definition and to the State plan requirements in § 361.33(b) of the regulations are intended to address the violations identified in recent audits of State agencies.

- Extended Employment

Comments: Several commenters requested that the definition of ''extended employment'' in the proposed regulations be broadened to include placements in integrated settings. Other commenters sought to expand the proposed definition to include employment with profitmaking organizations. Finally, some commenters requested that the regulations exclude extended employment from the scope of potential employment outcomes under the program.

Discussion: Section 101(a)(16) of the Act requires DSUs to annually review and reevaluate the status of each individual in extended employment to determine the individual's readiness for competitive employment in an integrated setting. This statutory requirement indicates that extended employment is limited to placements in non-integrated settings. The lack of integration in extended employment placements is a key factor in differentiating between extended employment and competitive employment outcomes.

The Secretary does not believe that extended employment includes work performed on behalf of profitmaking organizations. Extended employment, according to section 101(a)(16) of the Act, means work performed in community rehabilitation programs, including workshops, or in other non-integrated employment settings in which individuals are compensated pursuant to the FLSA. The Secretary believes that employment in private, profitmaking organizations should be viewed as competitive employment in which individuals shall earn at least the minimum wage and work in integrated settings. Incorporating placements in profitmaking organizations into the definition of extended employment would expand the scope of potential extended employment placements and would be contrary to the statutory policy that promotes movement from extended employment to competitive employment, the optimal employment outcome under the program. Nevertheless, the final regulations will continue to recognize extended employment as a possible employment outcome under the program consistent with 101(a)(16) of the Act.

Changes: None.

- Impartial Hearing Officer

Comments: One commenter requested that the regulations prohibit a member of a State Rehabilitation Advisory Council from serving as an impartial hearing officer for any DSU within that State.

Discussion: The definition of ''impartial hearing officer'' in the proposed regulations specified that a member of a DSU's State Rehabilitation Advisory Council (Council) could not serve as an impartial hearing officer for that same DSU. The proposed definition, however, did allow a member of a DSU's Council to serve as an impartial hearing officer in cases involving another DSU within the same State. For example, a member of the Council for a State unit serving individuals who are blind was not precluded under the proposed regulations, solely on the basis of that membership, from serving as an impartial hearing officer in cases involving the State unit that serves

individuals with disabilities other than individuals with visual disabilities. The Secretary believes that prohibiting members of a Council from serving as impartial hearing officers in cases involving any DSU within the State would be unduly restrictive. The Secretary also believes that other impartiality requirements in the definition that apply to all impartial hearing officers, including those who are members of Councils for other DSUs (e.g., the individual has no personal, professional, or financial conflict of interest) will sufficiently ensure the absence of potential conflicts between the hearing officer and the parties to the dispute.

Changes: None.

- Maintenance

Comments: Some commenters requested that the definition of ''maintenance'' in the proposed regulations be expanded to include expenses other than living expenses (e.g., food, shelter, and clothing). As an example, the commenters stated that maintenance should be authorized to support costs incurred by eligible individuals who take part in enrichment activities as part of a training program in a higher education institution. Several other commenters recommended deletion of the fourth example in the note following the proposed definition, which stated that maintenance could be used to pay for food, shelter, and clothing for homeless or recently deinstitutionalized individuals until other financial assistance is secured. These commenters asserted that these costs should be supported by welfare or other public assistance agencies rather than DSUs.

Discussion: The Secretary agrees that maintenance may include costs other than standard living expenses (i.e., food, shelter, and clothing) as long as the expenses are in excess of the normal expenses incurred by an eligible individual or an individual receiving extended evaluation services. Limiting maintenance to additional costs incurred by individuals receiving services under an IWRP or under a written plan for providing extended evaluation services is consistent with section 103(a)(5) of the Act, which restricts the provision of maintenance to ''additional costs while participating in rehabilitation.'

The Secretary also agrees that the fourth example of permissible maintenance expenses in the proposed regulations was inadvisable. Permitting DSUs to support the full costs of a homeless or deinstitutionalized individual's subsistence under the maintenance authority, until other financial assistance becomes available, is inconsistent with the policy of limiting maintenance costs to those in excess of the individual's normal expenses. In addition, the Secretary agrees that welfare and other social service agencies are better equipped to support the everyday living expenses of the homeless or deinstitutionalized. However, a DSU could choose to provide short-term emergency financial assistance to those individuals under § 361.48(a)(20) as ''other'' services that the DSU determines are necessary for the individual to achieve an employment outcome.

Changes: The Secretary has deleted the term ''living'' from § 361.5(b)(31) of the proposed regulations to clarify that maintenance may include expenses other than living expenses. In addition, the Secretary has deleted the fourth example in the note following the proposed definition of maintenance and replaced it with an example of a permissible maintenance cost that would not constitute a living expense.

- Ongoing Support Services

Comments: Some commenters recommended that the Secretary place a time limit on the provision of ongoing support services furnished by extended services providers. The commenters stated that the regulations should permit ongoing support services to ''fade'' once they are no longer needed to maintain an individual in supported employment.

Discussion: It is RSA's longstanding policy that individuals with the most severe disabilities who are placed in supported employment should require ongoing support services throughout the course of their placement. The need for ongoing support services provides a critical distinction (i.e., the provision of ongoing supports) between supported employment and other kinds of employment outcomes. The Secretary believes that if an individual in supported employment no longer requires ongoing support services that individual is no longer an appropriate candidate for supported employment.

Changes: None.

- Personal Assistance Services

Comments: Some commenters requested that the definition of ''personal assistance services'' in the proposed regulations be amended to more closely track the statutory definition of that term in section 7(11) of the Act. The commenters stated that revision to the proposed definition is needed to clarify that personal assistance services need not be provided on the job site.

Discussion: The Secretary agrees that personal assistance services may be provided off the job site as long as they are necessary to assist an individual with a disability to perform daily living functions and achieve an employment outcome and are provided while the individual is participating in a program of VR services. The Secretary believes the proposed definition clearly authorized personal assistance services needed by an individual to perform everyday activities off the job but, nevertheless, agrees that further clarification may be helpful.

Changes: The Secretary has amended § 361.5(b)(34) of the proposed regulations to track the language in section 7(11) of the Act authorizing personal assistance services needed to increase the individual's control in life and ability to perform everyday activities on or off the job.

- Physical and Mental Restoration Services

Comments: Some commenters requested that the regulatory definition of ''physical and mental restoration services'' specifically include psychological services provided by qualified personnel under State licensure laws.

Discussion: The Secretary agrees that psychological services are a form of mental restoration services. Psychological services, however, are subsumed within the broader term ''mental health services'' in paragraph (xiii) of the definition and need not be identified separately. Moreover, section 103(a)(4) of the Act authorizes services, including psychological services, that are needed to diagnose and treat mental or emotional disorders only if those services are provided by qualified personnel in accordance with State licensure laws. This requirement, which was included in the proposed definition, is reflected in paragraph (ii) of the definition in the final regulations.

Changes: None.

- Physical or Mental Impairment

Comments: Some commenters requested clarification of the requirement in the proposed regulations that a physical or mental impairment will probably result in materially limiting mental or physical functioning if it is not treated. One commenter stated that the definition should be limited to conditions that cause present functional limitations so as not to unnecessarily expand the pool of eligible individuals.

Discussion: The Secretary agrees that clarification is needed. The proposed regulations defined ''physical or mental impairment'' as an injury, disease, or other condition that materially limits, or if not treated will probably result in materially limiting, mental or physical functioning. The existence of a physical or mental impairment is the first criterion for determining eligibility under the program (see § 361.42(a) of the final regulations). The proposed definition was designed to include progressive conditions that may cause functional limitations in the future even though current functional limitations may not be evident. Although a DSU may not always know with certainty whether a certain condition will limit an individual's functional abilities, the Secretary believes that the definition must account for situations in which there is a strong likelihood that functional limitations will result if treatment is not provided. On the other hand, the Secretary does not believe that accounting for progressive conditions will result in an unwarranted increase in eligible individuals since all eligible individuals, including those who do not currently experience a limitation in functioning, must meet each of the eligibility criteria in § 361.42(a).

Changes: The Secretary has amended § 361.5(b)(36) of the proposed regulations to clarify that a physical or mental impairment must materially limit, or if untreated must be expected to materially limit, physical or mental functioning.

- Post-Employment Services

Comments: Some commenters requested that the regulations specify a time limit for providing post-employment services following the achievement of an employment outcome. Other commenters opposed the availability of post-employment services for purposes of assisting an individual to advance in employment. Finally, several commenters recommended that the definition enable individuals to receive post-employment services in order to maintain, regain, or advance in employment that is consistent with the individual's informed choice.

Discussion: The Secretary believes that it would be inappropriate to establish an absolute time limit after which post-employment services would be unavailable. DSUs are responsible for determining on a case-by-case basis whether an eligible individual who has achieved an employment outcome requires post-employment services in accordance with the definition in the regulations. As stated in the note following the proposed definition, post-employment services are available to meet rehabilitation needs that do not require a complex and comprehensive provision of services and, therefore, should be limited in scope and duration. If the DSU determines that an individual requires extensive services or requires services over an extended period of time, then the DSU should consider beginning a new rehabilitation effort for the individual, starting with a redetermination of whether, under current circumstances, the individual is eligible under the VR program.

The Secretary emphasizes that post-employment services are available if the DSU determines that the services are necessary to enable an individual to advance in employment consistent with the individual's strengths, resources, priorities, concerns, abilities, capabilities, and interests. Section 103(a)(2) of the Act specifically authorizes the provision of post-employment services for purposes of assisting an individual to maintain, regain, or advance in employment.

The Secretary agrees that the provision of post-employment services must be consistent with the individual's informed choice. However, the Secretary believes that it is unnecessary to add informed choice as an element in the definition of ''post-employment services'' because informed choice is specifically identified as a condition that applies to the provision of any VR service, including post-employment services, under § 361.48(a).

Changes: None.

- Substantial Impediment To Employment

Comments: The majority of commenters supported the definition of ''substantial impediment to employment'' in the proposed regulations. However, some commenters opposed the proposed definition on the basis that it requires only that an impairment hinder the individual from preparing for, entering into, engaging in, or retaining employment. These commenters recommended that the Secretary reinstate the standard from the draft regulations that an impairment must prevent the individual from employment in order for it to constitute a substantial impediment to employment.

Discussion: An individual's disability must result in a substantial impediment to employment for the individual to be found eligible under the VR program (see § 361.42(a)). The Secretary believes that the proposed definition establishes the appropriate standard for determining whether the individual's impairment causes a substantial impediment to employment when read in conjunction with the remaining eligibility requirements in § 361.42(a). This standard does not extend eligibility under the program to individuals with disabilities who do not experience material functional limitation or who do not need VR services to obtain appropriate employment since these individuals would not meet the criteria in § 361.42(a). On the other hand, the Secretary believes that requiring that an impairment prevent the individual from employment is too stringent and would exclude from the program those individuals who are underemployed and who need VR services to obtain new employment that is consistent with their abilities and capabilities.

Changes: None.

- Supported Employment

Comments: One commenter suggested that, given the requirement in the proposed regulations that limits competitive employment outcomes to those in which individuals earn at least the minimum wage, competitive employment should not be a required element of supported employment. Another commenter stated that an individual in a supported employment setting should be viewed as competitively employed as long as the individual earns at least the minimum wage at the time of transition to an extended services provider rather than at the time of initial placement in supported employment.

Discussion: Section 7(18) of the Act defines supported employment as competitive employment in an integrated setting with ongoing support services. Thus, individuals in supported employment shall earn at least the minimum wage consistent with the definition of competitive employment in the final regulations. The Secretary agrees, however, that the minimum wage requirement applies to individuals in supported employment at the time the individual has made the transition from support provided by the DSU to extended services provided by an appropriate State or private entity.

Changes: None.

- Transitioning Student

Comments: Some commenters were concerned that omitting the term applicant from the definition of ''transitioning student'' would mean that students with disabilities who apply for VR services might not be evaluated for program eligibility. In addition, some commenters stated that the term ''transitioning student'' is confusing and is inappropriately used in

other sections of the proposed regulations, specifically § 361.22 (Cooperation with agencies responsible for transitioning students).

Discussion: The proposed regulations defined ''transitioning student'' as a student who is eligible under the VR program and is receiving transition services. The Secretary believes that transition services, which are authorized under section 103(a)(14) of the Act and defined in § 361.5(b)(47) of the final regulations, are limited to those services identified in an eligible student's IWRP that promote or facilitate the accomplishment of long-term rehabilitation goals and intermediate rehabilitation objectives. Because assessment services are provided prior to the development of an IWRP and, therefore, are not transition services, student applicants under the program were not included within the proposed definition of ''transitioning student.'' Nevertheless, this interpretation does not alter the responsibility of DSUs to evaluate student applicants for eligibility for VR services. As with any individual with a disability, DSUs shall promptly handle a referral of a student for VR services, evaluate the student following application for services, and determine the student's eligibility under the program within 60 days after the application is submitted.

The Secretary agrees that the definition of the term ''transitioning student'' in the proposed regulations is confusing, as evidenced by the previous comments questioning the DSU's responsibility with regard to student applicants. Other commenters were confused by § 361.22(b) of the proposed regulations, which referred to students with disabilities who are not receiving special education services as ''transitioning students.'

Changes: The Secretary has eliminated the definition of the term ''transitioning student'', which is not defined in the Act, from the final regulations and has replaced that term in the regulations with the term ''student with a disability,'' which includes students who are receiving special education services and students who are not.

- Transportation

Comments: One commenter requested that the regulations clarify that transportation is a support service. Other commenters opposed the example following the definition that identified the purchase and repair of vehicles as a possible transportation expense. These commenters stated that adherence to this example would severely deplete DSU resources.

Discussion: ''Transportation'' is defined in both the proposed and final regulations as travel and related expenses that are necessary to enable an applicant or eligible individual to participate in a VR service. The Secretary believes that it is clear from this definition that transportation is not a stand-alone service but must be tied to the provision of other services identified in an IWRP.

The Secretary emphasizes that the examples provided under this definition, like all examples throughout the regulations, are provided solely for purposes of illustration and guidance and are not intended to substitute for DSU determinations in individual cases. Accordingly, the example opposed by some commenters neither requires nor encourages DSUs to purchase or repair vehicles. The example states only that the purchase or repair of vehicles is authorized as a transportation expense in those limited circumstances in which the DSU determines that provision of this service is necessary for an individual to participate in a VR service and is consistent with DSU policies that govern the provision of services. Appropriately developed DSU policies covering the nature and scope of services dictate the extent to which any service, including transportation, can be provided.

Changes: None.

§ 361.10 Submission, approval, and disapproval of the State plan.

Comments: None.

Discussion: The Secretary has revised the requirements governing the duration of State plans to reflect recent amendments to section 436 of the General Education Provisions Act (GEPA). Section 436 of GEPA, which applies to Rehabilitation Act programs, authorizes the Secretary to establish a State plan period that is longer than the standard three-year period specified in section 101(a) of the Rehabilitation Act and § 361.10(e) of the proposed regulations. Although RSA will continue to require the submission of a new State plan every three years, the regulations now permit RSA to establish a State plan period other than the regular three-year period if circumstances warrant. For example, RSA used this statutory authority in FY 1996 to extend for a fourth year the State plan covering FYs 1994 through 1996 in order to allow these final regulations to become effective before requiring submission of a new State plan. The flexibility afforded RSA through this regulatory change also obviates the need for § 361.10(h) of the proposed regulations, which would have permitted the Secretary to require an interim State plan covering less than three years following a reauthorization of the Act and prior to the publication of final regulations.

Changes: The Secretary has amended § 361.10(e) to state that the State plan must cover a multi-year period as determined by the Secretary. In addition, § 361.10(h) of the proposed regulations has been deleted from the final regulations.

§ 361.13 State agency for administration

Comments: Some commenters opposed the elimination of the requirement from the draft proposed regulations that the State plan describe the organizational structure of the State agency and its organizational units. These commenters stated that the absence of this description in the State plan would make it impossible for RSA to determine whether each DSU operates at a level comparable to that of other organizational units within the State agency. Other commenters recommended, consistent with requirements in the draft proposed regulations, that the final regulations authorize the designated State agency to define the scope of the program and direct its administration without external administrative controls. Additionally, in response to the Secretary's request in the NPRM, some commenters identified additional program functions that were not included in the proposed regulations for which the DSU shall be responsible in order to meet the statutory requirement in section 101(a)(2)(A) that it be responsible for the VR program. The additional functions identified by the commenters (determinations of whether an individual has achieved an employment outcome; policy development; and administrative control of VR funds) were specified in the draft proposed regulations. Finally, some commenters stated that the requirement in the proposed regulations that at least 90 percent of DSU staff shall be employed full time on rehabilitation work was unduly restrictive.

Discussion: This section of the proposed regulations was significantly revised under the Department's Principles for Regulating in an effort to reduce the paperwork requirements imposed on State agencies. For example, the Secretary proposed to remove from current regulations the requirement that the State plan describe the organizational structure of the State agency and its organizational units

because the Secretary considered the requirement unduly burdensome. The Secretary intended to reduce the paperwork burden on State agencies in developing their State plans and to emphasize the underlying administrative responsibility of States by relying on an assurance, required by statute, that if the State agency is required to have a vocational rehabilitation unit, the unit is located at an organizational level comparable to other organizational units within the State agency. The Secretary does not believe that continuing to require by regulations that an organizational description be included in the State plan would necessarily ensure that a DSU actually operates at a level comparable to that of other units within the State agency. Moreover, the Secretary believes that determinations as to whether a State agency meets the organizational requirements in this section, including whether the State unit operates at a comparable level to that of other State entities, can be better addressed by RSA through its monitoring process.

In an effort to reduce regulatory burden and increase State flexibility in accordance with the Department's Principles for Regulating, the Secretary also proposed to remove from current regulations the requirement that a designated State agency that has as its major function vocational rehabilitation or vocational and other rehabilitation of individuals with disabilities shall ''have the authority, subject to the supervision of the Governor, if appropriate, to define the scope of the program within the provisions of State and Federal law and to direct its administration without external administrative controls.'' This non-statutory requirement applies under current regulations to only one of the three designated State agency options. The Secretary believes, however, that a State should have the same authority to review or oversee the administration of its VR program regardless of the option under which it chooses to organize its agency. Elimination of this requirement will enable a State to locate and administer its vocational rehabilitation program within the limits permitted by statute without being influenced by the existence or non-existence of varying levels of control outside of the DSU.

In the preamble to the proposed regulations, the Secretary solicited public comment on whether the regulations should expand or otherwise clarify essential program functions for which the DSU shall be responsible in order to meet the statutory requirement in section 101(a)(2)(A) of the Act that it be responsible for the VR program. Consistent with current regulations, the proposed regulations specified that the DSU shall be responsible for determinations of eligibility, development of IWRPs, and decisions regarding the provision of services. The Secretary interprets this non-delegation provision to mean that the DSU shall carry out these functions or activities using its own staff. While some commenters believed that States should have the flexibility to delegate responsibility for other programmatic functions to State entities other than the DSU, the overwhelming majority of commenters stated that the additional functions that were identified in the draft regulations (determinations that service recipients have achieved appropriate employment outcomes, the formulation and implementation of program policy, and the allocation and expenditure of program funds) must be carried out by the DSU to ensure that the program is administered properly. In light of the public comment received, the Secretary agrees that responsibility for these additional functions must be retained by the DSU to ensure that State agencies that consolidate staff to administer multiple State and federally funded programs do not entrust these key VR programmatic decisions to individuals who lack experience in meeting the needs of individuals with disabilities. Moreover, the Secretary believes that the benefits derived from DSU retention of these functions—enhanced program efficiency and effectiveness—outweigh any costs that may be associated with the non-delegation requirements in the final regulations.

The Secretary does not believe that the proposed requirement that at least 90 percent of the designated State unit staff shall work full time on the rehabilitation work of the organizational unit is unduly restrictive. This provision means that if the organizational unit provides other rehabilitation services, in addition to vocational rehabilitation, the 90 percent staffing requirement applies to all unit staff providing rehabilitation services, not to just the vocational rehabilitation staff. ''Other rehabilitation'' includes, but is not limited to, other programs that provide medical, psychological, educational, or social services to individuals with disabilities. Although some commenters believed the 90 percent staffing requirement sets too restrictive a standard, the Secretary believes that this requirement is consistent with the statutory requirement in section 101(a)(2)(A)(iii) of the Act that ''substantially all'' of the DSU's staff shall work on rehabilitation and with RSA's longstanding interpretation of ''substantially all'' to mean 90 percent.

Changes: The Secretary has revised § 361.13(c) by adding three functions—determination that an individual has achieved an employment outcome, formulation and implementation of program policy, and allocation and expenditure of program funds—that must be carried out by the DSU.

§ 361.15 Local administration

Comments: One commenter requested clarification of the requirement that each local agency administering the program be ''under the supervision of the DSU.''

Discussion: Section 7(9) of the Act defines the term ''local agency'' as a local governmental unit that has an agreement with the designated State agency to conduct the VR program in accordance with the State plan. Accordingly, the requirement in this section that each local agency is subject to the supervision of the DSU means that the DSU is responsible for ensuring that the program is administered in accordance with the State plan. This provision does not require the DSU to supervise the day-to-day operations of each local agency's program staff.

Changes: For purposes of clarification, the Secretary has revised § 361.15 to add a cross-reference to the regulatory definition of ''sole local agency.'' The Secretary has also made technical changes to the citations of authority for this section.

§ 361.16 Establishment of an independent commission or a State Rehabilitation Advisory Council

Comments: One commenter requested clarification of the scope of the proposed requirement that the State plan summarize annually the advice provided by the Council.

Discussion: Section 101(a)(36)(A)(iii) of the Act requires the DSU to include in its State plan or amendment to the plan a summary of advice provided by the Council. Accordingly, § 361.16(a)(2)(iv) of the regulations requires that the State plan ''annually summarize the advice provided by the Council.'' This ''annual'' requirement means that any State plan submission, whether a new three-year plan or an annual amendment to an existing plan, must include, as appropriate, a summary of the advice provided by the Council on the new plan or the plan amendment. Thus, a summary of the advice provided by the Council on the entire plan must be submitted once every three years in conjunction with

the DSU's new, three-year State plan. During the interim between new plans, the DSU shall summarize the advice provided by the Council on the amendments to the existing plan and submit that summary in conjunction with its annual submission of amendments to the plan. Annual amendments to the plan include any amendment generated by a change to a State policy or practice that is reflected in the current State plan, as well as those amendments that are required by the Act or these regulations. Consistent with the general requirement in section 101(a)(36)(A)(iii), this section also requires the DSU to annually summarize the advice provided by the Council on matters other than those addressed in the State plan. A summary of the advice provided by the Council on these issues should be included also in the annual summaries.

Changes: None.

§ 361.18 Comprehensive system of personnel development

Comments: Some commenters questioned the authority for requiring the involvement of the State Rehabilitation Advisory Council in the development of the State agency's personnel standards, whereas other commenters supported a role for the Council in this area. Some commenters sought clarification of what it means for the Council to be ''involved'' in the development of personnel standards. Additional commenters sought an expanded role for the Council that would involve it in the formulation of other aspects of the State agency's comprehensive system of personnel development in addition to the State agency's personnel standards.

Some commenters stated that the data collection requirements in paragraph (a) of this section are unduly burdensome and should be eliminated.

A number of commenters opposed the authorization of State personnel requirements as comparable requirements upon which a State agency could develop its personnel standards under paragraph (c) of this section. These commenters stated that a State agency's personnel standards should be based solely on the licensing and certification requirements applicable to the profession in which DSU employees provide VR services in order to ensure that DSU personnel are ''qualified'' within the meaning of the Act. Similarly, several commenters opposed the use of ''equivalent experience'' as a substitute for academic degrees in the definition of ''highest requirements in the State* * *'' under paragraph (c) of this section. One commenter stated that the personnel standards developed by State agencies under this section should be prospective only and that agencies should be permitted to retain current DSU personnel who do not meet the ''highest requirements in the State.'' In addition, some commenters recommended that the regulations specifically provide for DSU employment for individuals who, due to the existence of their disability, are unable to satisfy certification or licensure standards applicable to a particular profession. As an example, these commenters stated that, historically, individuals who are blind have been excluded on the basis of their disability from obtaining necessary certification to teach orientation and mobility to other blind individuals even though they are fully qualified to work in that profession.

Some commenters believed that the regulations should require that DSU staff receive mandatory training in all of the areas identified in paragraph (d)(2) of this section. Paragraph (d)(2) listed examples of training areas (e.g., the Americans with Disabilities Act and the Individuals with Disabilities Education Act (IDEA)) that State agencies, at their discretion, may incorporate into their staff development systems.

Several commenters opposed the statement in the preamble to the proposed regulations that supported a DSU's use of family members and community volunteers for purposes of communicating in an applicant's or eligible individual's native language. The commenters believed that the availability of family members or volunteers should not relieve the State agency of its responsibility to hire qualified personnel who are able to meet the communication needs of individuals with disabilities. One commenter asked whether the State agency's responsibility to employ persons who can address the communication needs of applicants and eligible individuals means that the State agency shall include sign-language interpreters among its personnel.

Finally, one commenter stated that the number of individuals that a rehabilitation counselor assists in achieving an employment outcome should not be considered as a factor in the evaluation of the rehabilitation counselor's performance under paragraph (f) of this section.

Discussion: The Act requires that the Council generally advise the State unit in connection with the carrying out of its responsibilities. In addition, the Council is required to advise the State agency on issues affecting the development of the State plan. Because an effective system of personnel development is an essential part of the State plan and a critical element to the success of The State Vocational Rehabilitation Services Program, the Secretary believes it is necessary for the Council to be involved in the development of key aspects of the State agency's personnel development system. Specifically, the Secretary agrees with the commenters who stated that the Council should provide advice to the State agency in connection with the development of the recruitment, preparation, and retention plan under paragraph (b) of this section; staff development policies and procedures under paragraph (d) of this section; and the performance evaluation system under paragraph (f) of this section; as well as in the development of personnel standards under paragraph (c) of this section, as was stated in the proposed regulations.

The Secretary emphasizes that this section of the regulations is not intended to expand or alter the role of the Council beyond the advisory role contemplated by the Act, but only to identify those areas of personnel development in which the Council must be involved in an advisory capacity. The Secretary believes that to fulfill its advisory role, the Council, at a minimum, must be afforded an opportunity to review and comment on relevant plans, policies, and procedures prior to their implementation. This ''opportunity for review and comment'' is necessary to ensure that the Council plays a meaningful, although advisory, role in the development of a system that ensures an adequate supply of qualified DSU personnel.

The data system and data collection requirements specified in paragraph (a) of this section are statutorily required. However, the Secretary emphasizes that the regulations require only that the State plan include a description of the system used to collect the data on personnel needs and personnel development and do not require the State to submit the actual data to the Secretary.

The Secretary agrees with those commenters who stated that the State agency's personnel standards must be based solely on existing licensing or certification requirements applicable to the profession in which DSU employees provide VR services. The Secretary interprets section 101(a)(7)(B) of the Act to permit DSUs to base their personnel standards on other ''comparable'' requirements only if certification or licensing requirements applicable to a particular profession do not exist. This interpretation is consistent with the

statute's emphasis on qualified personnel and with the requirement in the Act that State agencies develop personnel standards that are based on the ''highest requirements in the State.'' State personnel requirements may be used as ''comparable requirements'' by the State agency only in those very limited instances in which there is no national or statewide certification or license that applies to the professional or paraprofessional providing VR services (e.g., case aides). Under those circumstances, State personnel requirements may, in fact, represent the highest requirements in the State for the particular profession.

The proposed regulations authorized States to base the highest personnel standards in the State on equivalent experience, as well as on academic degrees, in an effort to stress the significance of relevant work experience and to expand the pool from which qualified personnel can be selected. The overwhelming majority of commenters on this issue, however, asserted that the use of ''equivalent experience'' as a substitute for academic degrees for purposes of meeting the ''highest requirements in the State * * *'' significantly weakened the Act's focus on qualified personnel. In light of these comments, the Secretary agrees that the ''highest requirements in the State'' should be limited to the highest entry-level academic degree needed for a national or State license or certification in order to ensure that the DSU employs those professionals who are most capable of assessing the specialized needs of individuals with disabilities and addressing those needs through an appropriate provision of VR services. The Secretary recognizes the extent to which the qualified personnel standard in the Act would be undermined if States chose to ignore widely recognized, nationally approved or State-approved licensing standards and to employ less qualified individuals on the basis of ''equivalent experience.''

The Secretary interprets the Act and regulations to permit State agencies to retain current DSU personnel who do not meet the ''highest requirements in the State.'' This position is consistent with paragraph (c)(1)(ii) of this section, which requires the State agency to describe the steps it plans to take to retrain or hire personnel to meet standards that are based on the highest requirements in the State if the State's current standards are not based on the highest requirements in the State.

The Secretary recognizes the concerns of those commenters who sought to safeguard DSU employment opportunities for individuals who, because of their disability, are prohibited from obtaining the license or certification applicable to their particular profession. To the extent that certification and licensing requirements are discriminatory on the basis of disability, these issues should be addressed as compliance issues under section 504 of the Act and the ADA. Nevertheless, the Secretary is cognizant of the particular difficulty experienced by blind individuals who, historically, have been excluded on the basis of their disability from becoming certified as orientation and mobility instructors. The Secretary emphasizes that these regulations do not inhibit DSUs or other VR service providers from hiring blind individuals as orientation and mobility teachers even though those individuals may not meet current certification requirements. To the extent that a DSU employs blind individuals who do not meet the ''highest requirements in the State'' applicable to the orientation and mobility profession, the State agency's plan under paragraph (c)(1)(ii) of this section must identify the steps the agency plans to take to assist employees in meeting those requirements. In this regard, the Secretary is supporting a national project to develop alternative certification standards for orientation and mobility instructors in order to ensure that individuals who are blind can meet necessary certification standards within the timeframe outlined in the DSU's plan under paragraph (c)(1)(ii) of this section.

The Secretary does not believe it is prudent to make the training areas identified in paragraph (d) of this section mandatory for all staff employed by each DSU. The Secretary believes that the specific training areas for staff development adopted by a State unit must be based on the particular needs of that State unit. Thus, the final regulations, like the proposed regulations, identify specific training areas as examples that State agencies may incorporate into their staff development systems in light of the DSU's needs.

Paragraph (e) of this section requires the State unit to describe in the State plan how it includes among its personnel or obtains the services of—(1) Individuals able to communicate in the native languages of applicants and eligible individuals who have limited English speaking ability; and (2) Individuals able to communicate with applicants or eligible individuals in appropriate modes of communication. Personnel under the first requirement may include State agency staff, family members of an applicant or eligible individual, community volunteers, and other individuals able to communicate in the appropriate native language. However, the Secretary agrees that a DSU cannot institute an across-the-board policy of using family members or volunteers as a substitute for addressing the communication needs of individuals with limited English proficiency through the use of DSU staff or contract personnel. DSUs shall be prepared to address the individual communication needs of each applicant or eligible individual it serves. In addition, the Secretary believes that the DSU is responsible for employing or obtaining the services of sign-language interpreters, which fall within the definition of ''appropriate modes of communication'' in § 361.5(b)(5), to the extent necessary to meet the communication needs of individuals who are deaf.

The Secretary believes that in evaluating a rehabilitation counselor's performance, States should not focus primarily on the number of individuals that the counselor has assisted in achieving an employment outcome. At most, the number of employment outcomes for which the counselor is responsible should be considered as one of many factors in the assessment of the counselor's performance. The Act requires that the State's performance evaluation system facilitate the accomplishment of the policies and procedures outlined in the statute, including the policy of serving, among others, individuals with the most severe disabilities. Thus, counselors should be evaluated on the basis of their efforts in advancing the purposes of the program and, more precisely, on the basis of their performance in serving the most severely disabled. The Secretary notes the following passage from the report of the Senate Committee on Labor and Human Resources, which was also referenced in the preamble to the proposed regulations, to further support this position: ''The Committee is concerned that in some States, procedures used for evaluating performance of counselors may have the unintended consequence of providing a disincentive to serve individuals with the most severe disabilities and those clients requiring complex services.'' The performance evaluation system required under the Act and included in the regulations is designed to address these disincentives.

Changes: The Secretary has amended § 361.18 to require that the State Rehabilitation Advisory Council must be afforded an opportunity to review and comment on the following aspects of the State agency's comprehensive system of personnel development: The

plan for recruitment, preparation, and retention of qualified personnel. Personnel standards. Staff development. The performance evaluation system. In addition, the Secretary has clarified paragraph (c) of this section to permit DSUs to base their personnel standards on comparable requirements (including State personnel requirements) only if national or State-approved or -recognized certification, licensing, or registration requirements applicable to a particular profession do not exist. Finally, the term ''equivalent experience'' has been deleted from the definition of ''highest requirements in the State'' under paragraph (c) of this section.

§ 361.22 Cooperation with agencies responsible for students with disabilities

Comments: Some commenters questioned whether this section requires DSUs to develop policies that enable transitioning students to live independently before leaving school. The commenters stated that the proposed regulations appeared to require DSUs to assist students in living independently while the student continues to receive special education services from an educational agency. Other commenters recommended that the regulations be revised to require the development and completion of the IWRP for a special education student who is eligible for VR services before the student leaves the school system.

Several commenters believed that the elements of formal interagency agreements between State units and educational agencies identified in the proposed regulations should be mandatory for all interagency agreements developed under this section. Another commenter asked whether the regulations require DSUs to enter into formal interagency agreements with each local educational agency within the State.

One commenter opposed the distinction in the proposed regulations between those students who receive special education services and those who do not receive special education services and argued that the requirements governing coordination between educational agencies and State units should apply for both groups of students. Finally, some commenters recommended that the term ''transitioning student'' be replaced by the term ''student with a disability'' for purposes of referring to students who do not receive special education services from an educational agency.

Discussion: The proposed regulations required the DSU to develop plans, policies, and procedures designed to facilitate the transition of special education students from the school setting to the VR program. Specifically, the regulations stated these policies must be designed to facilitate the development and accomplishment of long-term rehabilitation goals, intermediate rehabilitation objectives, and goals and objectives related to enabling a transitioning student to live independently before leaving school. Although these regulatory requirements largely track the statutory requirements in section 101(a)(24) of the Act, the Secretary agrees that clarification is needed.

The Secretary does not believe that the Act places on the DSU the responsibility for assisting a student with a disability to become independent prior to leaving school. However, the Secretary interprets the Act to require that, before a student with a disability who is in a special education program leaves school, the DSU shall plan for that student's transition to the VR program in order to ensure that there is no delay in the provision of VR services once special education services end. This means that the IWRP for each student determined to be eligible under the VR program or, if the designated State unit is operating under an order of selection, the IWRP for each eligible student able to be served under the order, must be completed before the student leaves school and must, at a minimum, be consistent with the rehabilitation goals and objectives, including goals and objectives related to enabling the student to live independently, that were previously identified in the student's individualized education program. The Secretary believes that this position is further supported by the legislative history to the Act, particularly the Report of the Senate Committee on Labor and Human Resources, portions of which are restated in the note following this section of the regulations. Furthermore, the Secretary believes that requiring the development of the IWRP before a VR-eligible student leaves school does not impose any additional costs on the DSU since DSUs are already required to develop IWRPs for eligible individuals, including students with disabilities, if those individuals can be served. More importantly, the Secretary believes that this requirement will improve coordination between the State's special education and VR programs and will ensure that services are not interrupted after an eligible student leaves school.

In the proposed regulations, the Secretary attempted to lessen the paperwork burden on State units by reducing the mandatory content requirements that the draft regulations made applicable to all formal interagency agreements between State units and educational agencies. Accordingly, the proposed regulations required only that interagency agreements identify provisions for determining State lead agencies and qualified personnel responsible for transition services and identify policies and practices that can be coordinated between the agencies. The remaining elements under the draft regulations (identification of available resources, financial responsibilities of each agency, dispute resolution procedures, and other necessary cooperative policies) were discretionary under the proposed regulations. However, most commenters on this section opposed the reduction in required elements and stated that each component is essential for ensuring the appropriate transition of special education students from the school setting to the VR program. Without detailed agreements, the commenters argue, resources may be wasted and key processes may not be delineated, resulting in delays in services once the special education student leaves school. Consequently, each identified element of formal interagency agreements is mandatory for all agreements developed under this section of the final regulations. The Secretary believes this position is consistent with the statutory requirements governing formal interagency agreements in section 101 (a)(11) and (a)(24) of the Act.

In reviewing the regulations since publication of the NPRM, the Secretary identified an additional mandatory element of formal interagency agreements that was inadvertently omitted from the proposed regulations. This additional element implements the requirement in section 101(a)(11)(B) of the Act, which specifies that interagency cooperation between the DSU and other agencies, including educational agencies, must include training for staff of the agencies as to the availability, benefits of, and eligibility standards for vocational rehabilitation services, to the extent practicable.

The Secretary notes that, although the regulations require the DSU to enter into a formal agreement with the State educational agency, it is within the discretion of each State to determine which local educational agencies should be parties to agreements with the DSU.

The Secretary agrees that classifying students who do not receive special education services as ''transitioning students'' is confusing. As stated previously in the preamble analysis of comments on § 361.5(b)(49), the

Secretary believes that replacing all references to ''transitioning students'' in the final regulations with the term ''students with disabilities'' and eliminating the definition of ''transitioning student'' from the final regulations will enable DSUs and educational agencies to more easily refer to, and differentiate between, students with disabilities who are receiving special education services and students with disabilities who are not receiving special education services. Moreover, these changes are consistent with the reference to ''students who are individuals with disabilities'' in section 101 (a)(24) and (a)(30) of the Act.

The Secretary also notes that section 101(a)(30) of the Act warrants the separate treatment that is afforded students with disabilities who are not in special education programs as opposed to those who receive special education services. Paragraph (b) of this section implements this statutory provision by requiring DSUs to develop and implement policies for providing VR services to students with disabilities who do not receive special education services.

Changes: The Secretary has revised § 361.22 to clarify that DSU policies must provide for the development and completion of the IWRP for each student with a disability determined to be eligible for vocational rehabilitation services before the student leaves the school setting. This section has been revised further to expand the number of mandatory elements, including staff training to the extent practicable, that must be included in formal interagency agreements between DSUs and educational agencies. The Secretary also has revised this section by replacing the term ''transitioning student'' with the term ''student with a disability.'' Finally, the Secretary has expanded the note following this section in order to highlight the emphasis in the Act on the timely provision of VR services to special education students.

§ 361.23 Cooperation with other public agencies

Comments: None.

Discussion: The Secretary wishes to clarify the requirements governing interagency cooperation between State units and other public agencies that provide rehabilitation services to individuals with disabilities. Section 361.23(b)(3) of the proposed regulations would have required that all types of interagency cooperative initiatives developed pursuant to this section meet certain requirements. However, consistent with section 101(a)(11) of the Act, the Secretary wishes to clarify that the requirements specified in paragraph (b)(3) of this section (e.g., identification of policies that can be coordinated between agencies, description of financial responsibility of each agency, and procedures for resolving disputes) apply only if the State unit chooses to enter into formal interagency cooperative agreements with other agencies. It is within the discretion of the State to determine how the State unit will cooperate with agencies other than agencies responsible for students with disabilities and to determine whether the requirements identified in paragraph (b)(3) of this section should be addressed if the State adopts cooperative methods other than formal interagency agreements (e.g., interagency working groups).

Changes: The Secretary has revised § 361.23 to clarify that the mandatory policies, practices, and procedures specified in paragraph (b)(3) apply only to formal interagency cooperative agreements developed under this section.

§ 361.27 Shared funding and administration of joint programs

Comments: One commenter supported the proposal to no longer require written agreements for joint programs. The majority of commenters, however, stated that written agreements are necessary to ensure that joint programs are administered consistent with the purposes of the VR program.

Discussion: The proposed regulations removed the current regulatory requirements relating to written agreements for programs involving shared funding and administrative responsibility as part of the effort to reduce paperwork burden on State units and increase State flexibility. The Secretary maintains that it is within the discretion of the State to determine whether the public agencies administering a joint program for providing services to individuals with disabilities shall enter into a formal written agreement. However, the Secretary agrees with the commenters who indicated that DSUs should be accountable for the proper administration of joint rehabilitation programs authorized under section 101(a)(1)(A) of the Act. Accountability will be based on the extent to which joint programs are carried out consistent with the State plan description required by the final regulations. This limited description is much less extensive, and therefore less burdensome to DSUs, than the State plan requirements in the current regulations related to joint programs.

Changes: The Secretary has amended § 361.27 to require that the State plan describe the nature and scope of any joint program to be entered into by the DSU, including the services to be provided, the respective roles of each participating agency in the provision of services and in the administration of the services, and the share of the costs to be assumed by each agency.

§ 361.29 Statewide studies and evaluations

Comments: One commenter requested that DSUs be required to conduct a comprehensive assessment of the rehabilitation needs of individuals with severe disabilities every five years rather than every three years as was specified in the proposed regulations. Another commenter asked whether the review of outreach procedures to identify and serve underserved populations and the review of the provision of VR services to individuals with the most severe disabilities required under paragraph (a) of this section are to be conducted on an annual or triennial basis. In addition, one commenter questioned the statutory basis for requiring the DSU to analyze the characteristics of individuals determined to be ineligible for VR services and the reasons for the ineligibility determinations.

One commenter stated that requiring the DSU to analyze, as part of its annual evaluation under paragraph (b) of this section, the extent to which the State has achieved the objectives of the strategic plan is unnecessary and duplicative of the requirements in § 361.72. Other commenters stated that it is unduly burdensome to require the submission of summaries or copies of the statewide studies and annual evaluations as attachments to the State plan. Finally, one commenter asked whether the DSU must provide copies of the statewide studies and annual evaluations to the State Rehabilitation Advisory Council.

Discussion: The Secretary believes it is appropriate and necessary that a comprehensive assessment of the rehabilitation needs of individuals with severe disabilities be conducted every three years. This time period is intended to ensure that the DSU conducts the assessment and reviews its results in connection with the development of a new State plan which, in most instances, must be submitted every three years. Moreover, the Secretary believes that each review or assessment identified in the regulations as a minimum component of the DSU's continuing statewide studies must be conducted on a triennial basis in

conjunction with the development of the State plan.

Section 101(a)(9)(D) of the Act requires that the State agency annually provide to the Secretary an analysis of the characteristics of those individuals determined to be ineligible for VR services and the reasons for the ineligibility determinations. This requirement, however, was mischaracterized in the proposed regulations as a statewide study component and should have been identified as an annual reporting requirement to be submitted in the State plan.

The Secretary agrees that the proposed annual evaluation requirement related to the State's achievement of the objectives in its strategic plan is duplicative of the requirements in § 361.72(e) and that the requirement should be deleted from paragraph (b) of this section.

In recognition of the paperwork burden associated with including summaries or copies of the statewide studies and annual evaluations as attachments to the State plan, the Secretary intends to require only that DSUs maintain copies of the studies and evaluations and provide copies to the Secretary upon request. Copies of the studies and evaluations, however, should be provided to the State Rehabilitation Advisory Council so that the Council can meaningfully fulfill its advisory role in connection with the development of those documents as is required under section 105(c) of the Act. Additionally, although this program reporting requirement has been revised, the Secretary notes that, pursuant to section 635 of the Act, State agencies shall submit as part of the supported employment supplement to their State plan a summary of the results of the comprehensive, statewide assessment on the rehabilitation and career needs of individuals with severe disabilities and the need for supported employment services.

Changes: The Secretary has amended § 361.29 to clarify that each mandatory assessment and review identified in paragraph (a) as part of the DSU's continuing statewide studies must be conducted triennially in conjunction with the development of the State plan. In addition, paragraph (a)(3) of this section of the proposed regulations (annual analysis of ineligible individuals and ineligibility determinations) has been changed to a reporting requirement in the State plan and relocated to paragraph (c)(3) in the final regulations. The Secretary also has deleted the analysis of the State's progress in achieving the objectives in the strategic plan from the annual evaluation requirements in paragraph (b) of this section. Finally, the Secretary has revised paragraph (c)(3) of this section to require that the DSU maintain copies of its statewide studies and annual evaluations and make those copies available upon the request of the Secretary. This provision has been relocated to paragraph (c)(4) in the final regulations.

§ 361.33 Use, assessment, and support of community rehabilitation programs

Comments: Some commenters opposed the requirement that vocational rehabilitation services received through community rehabilitation programs must be provided in the most integrated settings possible. Other commenters requested that this section be revised to require the development of a plan for improving existing community rehabilitation programs.

Discussion: Section 102(b)(1)(B) of the Act requires that vocational rehabilitation services, including those provided by community rehabilitation programs, be provided in the most integrated settings possible. Thus, the standard of integration specified in this section is consistent with the Act and with other sections of the regulations governing the provision of services.

The Secretary recognizes that the proposed regulations did not adequately address each statutory requirement in section 101(a) of the Act related to community rehabilitation programs. Consequently, the Secretary believes that this section of the final regulations should be reorganized, revised, and retitled in an effort to more accurately reflect all of these statutory requirements, including the requirement that DSUs develop plans for improving existing programs.

In addition, the Secretary believes that DSUs should be required to describe in the State plan the need to use Federal funds in support of new or existing community rehabilitation programs in light of recent program audit findings indicating that some States have used Federal funds received under the authority for establishing, developing, or improving community rehabilitation programs for purposes other than providing VR services to applicants and eligible individuals. Any paperwork burden or cost associated with this description, the Secretary believes, is significantly outweighed by the need to ensure that program funds used to support community rehabilitation programs are properly expended.

Changes: The Secretary has revised § 361.33 to require that the State plan contain plans for improving existing community rehabilitation programs. In addition, the Secretary has revised this section to require States to describe in the State plan the need to establish, develop, or improve, as appropriate, a community rehabilitation program to provide VR services to applicants and eligible individuals. This requirement is consistent with revisions made to the definition of ''establishment, development, or improvement of a public or nonprofit community rehabilitation program'' in § 361.5(b)(16) to clarify that Federal support of community rehabilitation programs is limited to the provision of services to applicants and eligible individuals under the VR program. Finally, this section has been retitled ''use, assessment, and support of community rehabilitation programs'' and has been reorganized to reflect these three types of requirements.

§ 361.34 Supported employment plan

Comments: One commenter opposed the requirement in the proposed regulations that the DSU submit annual revisions to its supported employment plan as a supplement to its State plan.

Discussion: The Secretary does not intend to require DSUs to annually revise each provision of its supported employment plan and submit those revisions to RSA every year. Section 635(a) of the Act requires that each State submit a State plan supplement for providing supported employment services and ''annual revisions [to] the plan supplement as may be necessary.'' Pursuant to section 635(b)(3) of the Act, however, RSA requires that each year the DSU explain how it will expend its annual allotment of supported employment funds received under section 632 of the Act. Thus, at a minimum, the DSU is required to submit an annual revision to its State plan attachment that describes its plans for distributing section 632 funds for purposes of providing supported employment services to individuals with the most severe disabilities. In addition, the State unit shall provide, on an annual basis, any revisions to its supported employment plan that are necessary to reflect corresponding changes in State policies or practices regarding the provision of supported employment services.

Changes: The Secretary has revised § 361.34(b) to clarify that the DSU is required to submit ''any needed'' annual revisions to its supported employment plan.

§ 361.35 Strategic plan

Comments: Two commenters opposed the requirement that the strategic plan be submitted as a supplement to the State plan.

Discussion: Section 120 of the Act requires that each State develop a strategic plan for developing, expanding, and improving VR services and submit the plan to RSA. In addition, section 101(a)(34)(A) of the Act requires that the State plan include an assurance that the State has developed and implemented a strategic plan. The statute, however, does not authorize the Secretary to approve or disapprove the strategic plan. Consistent with these requirements, the Secretary does not consider the strategic plan to be part of the State plan that is subject to the approval of the Secretary, but is requiring the DSU to submit the strategic plan and the State plan at the same time for purposes of administrative efficiency.

Changes: The Secretary has amended § 361.35(b) to require that the DSU submit the strategic plan at the same time that it submits the State plan.

§ 361.37 Establishment and maintenance of information and referral programs

Comments: The majority of commenters on this section of the proposed regulations supported the new provision that would authorize State units operating under an order of selection to establish an expanded information and referral program for eligible individuals who do not meet the order of selection criteria for receiving VR services. Some commenters did seek additional clarification as to whether counseling and guidance services are authorized or whether an IWRP is to be developed for individuals served under the expanded program. One commenter requested that the Secretary define the term ''referral for job placement.'' Other commenters requested that DSUs be permitted to count as successful outcomes those individuals who obtain employment following a referral by the DSU. A limited number of commenters believed the expanded program to be inconsistent with the order of selection requirements in the Act.

Discussion: The expanded information and referral program authorized in this section is intended to address the concerns of some State units operating under an order of selection. These State units believe they should be permitted to provide limited non-purchased services to eligible individuals who do not qualify for services under the State unit's priority categories. An order of selection is required under section 101(a)(5)(A) of the Act if a State unit determines that it is unable to provide services to all eligible individuals. Authorization of an expanded information and referral program under this section is consistent with the Act as long as the DSU, in carrying out the expanded program, does not use funds needed to provide VR services to eligible individuals who are able to be served under the State unit's order of selection. An assurance to this effect is a key condition to operating an expanded program. In addition, the Secretary expects a DSU to expend a limited level of resources (e.g., staff time and equipment) in support of its referral program. For example, a DSU staff member can administer the expanded program only to extent that the staff person is not needed to provide VR services to eligible individuals who qualify for services. This limited commitment of resources must be reflected in the DSU's description of its program under paragraph (c)(2) of this section.

The Secretary agrees that it is appropriate to provide counseling and guidance services under the expanded referral program. Authorization of these services further distinguishes the expanded program from the general information and referral functions performed by the DSU for any individual with a disability. However, DSUs are not expected to develop IWRPs for eligible individuals receiving expanded information and referral services since these individuals do not meet the DSU's criteria for receiving services under its order of selection and, therefore, cannot receive the full range of services under section 103(a) of the Act to address their rehabilitation needs.

The Secretary believes that the term ''referral for job placement'' is self-explanatory. The expanded program authorizes DSUs to refer individuals to various public and private placement agencies in the community that may be able to assist the individual in obtaining employment.

Although the proposed regulations had required DSUs to track the results of its expanded information and referral program, the final regulations make this a State option. For those DSUs that choose to track and report on individuals who obtain employment following their participation in the expanded information and referral program, the final regulations require that the DSU report to RSA the number of individuals served and the number who obtain employment. However, the Secretary emphasizes that the number of individuals who are assisted, in part, under the expanded information and referral program and who subsequently obtain employment must be identified separately from those individuals who receive full services under an IWRP and achieve an employment outcome under the VR program. Individuals who obtain employment following their receipt of limited counseling, guidance, and referral services through the expanded program are not considered to have achieved an employment outcome under § 361.56 of the regulations.

Changes: The Secretary has revised § 361.37(c) to authorize counseling and guidance services under the DSU's expanded information and referral program. In addition, paragraph (c) of this section has been amended to give the DSU the discretion to determine whether to track the results of its expanded information and referral program.

§ 361.38 Protection, use, and release of personal information

Comments: One commenter questioned whether the regulations authorize the release of personal information to the State Rehabilitation Advisory Council for purposes of evaluating program effectiveness and consumer satisfaction. Other commenters stated that this section should permit applicants or eligible individuals to examine, as well as receive copies of, the information in their record of services.

Some commenters argued that determinations as to whether information is harmful under paragraph (c)(2) of this section should be made by objective third parties rather than DSUs. These commenters were concerned that a conservative interpretation of the term ''harmful'' by a State unit would result in limited access to important information.

Additional commenters requested that applicants and eligible individuals be given unrestricted access to personal information obtained by the DSU from other agencies and organizations. Other commenters sought authorization in this section for the removal of inaccurate or misleading information from the record of services. Finally, some commenters requested clarification of the term ''judicial officer'' in paragraph (e)(4) of this section, which is used in connection with the release of information in response to a judicial order.

Discussion: Paragraph (d) of this section authorizes the release of personal information to entities that evaluate the VR program as long as the evaluation is directly related to the

administration of the program or to the improvement of the quality of life for applicants and eligible individuals. State Rehabilitation Advisory Councils are responsible for evaluating the effectiveness of, and consumer satisfaction with, the State agency and VR services. Because the Council's evaluations are designed to facilitate improvement in the administration of the VR program and in the provision of VR services, personal information may be released to the Council for purposes of carrying out its evaluative functions, provided that the Council safeguards the confidentiality of the information consistent with the requirements in paragraph (d).

The Secretary recognizes that, in some instances, an applicant or eligible individual may need ready access to the information in his or her case record, in addition to copies of the information. The proposed regulations were not intended to foreclose the current regulatory option that permits applicants and eligible individuals to examine the information in their record of services.

The Secretary believes it would be unduly burdensome to require that an objective third party rather than the DSU determine whether information requested by an applicant or eligible individual is ''harmful'' to that individual. Moreover, the Secretary regards any inconvenience resulting from the individual's inability to directly receive ''harmful'' information as minimal since the relevant information must still be provided to the individual, except that it shall be provided through a third party chosen by the applicant or eligible individual. The Secretary also notes that the individual's right under paragraph (c)(2) of this section to choose the person to whom harmful information is released supersedes any conflicting State confidentiality policy developed under paragraph (a)(1) that designates a specific individual to receive harmful information (e.g., medical professional). Nevertheless, if a representative has been assigned by a court to represent the applicant or eligible individual, the harmful information must be released to the individual through the court-appointed representative. This exception is particularly applicable if the applicant or eligible individual is a minor or has limited cognitive capacity.

The Secretary does not believe that there is a basis for requiring that applicants and eligible individuals be given unrestricted access to personal information obtained by the DSU from other agencies and organizations. Release of information developed or compiled by another agency or organization is subject to the conditions established by that entity in accordance with paragraph (c)(3) of this section.

The Secretary recognizes that any applicant or eligible individual would prefer that inaccurate or misleading information be removed from the individual's record of services. On the other hand, the Secretary also believes it would be unduly burdensome to impose, through these regulations, costly and time-consuming due process procedures that would enable an individual to legally challenge the accuracy of the information in his or her file. It is within the discretion of the DSU to determine the extent to which an individual may challenge the information in that individual's record of services. However, the Secretary believes, at a minimum, that applicants and eligible individuals should be given an opportunity to question the accuracy of the information in the individual's record of services and, if unsuccessful in having the information removed, should be permitted to include a statement in the record that identifies the information that the individual considers to be inaccurate.

The Secretary emphasizes that DSUs are not authorized to release personal information in response to a subpoena or other document issued by a party to a dispute or an attorney. Release is authorized only if a judge or other judicial officer orders the State unit to release the information. The term ''judicial officer'' in the proposed regulations was intended to mean any judge, magistrate, or other official who is authorized to decide the merits of, and issue, a court order. The Secretary has clarified this intention in the final regulations.

Changes: The Secretary has expanded paragraph (c)(1) of § 361.38 to require that the DSU make the information in the record of services available for inspection by the applicant or eligible individual. In addition, paragraph (c)(2) has been amended to clarify that if a court has appointed a representative to represent an applicant or eligible individual, then any requested information that is considered harmful to the individual shall be provided to the individual through the court-appointed representative. The Secretary also has expanded paragraph (c) to authorize applicants and eligible individuals to request that misleading or inaccurate information in the individual's record of services be amended and to have the request documented in the individual's file. Finally, paragraph (e)(4) has been clarified to require the release of information in response to an order issued by a judge, magistrate, or other authorized judicial officer.

§ 361.41 Processing referrals and applications

Comments: Some commenters opposed the proposed requirement that the DSU develop timelines for informing individuals referred to the DSU for VR services of its application requirements and for gathering information necessary to assess the individual's eligibility and priority for services. While these commenters viewed the timeline requirements as unduly burdensome, other commenters supported the provision and emphasized the need for DSUs to respond timely to individuals during the pre-application stage.

One commenter stated that authorized extensions of the 60-day time period for determining eligibility should be limited in duration. Other commenters stated that all individuals should be required to complete the DSU's formal application form before the 60-day time period begins to run. Finally, one commenter requested clarification as to whether all individuals must provide information necessary to conduct an assessment for determining eligibility and priority for services before being considered ''to have submitted an application.''

Discussion: The Secretary believes that it is important to retain in the final regulations the requirement that DSUs develop timelines for making good faith efforts to inform individuals referred to the VR program of the DSU's application requirements and to obtain information needed to assess the individual's eligibility and priority for services. The Secretary agrees with those commenters who indicated that these timelines are necessary to ensure that there is no unreasonable delay between the individual's referral and application for VR services. Moreover, this requirement is unlikely to cause DSUs undue burden since many States already have in place timelines for handling referrals. However, the Secretary believes that the development of an appropriate, good faith timeline for processing referrals is a matter of State discretion and that it would be inappropriate to impose in the final regulations a specific Federal time period for this purpose.

Section 102(a)(5)(A) authorizes extensions of the 60-day time period for determining eligibility if (1) exceptional or unforeseen circumstances arise or (2) an extended evaluation of the individual is necessary, which may not exceed 18 months. The Secretary agrees,

however, that extensions due to exceptional or unforeseen circumstances cannot be open-ended but must be limited to a specific time period that is mutually agreed upon by the individual and the DSU.

The Secretary believes it would be unduly restrictive to require in all instances that an individual with a disability complete the DSU's application form before the DSU initiates an assessment for determining eligibility and priority for services. This limitation would be particularly burdensome for individuals in rural areas who may not have ready access to a DSU application form. Although the regulations require the DSU to make its application form widely available throughout the State, the Secretary considers it inappropriate to penalize individuals who are unable to secure an application. Thus, the Secretary maintains that the 60-day time period for determining eligibility begins once the individual (1) has either completed and signed an agency application form or has otherwise requested services and (2) has provided information necessary for the DSU to initiate the assessment. Once an individual or the individual's representative, as appropriate, requests services, it is expected that State units will make good faith efforts to obtain the assessment information as quickly as possible. The Secretary also notes that information needed to initiate the assessment must be provided before the 60-day timeline begins to run, whether the individual has completed an agency application form or has otherwise requested services. Of course, it is essential that the individual remain available during this period to complete the assessment process.

Changes: The Secretary has amended § 361.41 to require that extensions of the 60-day time period for determining eligibility due to exceptional or unforeseen circumstances be limited in duration and that a specific time period be agreed to by the individual and the DSU. In addition, the Secretary has revised this section to clarify that all individuals who have requested VR services, whether through the completion of an agency application or otherwise, shall be available to complete the assessment before the individual is considered to have submitted an application for VR services.

§ 361.42 Assessment for determining eligibility and priority for services

Comments: With respect to the first eligibility criterion, several commenters opposed the standard in the proposed regulations that required qualified personnel ''licensed or certified in accordance with State law and regulation'' to determine the existence of a physical or mental impairment. The commenters further recommended that the regulations permit DSU employees who meet requirements that are ''comparable'' to licensing or certification requirements to determine the existence of obvious physical impairments.

Some commenters sought clarification under the second eligibility criterion that an impairment that hinders an individual from maintaining a job placement constitutes a ''substantial impediment to employment.'' These commenters were concerned that the proposed regulations appeared to limit ''substantial impediments to employment'' to impairments that prevent unemployed individuals from obtaining jobs.

Other commenters recommended that the term ''determine'' be replaced by the statutory term ''demonstrate'' in paragraph (a)(2) of this section, in connection with rebutting the presumption that an individual who has a substantial impediment to employment can benefit in terms of an employment outcome from VR services. Finally, one commenter requested clarification as to whether individuals who qualify for Social Security benefits are presumed eligible for VR services.

Several commenters recommended specific clarifying changes to some of the examples following this section, whereas other commenters opposed the use of examples under this section altogether.

Discussion: The Secretary believes that the personnel standard proposed in connection with the first eligibility criterion is consistent with the Act. The proposed standard was based on the requirement in section 103(a)(1) of the Act, which states that the assessment for determining an individual's eligibility and VR needs must be conducted by qualified personnel. The Secretary interprets the term ''qualified personnel'' under section 103(a)(1) of the Act to refer to personnel who meet the DSU's personnel standards under § 361.18(c) of these final regulations (i.e., national or State-approved certification, licensing, or registration requirements or, if none of these requirements exist, other ''comparable requirements'' that apply to the profession in which the individual provides VR services). Thus, a determination that an individual has a physical or mental impairment, or meets any of the other eligibility criteria in § 361.42(a), must be made by personnel who meet existing licensure, certification, or registration requirements applicable to their profession. Moreover, because DSUs are required under § 361.18(c) to develop personnel standards based on existing certification or licensure requirements, it is expected that DSU personnel who determine the existence of impairments, including obvious physical impairments, will be qualified within the meaning of the Act.

The Secretary agrees that an individual does not have to be unemployed to have a ''substantial impediment to employment.'' A ''substantial impediment to employment,'' as defined in § 361.5(b)(44), includes any impairment that hinders the individual from entering into, engaging in, or retaining employment consistent with the individual's abilities and capabilities. Given that the regulatory definition of the term ''substantial impediment to employment'' clearly recognizes that currently employed individuals may qualify for VR services for purposes of ''retaining'' their employment, the Secretary does not believe it is necessary to revise the second eligibility criterion in paragraph (a)(1)(ii) as the commenters recommended.

Section 102(a)(4)(A) of the Act requires the DSU to presume that an individual can benefit in terms of an employment outcome, unless the DSU can ''demonstrate,'' based on clear and convincing evidence, that the individual is incapable of benefitting in terms of an employment outcome from VR services. The Secretary did not intend to weaken this statutory presumption by using the term ''determine'' in place of the term ''demonstrate'' in the proposed regulations and agrees that the regulations should be changed to track the stronger statutory language.

In addition, the Secretary emphasizes that Social Security beneficiaries are not automatically eligible to receive VR services, but are presumed under section 102(a)(2) of the Act to meet only the first two eligibility criteria under paragraph (a)(1) of this section (i.e., the individual has a physical or mental impairment that constitutes or results in a substantial impediment to employment). Eligibility for services under the Social Security Act also means that the individual is presumed to meet the first element in the definition of ''individual with a severe disability'' under § 361.5(b)(28). The Secretary believes that these limited presumptions were clearly reflected in the proposed regulations.

Although the Secretary believes that most of the examples in the regulations represent useful guidance material, the Secretary agrees that the examples

following this section of the proposed regulations, which had identified six potential applications of the fourth eligibility criterion (an individual requires VR services), should be removed from the final regulations in light of the confusion expressed by commenters and in recognition of the fact that eligibility determinations are highly individualized. The commenters' confusion, the Secretary believes, stems from the possibility that the application of the fourth eligibility criterion may result in different outcomes for individuals with disabilities who face apparently similar circumstances. By removing these examples, the Secretary seeks to avoid causing similar confusion on the part of individual counselors charged with making individual eligibility determinations. Because the examples used elsewhere in the regulations (e.g., permissible expenses under the definitions of ''maintenance'' and ''transportation'') are straightforward applications of clear issues and do not create similar confusion among commenters, the Secretary believes that those examples should be retained in the final regulations.

Changes: The Secretary has amended § 361.42(a)(2) of this section to require a ''demonstration,'' based on clear and convincing evidence, that an individual is incapable of benefitting from VR services in order for the DSU to overcome the presumption that an individual can benefit from VR services. A technical change also has been made to paragraph (a)(1)(iii) to identify more accurately the third eligibility criterion as a ''presumption'' of benefit, not a ''determination'' of benefit. In addition, the Secretary has removed from the final regulations the examples that had followed this section in the proposed regulations of how an individual may or may not meet the final eligibility criterion.

§ 361.43 Procedures for ineligibility determination

Comments: Several commenters stated that DSUs should be required, in all instances, to inform individuals in writing of the DSU's ineligibility determination. These commenters were concerned that the proposed regulations authorized DSUs to inform individuals of ineligibility determinations through an appropriate mode of communication without a written record.

In addition, several commenters indicated that it is unduly burdensome to require DSUs to review all ineligibility determinations within 12 months. These commenters stated that the review of ineligibility determinations should be limited to those determinations that are based on a finding that the individual is incapable of achieving an employment outcome. Other commenters asked that the regulations specify additional bases for not reviewing ineligibility determinations (e.g., that the individual's disability is rapidly progressive or terminal).

Discussion: The proposed regulations incorrectly indicated that DSUs have the option of providing ineligibility notices in writing or through an appropriate mode of communication. The Secretary agrees that, at a minimum, notice of an ineligibility determination and other required information should be provided to the individual in writing and supplemented, as necessary, by other appropriate modes of communication in accordance with the individual's informed choice.

The Secretary agrees with the suggestion to modify the requirements in paragraph (d) of this section governing the review of ineligibility determinations in light of the views expressed by public commenters. The proposed regulations required DSUs to review all ineligibility determinations at least once within 12 months and to review annually thereafter if requested by the individual determinations based on a finding that the individual cannot achieve an employment outcome. In order to reduce the process burden and associated costs on DSUs, however, the Secretary believes that DSUs should be required to review within 12 months, and annually thereafter if requested by the individual, only those ineligibility determinations that are based on a finding that the individual is incapable of achieving an employment outcome. Moreover, an additional exception to this review requirement, which is authorized under the current regulations, should be permitted for situations in which the individual's medical condition is rapidly progressive or terminal. The Secretary believes this narrower interpretation of the review requirements is supported by sections 101(a)(9)(D) and 102(c) of the Act and notes that this position is consistent with the current regulations in 34 CFR 361.35(d). The Secretary also notes that the requirements of this section apply both to ineligibility determinations following an extended evaluation and to ineligibility determinations made after an individual has begun to receive services under an IWRP.

Changes: The Secretary has revised § 361.43 to specify that notice of ineligibility determinations must be provided in writing and must be supplemented, as necessary, by other appropriate modes of communication consistent with the individual's informed choice. For example, a DSU could meet these requirements by providing an ineligibility notice in braille or large print form to an applicant who has a visual impairment. In addition, the Secretary has revised this section to require DSUs to review only ineligibility determinations that are based on a finding that the individual is incapable of achieving an employment outcome. The final regulations also clarify that this review of ineligibility determinations need not be conducted if the individual's medical condition is rapidly progressive or terminal.

§ 361.44 Closure without eligibility determination

Comments: One commenter requested that this section be amended to state that a DSU ''shall not close'' (rather than ''may not close'') an applicant's case prior to making an eligibility determination in order to clarify that the prohibition under this section is mandatory.

Discussion: The Secretary emphasizes that State units are prohibited from closing an applicant's record of services prior to making an eligibility determination unless certain circumstances are evident (e.g., the applicant declines to participate in the assessment, and the DSU has made a reasonable number of attempts to encourage the applicant's participation). The Secretary interprets the phrase ''may not close'' to signify a mandatory prohibition.

Changes: None.

§ 361.45 Development of the individualized written rehabilitation program

Comments: Several commenters stated that the regulations should be strengthened to ensure that the eligible individual's employment goal is consistent with that individual's informed choice. In addition, some commenters opposed requiring DSUs to develop timelines for the prompt development of IWRPs, whereas other commenters supported the timeline requirement as a necessary protection for eligible individuals. Commenters also stated that the DSU should not be required to revise an individual's IWRP to reflect minor changes to services that are already identified in the IWRP.

Discussion: The Secretary agrees that the informed choice of the individual, as well as the individual's strengths, priorities, concerns, abilities, capabilities, and interests, should be considered in determining the individual's employment goal. Addition

of the term ''informed choice'' to the list of factors to be considered under paragraph (a) of this section is also consistent with the consideration of informed choice in connection with the provision of services under § 361.48 and in connection with the achievement of an employment outcome under § 361.56.

The Secretary believes that the proposed requirement that DSUs establish and implement timelines for the prompt development of IWRPs should be retained in the final regulations. The Secretary agrees with those commenters who indicated that these timelines are necessary to guard against unreasonable delays in the development of the IWRP once an individual is determined eligible for VR services. It should also be noted that this section does not require DSUs to apply an arbitrary time limit to the development of all IWRPs, as some commenters had questioned. Instead, DSUs are required to develop general standards that ensure the timely development of IWRPs as long as the standards include timelines that take into account the specific needs of the individual.

Changes in an individual's vocational goal, intermediate objectives, or VR services must be documented through a revision in the IWRP after obtaining the agreement and signature of the individual. The Secretary believes that changing the reference from ''VR needs'' to ''VR services'' will help clarify this provision.

In addition, the Secretary agrees that minor changes to an individual's program of services do not have to be recorded in a revision to the IWRP. This means, for example, that a slight change in the cost of a previously authorized VR service would not warrant a revision to the IWRP. On the other hand, a substantive change to an existing service (e.g., a change in service provider) or the addition of a new service must be documented by a revision. Regardless of whether a particular change to an individual's program necessitates a revision to the IWRP, however, the Secretary expects that the DSU will obtain the agreement of the individual before the change is implemented.

Changes: The Secretary has revised § 361.45 to clarify that the informed choice of the individual must be considered in the development of the IWRP and the identification of a vocational goal. The Secretary also has amended this section to require the DSU to incorporate into the IWRP any revisions necessary to reflect changes to the individual's goal, objectives, or VR services and to obtain the individual's agreement and signature to the revisions.

§ 361.46 Content of the IWRP

Comments: Some commenters on the proposed regulations questioned certain required elements of the IWRP, contending they were inconsistent with the Act and unnecessarily burdensome. Specifically, several commenters questioned the basis for requiring that the long-term vocational goal identified in the IWRP be ''specific.'' Similarly, other commenters stated that intermediate rehabilitation objectives need not be ''measurable.'' Additional commenters opposed requiring a projected date for the achievement of the vocational goal. Several commenters recommended that the record of the DSU's evaluations of individual progress be removed from the IWRP and added to the record of services under § 361.47. Finally, some commenters opposed the requirement that the individual be provided with information concerning the availability and qualifications of alternative service providers.

Discussion: The Secretary believes that the long-term vocational goal must be stated with some specificity in the IWRP in order for it to be meaningful. The Secretary does not intend that the IWRP identify the exact job that the individual intends to obtain, but expects, at a minimum, that the vocational goal be described in terms of a particular type of profession or occupation. For example, ''clerical work'' is a sufficiently detailed vocational goal under this requirement, whereas a vocational goal of ''supported employment'' or ''self-employment'' would be impermissibly vague.

The requirement in the proposed regulations that the intermediate rehabilitation objectives must be ''measurable'' was misplaced and has been eliminated from the final regulations. The use of this term was based on the requirement in section 102(b)(1)(B)(vii) of the Act that the DSU shall develop procedures for evaluating the individual's progress toward meeting the intermediate rehabilitation objectives. The final regulations also clarify that the progress of the individual in satisfying the objectives must be measured periodically by the DSU, but a record of the reviews and evaluations need not be included in the IWRP. These reviews and evaluations, the Secretary agrees, should be maintained as part of the individual's record of services under § 361.47, as some commenters suggested.

The Secretary does not expect DSUs to specify a date certain on which an employment outcome shall be achieved. Thus, the term ''projected date'' for the achievement of the individual's vocational goal in paragraph (a)(4) of this section in the proposed regulations has been replaced by the term ''projected timeframe'' in the final regulations. This provision is intended to ensure that the individual understands how long the rehabilitation process is expected to take.

The Secretary believes that the requirement in this section concerning the individual's description of how information was provided about the availability and qualification of alternative service providers should be removed from the final regulations since it is duplicative of the choice requirements in § 361.52. Section 361.52(b) specifies that the DSU shall provide the individual, or assist the individual in acquiring, information necessary to make an informed choice about VR services and service providers, including information about the qualifications of potential service providers.

Changes: The Secretary has revised § 361.46 by removing the term ''measurable'' from paragraph (a)(2). The Secretary also has replaced the term ''projected date'' in paragraph (a)(4) of this section with the term ''projected timeframe'' in connection with the achievement of the individual's vocational goal. Additionally, the record of reviews and evaluations of individual progress has been removed from paragraph (a)(5) of this section as an IWRP requirement and relocated to § 361.47(h) as a record of services requirement. Finally, the reference in the individual's statement to the availability and qualifications of alternative service providers has been removed from paragraph (a)(6).

§ 361.47 Record of services

Comments: None.

Discussion: In the proposed regulations, the Secretary proposed to delete from the record of services a number of requirements that were considered burdensome or were adequately addressed in other regulatory provisions. In particular, several requirements that were duplicative of IWRP content requirements in § 361.46 were proposed for removal from this section. For the same reason, the Secretary believes that proposed § 361.47(h) should be deleted from the final regulations. This provision would have required documentation in the record of services of the DSU's reasons for terminating services to an individual and, if appropriate, documentation of the

DSU's basis for determining that the individual has achieved an employment outcome under § 361.56. The Secretary believes that further reducing the paperwork burden on DSUs by removing proposed § 361.47(h) is appropriate given that this requirement is adequately addressed by § 361.46(a)(10).

However, in order to ensure that individuals in competitive employment are compensated in accordance with the definition of ''competitive employment'' in § 361.5(b)(10), the Secretary believes that the record of services for those individuals must include documentation that the individual is compensated at or above the minimum wage and receives at least the customary wage and benefit level paid to non-disabled persons performing similar work for the same employer.

Changes: The Secretary has removed from § 361.47 the documentation requirements relating to the termination of services and the achievement of an employment outcome and has added a cross-reference in § 361.46(a)(10) to § 361.56 for additional clarification. In addition, this section has been amended to require that the DSU verify in the record of services that an individual with a disability in competitive employment is compensated at or above the minimum wage and that the individual's wage and level of benefits are not less than that paid by the employer for the same or similar work performed by non-disabled individuals. This new requirement is located in paragraph (i) of this section.

§ 361.48 Scope of vocational rehabilitation services for individuals with disabilities

Comments: Some commenters recommended that this section of the final regulations identify assessment services, counseling and guidance, and rehabilitation technology as mandatory services that the DSU shall provide to all individuals in need of these services. Other commenters opposed limiting counseling and guidance services authorized under this section to ''vocational counseling and guidance.'' Two commenters requested that the final regulations clarify that it is the joint responsibility of the DSU and the individual to secure grant assistance from sources other than VR program funds to pay for training in institutions of higher education. Other commenters recommended that language be added to paragraph (a)(13) of this section to ensure that job search and placement services are not discontinued before an individual achieves the employment outcome specified in the individual's IWRP. One commenter opposed the requirement in paragraph (b) that the State plan descriptions related to the provision of rehabilitation technology and personal assistance services be provided on an annual basis. Another commenter stated that the description of the DSU's strategies for expanding the availability of personal assistance services under § 361.48(b)(3) of the proposed regulations is unduly burdensome and is not required by the Act. Finally, several commenters recommended that the final regulations require, consistent with the Act, a description in the State plan of how assistive technology devices are provided or worksite assessments are made as part of the assessment for determining eligibility and VR needs of the individual.

Discussion: Section 361.48, which implements section 103(a) of the Act, authorizes specific vocational rehabilitation services necessary to address the rehabilitation needs of individuals with disabilities. These services must be included in each DSU's program of VR services and, consistent with § 361.45(a) and § 361.46(a), must be provided to an eligible individual if the service is needed to achieve the intermediate rehabilitation objectives or vocational goal included in the individual's IWRP. In addition, § 361.42 requires DSUs to conduct an assessment for determining eligibility and priority for services for each applicant and to provide rehabilitation technology devices and services during the assessment if needed to determine eligibility. In light of these requirements, the Secretary does not believe it is necessary to identify assessment services, counseling and guidance, and rehabilitation technology as mandatory services under this section of the regulations, as some commenters had recommended. The commenters correctly noted that section 101(a)(8) of the Act exempts these services from the required search for comparable service and benefits. Regardless of whether a particular service is subject to the comparable service and benefits requirements, however, the regulations clearly require DSUs to conduct an assessment for determining eligibility and priority for services for each applicant and to ensure that each eligible individual receives needed VR services in accordance with the individual's IWRP.

Those commenters who opposed changing the term ''counseling and guidance'' to ''vocational counseling and guidance'' in the proposed regulations were concerned that the change would limit the scope of counseling and guidance currently provided under the program. Specifically, the commenters were concerned that this term would prohibit the provision of personal adjustment counseling and other related counseling services currently provided by vocational rehabilitation counselors—services that are necessary to address issues confronted by individuals with disabilities seeking employment, including issues associated with adjusting to environmental barriers, medical issues, family and social issues, and other related issues that are not considered ''vocational.'' However, the use of the term ''vocational counseling and guidance'' in the proposed regulations was not intended to limit the scope of the counseling and guidance that an individual may need in order to achieve a vocational goal. Rather, the term ''vocational counseling and guidance'' was intended merely as a means of distinguishing discrete, therapeutic counseling and guidance services that are necessary for an individual to achieve an employment outcome from the general supportive role that the VR counselor performs throughout the rehabilitation process in connection with any service. Discrete, therapeutic counseling and guidance services include personal adjustment counseling, counseling that addresses medical, family, or social issues, vocational counseling, and any other form of counseling and guidance that is necessary for an individual with a disability to achieve an employment outcome. The Secretary agrees that changing the term ''vocational counseling and guidance'' to ''vocational rehabilitation counseling and guidance'' in the final regulations, as some commenters suggested, better reflects this broad interpretation. Like the term used in the proposed regulations, this change does not affect the general counseling and guidance relationship that exists between the counselor and the individual during the entire rehabilitation process.

The Secretary agrees that the DSU and the individual share a joint responsibility to secure grant assistance from sources other than VR program funds in order to pay for training in institutions of higher education. This position is consistent with RSA's longstanding policy relating to the requirement that available comparable services and benefits be located and used before a DSU expends program funds to pay for VR services. Under this policy, DSUs are responsible for identifying providers of comparable services and benefits and for assisting

eligible individuals in obtaining those resources. The individual, on the other hand, is responsible for applying for appropriate comparable services and benefits identified by the DSU. The Secretary believes that this policy is equally applicable to the requirement in section 103(a)(3) of the Act that maximum efforts be made to secure alternative sources to pay for training in institutions of higher education. Accordingly, it is expected that DSUs will locate alternative funding sources to support the cost of training in colleges and universities and, to the extent necessary, assist eligible individuals in obtaining this assistance. It is further expected that an individual in need of training in a higher education institution will pursue and apply for alternative funding sources identified by the DSU.

Commenters on § 361.48(a)(13) of the proposed regulations were concerned that DSUs could terminate job placement services anytime an eligible individual obtains a job even if the job is inconsistent with the vocational goal identified in the individual's IWRP. As a result, these commenters recommended that this section specifically authorize job search and placement assistance until the individual achieves an employment outcome that is consistent with his or her abilities, capabilities, interests, and informed choice. The Secretary believes, however, that the commenters' concerns are fully addressed by § 361.56 of the regulations. That section contains the requirements for determining whether an individual has achieved an employment outcome, including the requirement in § 361.56(b) that the employment outcome be consistent with the individual's abilities, capabilities, interests, and informed choice. Thus, termination of services on the basis that the individual has achieved an employment outcome is dependent, in part, upon whether the job placement is appropriate for the individual in accordance with § 361.56(b). If an eligible individual receiving VR services is underemployed (i.e., placed in a job that is not consistent with the individual's abilities, capabilities, interests, and informed choice), the DSU may not discontinue services, including job search and placement assistance, that the individual needs in order to achieve the vocational goal specified in the individual's IWRP.

In an effort to further reduce the paperwork burden and associated costs on DSUs, the Secretary has made two regulatory changes to paragraph (b) of this section that were recommended by commenters on the proposed regulations. First, the final regulations require the DSU to submit descriptions related to the provision of rehabilitation technology and personal assistance services triennially as part of its new State plan. The proposed regulations would have required submission of these descriptions annually as revisions to the State plan. Second, the proposed State plan description of the DSU's strategies for expanding the availability of personal assistance services has been removed from the final regulations because it is not required by statute and could be more appropriately addressed in a DSU's strategic plan. Additionally, the Secretary has added to § 361.48(b) of the final regulations a requirement that the State plan describe how assistive technology devices are provided or worksite assessments are made as part of the assessment for determining eligibility and VR needs of the individual. This State plan component, which is required under section 101(a)(31) of the Act, was inadvertently omitted from the proposed regulations.

Changes: The Secretary has revised § 361.48 of the proposed regulations by changing the term ''vocational counseling and guidance'' under paragraph (a)(3) of this section to ''vocational rehabilitation counseling and guidance.'' The Secretary also has revised this section by clarifying under paragraph (a)(6) that it is the joint responsibility of the DSU and the individual to secure grant assistance from other sources before using VR funds to pay for training in institutions of higher education. In addition, the term ''annually'' has been removed from paragraph (b) of this section. The description in the State plan regarding the DSU's strategies for expanding the availability of personal assistance services that would have been required under § 361.48(b)(3) of the proposed regulations also has been removed from the final regulations. Finally, the Secretary has added to this section the requirement that the State plan describe the manner in which assistive technology devices are provided or worksite assessments are made as part of the assessment for determining eligibility and VR needs of the individual.

§ 361.49 Scope of Vocational Rehabilitation Services for Groups of Individuals With Disabilities

Comments: None.

Discussion: Because the final regulations limit § 361.50 to written policies that cover the nature and scope of services provided to individuals under § 361.48, the Secretary believes that the requirement regarding written policies for services to groups properly belongs in § 361.49(b)(2) of the final regulations. This provision is intended to ensure that if a DSU chooses to provide services to groups under § 361.49, then the DSU develops and maintains written policies covering each service and the criteria under which each service is provided.

Changes: The Secretary has revised § 361.49 by relocating the requirement regarding written policies for services to groups from § 361.50 of the proposed regulations to § 361.49(b)(2).

§ 361.50 Written Policies Governing the Provision of Services for Individuals With Disabilities

Comments: One commenter stated that it is inappropriate for this section to require DSUs to develop written policies governing the provision of VR services to groups since these services are not included in the individual's IWRP. Several commenters recommended requiring that the written policies developed under this section must ensure that the provision of services to each individual is consistent with the individual's informed choice. Finally, one commenter questioned whether DSUs can prohibit verbal authorization for services in all instances.

Discussion: The Secretary recognizes the inconsistency in requiring the DSU to develop written policies that cover the scope of VR services for groups under § 361.49 and, at the same time, ensure that the provision of services is based on the needs of the individual as identified in the individual's IWRP. The commenter on the proposed regulations who raised this issue correctly noted that group services under § 361.49 are not necessarily included in the IWRP to address a rehabilitation need of the individual. The Secretary intends that the policies developed under § 361.50 will ensure that the provision of services to any eligible individual will be based on that individual's needs and that no arbitrary limits, including limits pertaining to the location, cost, or duration of a particular service, will be placed on an individual's receipt of VR services.

The Secretary agrees that the provision of VR services must be consistent with the informed choice of the individual. This position is clearly reflected in § 361.48 of the regulations. Consequently, the final regulations specify that the DSU's written policies developed under § 361.50 must ensure that the provision of VR services is based on the individual's rehabilitation needs and is consistent with the individual's informed choice.

Consistent with the proposed regulations, § 361.50(d) of the final regulations requires DSUs to establish policies related to the timely authorization of services, including any conditions under which it allows verbal authorization. Although the Secretary expects that, in most instances, the DSU will provide written authorization of services before or at the same time that the services are provided, the Secretary agrees that DSUs should have the flexibility to determine the circumstances under which verbal authorization for services is permitted. The Secretary recognizes, however, that some States prohibit verbal authorization under all circumstances. This provision is not intended to infringe on this State prerogative and requires only that the DSU specify the conditions, if any, under which verbal authorization can be given.

Changes: The Secretary has amended § 361.50 by clarifying that this section applies only to the provision of services to individuals with disabilities under § 361.48. This section also has been retitled to reflect this change. A corresponding requirement regarding written policies for services to groups has been added to § 361.49(b) of the final regulations. In addition, the Secretary has revised § 361.50 to specify that the DSU's written policies must ensure that the provision of services is consistent with the individual's informed choice. Finally, paragraph (d) of this section has been clarified to require that the DSU's policies regarding the timely authorization of services identify any conditions under which verbal authorization can be given.

§ 361.51 Written Standards for Facilities and Providers of Services

Comments: None.

Discussion: The Secretary believes it is necessary to revise the requirements relating to qualified personnel in paragraph (b)(1) of this section to reflect corresponding changes to the personnel standards included in the State agency's comprehensive system of personnel development under § 361.18(c) of these regulations. A change is necessary to clarify that individuals who provide VR services shall meet existing national or State-approved certification, licensing, or registration requirements that apply to the discipline in which that rehabilitation professional provides VR services. Individuals who meet ''comparable requirements,'' such as State personnel requirements, developed by the DSU under § 361.18(c) would be authorized to provide VR services only if there are no existing licensing, certification, or registration requirements applicable to their particular profession. As stated in the analysis of comments on § 361.18(c), the Secretary believes that the Act precludes the use of less rigorous ''comparable requirements'' in place of existing national or statewide certification, licensing, or registration requirements that apply to the discipline in which a rehabilitation professional provides VR services.

Changes: The Secretary has revised § 361.51(b) consistent with § 361.18(c) to clarify that individuals who provide VR services shall meet applicable certification, licensing, or registration requirements or, if none exist, other ''comparable requirements'' developed by the DSU under its comprehensive system of personnel development.

§ 361.52 Opportunity To Make Informed Choices

Comments: Some commenters requested clarification of the meaning of the term ''informed choice.'' Other commenters stated that the DSUs should be required to inform individuals of their right to make informed choices and to explain how informed choice may be exercised. Additional commenters recommended requiring DSUs to provide through appropriate modes of communication information that is necessary for an individual to make an informed choice and to assist individuals with cognitive disabilities in exercising choice.

Some commenters opposed the requirement that DSUs provide, or assist individuals in obtaining, information related to the level of consumer satisfaction with each service. These commenters stated that information pertaining to consumer satisfaction may not be available to the DSU in all instances. In addition, several commenters questioned whether the sources of information specified in paragraph (c) of this section must be used by DSUs to ensure that individuals have sufficient information to make informed choices.

Discussion: ''Informed choice'' is a decisionmaking process in which the individual analyzes relevant information and selects, with the assistance of the rehabilitation counselor or coordinator, a vocational goal, intermediate rehabilitation objectives, VR services, and VR service providers. Accordingly, this section of the regulations requires each DSU, in consultation with its Council if it has one, to develop its own policies and procedures that enable individuals with disabilities to make informed choices throughout their participation in the VR program. In addition, the regulations identify minimum types of information that must be provided to the individual by the DSU or through the DSU's assistance in connection with the development of the IWRP (e.g., information pertaining to cost, accessibility, and duration of services, qualifications of service providers, and degree of integration associated with a service). Beyond these limited informational requirements, the Secretary believes it would be inappropriate to impose, through these regulations, an across-the-board definition of ''informed choice,'' as some commenters suggested. It is within the discretion of the DSU to develop appropriate policies that facilitate access to, at a minimum, the types of information specified in the regulations and that enable each individual to make informed choices.

However, the Secretary agrees that individuals must be appropriately informed of their opportunity to make informed choices throughout the rehabilitation process and that requirements should be added to the final regulations that are designed to ensure that individuals are aware of their right to make an informed choice about their vocational goal, rehabilitation objectives, services, and service providers and that they understand how to exercise that right. In addition, the Secretary believes that requiring DSUs to apprise eligible individuals of their statutory right to informed choice is an essential protection for individuals with disabilities that significantly outweighs any additional burden associated with the information requirements in this section.

The Secretary recognizes that, in some instances, DSUs may not have access to information regarding the level of consumer satisfaction with a particular service and that DSUs should be required to provide, or assist the individual in acquiring, this information to the extent that it is available.

In addition, the Secretary emphasizes that the information sources and methods of obtaining information identified in paragraph (c) of this section are intended to serve only as examples. A DSU can assist individuals in making informed choices by using the identified methods (e.g., referring individuals to local consumer groups or disability advisory councils), by providing the listed sources of information (e.g., State or regional lists of services and services providers), or by using other methods or information sources that it considers appropriate.

Changes: The Secretary has revised § 361.52(a) to require DSUs to develop

policies that ensure that each individual receives, through appropriate modes of communication, information concerning the availability and scope of informed choice, the manner in which informed choice may be exercised, and, consistent with section 12(e)(2)(F) of the Act, the availability of support services for individuals with cognitive or other disabilities who require assistance in exercising informed choice. In addition, the Secretary has clarified in paragraph (b) that the DSU shall provide the individual, or assist the individual in acquiring, information regarding consumer satisfaction with relevant services to the extent that that information is available.

§ 361.53 Availability of Comparable Services and Benefits

Comments: Several commenters requested clarification of the proposed requirement that comparable services and benefits must be available within a reasonable period of time. Other commenters sought clarification of proposed paragraph (b) of this section, which identifies those services for which a DSU is not required to determine whether comparable services and benefits are available. Some commenters recommended that the regulations direct DSUs to provide the services specified in paragraph (b) in all instances. Other commenters asked whether a DSU, although not required, has the discretion to search for and use comparable services and benefits in connection with the provision of the services identified in paragraph (b).

Discussion: The proposed regulations required DSUs to use comparable services and benefits for all non-exempt services if available to the eligible individual within a reasonable period of time so that the intermediate rehabilitation objectives in the individual's IWRP can be met. The proposed regulations were intended to require DSUs to determine what constitutes a reasonable period of time on a case-by-case basis according to the services and rehabilitation objectives identified in each individual's IWRP. However, in light of the confusion expressed by commenters about both this section of the regulations and the proposed definition of ''comparable services and benefits, the Secretary believes that requiring comparable services and benefits to be available at the time that the service is needed to accomplish the rehabilitation objectives in the individual's IWRP represents a clearer standard for DSUs to follow.

The proposed regulations also were intended to exempt specific services from the comparable services and benefits requirement consistent with section 101(a)(8) of the Act. The statute requires DSUs to provide certain services (e.g., rehabilitation technology) as mandatory services without determining the availability of comparable services and benefits as is required for the remaining VR services. The Secretary agrees that the statement in proposed paragraph (b) of this section that a comparable services and benefits determination ''is not required'' prior to the provision of the services identified in section 101(a)(8) of the statute is unclear and that the final regulations should clarify that the exempted services are not subject to a prior comparable services and benefits determination, i.e., the DSU has the affirmative responsibility to provide these services without determining the availability of alternative funding sources. Nevertheless, the Secretary agrees that, if an exempted service such as an assistive technology device is known to be readily available from an alternative source at the time the service is needed to accomplish a rehabilitation objective in the individual's IWRP, it is prudent for the DSU to use those sources in order to conserve funds provided under this program. The Secretary notes, however, that projects supported by the Technology-Related Assistance for Individuals with Disabilities Act of 1988 (Tech Act) are not alternative sources to the VR program for purposes of providing rehabilitation technology. Tech Act projects are designed to assist States in developing and implementing effective systems for securing from other programs technology-related assistance for individuals with disabilities. These projects do not provide actual assistive technology devices or services to individuals.

Changes: The Secretary has revised paragraph (a)(2) of § 361.53 to require DSUs to use comparable services and benefits that are available to the individual at the time the services are needed to achieve the rehabilitation objectives in the individual's IWRP. This change is consistent with the changes made to the proposed definition of ''comparable services and benefits'' discussed previously in the preamble analysis of comments under § 361.5(b). In addition, the Secretary has revised this section to clarify that the services listed in paragraph (b) are exempt from a determination of the availability of comparable services and benefits.

§ 361.54 Participation of Individuals in Cost of Services Based on Financial Need

Comments: None.

Discussion: The Secretary believes it is necessary to clarify that State policies governing individual participation levels in the cost of VR services must take into consideration the disability-related expenses born by an individual when determining the individual's financial need. Although the Secretary presumes that DSUs already consider the individual's disability-related expenses when determining financial need, the Secretary seeks to emphasize the importance of disability-related expenses given the significant impact that they may have on an individual's ability to contribute to the cost of VR services.

Changes: The Secretary has revised § 361.54 by requiring in paragraph (b)(2)(v)(C) that an individual's disability-related expenses be considered in determining the extent to which an individual shall contribute toward the cost of VR services.

§ 361.55 Review of extended employment in community rehabilitation programs or other employment under section 14(c) of the Fair Labor Standards Act

Comments: Some commenters requested that DSUs be permitted to limit the number of annual reviews of individuals in extended employment that DSUs are required to conduct. In addition, some commenters requested that the regulations specify that the annual review requirement in this section applies to individuals in supported employment who earn less than the minimum wage.

Discussion: Section 101(a)(16) of the Act requires DSUs to review annually the status of each eligible individual in extended employment in order to determine the individual's needs and interests related to competitive employment. The Act does not provide for any exceptions to this annual review requirement. Thus, the Secretary interprets section 101(a)(16) of the Act to prohibit DSUs from discontinuing annual reviews of individuals who remain in extended employment for extensive periods. This position represents a modification to the policy in the RSA Manual, which had permitted States to place limitations on the number of annual reviews of those in extended employment. Given the expanded scope of competitive employment, supported employment, and other integrated employment opportunities that may become available

to individuals in extended employment in future years, the Secretary believes that discontinuing annual reviews would be inconsistent with the emphasis that the statute places on competitive and integrated employment.

In addition to conducting reviews of individuals in extended employment, section 101(a)(16) of the Act requires DSUs to review annually the job status of individuals employed in ''other employment settings'' in which the individual is compensated under section 14(c) of the FLSA. This review requirement applies to any eligible individual employed in an integrated setting who earns below the minimum wage, including individuals in supported employment settings who are unable to earn the minimum wage at the time of transition to extended services. In each case, the DSU is required to review the individual's employment status and determine his or her needs and interests in becoming competitively employed.

Changes: None.

§ 361.56 Individuals determined to have achieved an employment outcome

Comments: Several commenters responded to the Secretary's request in the NPRM for comments on the potential effect of the proposed time standard for maintaining a job placement in order to achieve an employment outcome. Many of the commenters questioned the proposed standard—the duration of the employers's probationary period or 90 days if the employer does not have an established probationary period—by stating that reliance on employer probationary periods would be too burdensome for DSUs to administer or would not ensure job stability in instances in which the probationary period is very short (e.g., two weeks). Some commenters supported the proposed standard, while others suggested that the regulatory time period be 90 days or the employer's probationary period, whichever is longer. However, a large majority of the commenters recommended that the regulations establish a uniform time period applicable to all job placements. Some commenters suggested retaining the 60-day time period required under the current regulations, whereas other commenters recommended that the current standard be increased to 90 or 180 days.

Discussion: The requirement in the proposed regulations that an individual maintain a job placement for the employer's probationary period or, if the employer does not have a probationary period, for at least 90 days was intended to better reflect whether an individual has successfully achieved an employment outcome. Like many of the commenters on the proposed regulations, the Secretary believes that the 60-day standard under the current regulations is too short a period to determine whether the individual will be able to successfully maintain the job placement over time. The proposed regulations were designed both to strengthen the existing standard and to base the decision that an individual has achieved an employment outcome, in part, on the individual's ability to satisfy the requirements imposed by the employer on any employee. If the employer did not have a probationary period in place, the 90-day period was considered an adequate safeguard to ensure that the individual is performing well and is likely to maintain the employment outcome.

Nevertheless, the Secretary understands the concerns of many commenters that the proposed standard may cause DSUs to avoid placing individuals with employers who have lengthy probationary periods, thereby shrinking the pool of potential job placements, or may be inconsistent with the informed choice of an individual who seeks to cease contact with the DSU prior to the end of the relevant probationary period. In addition, it is clear that most commenters prefer a fixed time period that applies equally to each individual who receives VR services. At the same time, however, the Secretary recognizes that in some instances 90 days may be too short a period to ensure job stability. For these reasons, the final regulations contain a uniform, minimum 90-day standard that applies to all individuals who obtain employment under the VR program. This uniform standard, the Secretary expects, enables DSU staff to conserve time and work more efficiently than would be possible under an individual employer-based standard and also affords DSUs the flexibility to increase the 90-day minimum time period whenever circumstances warrant. For example, a DSU may decide to extend the period to conform to an employer's longer probationary period if at the end of 90 days it is uncertain whether the individual will be able to successfully satisfy the probationary period without DSU support. Similarly, a DSU should extend the job-retention period if requested by the individual. The Secretary also emphasizes that paragraph (e) precludes DSUs from ceasing contact with an individual who obtains employment unless at the end of the appropriate retention period (90 days or longer), the individual and the rehabilitation counselor or coordinator consider the employment outcome satisfactory and agree that the individual is performing well on the job.

Additional safeguards that were specified in the proposed regulations also are retained in the final regulations, including the requirement that the employment outcome be consistent with the strengths, resources, priorities, concerns, abilities, capabilities, interests, and informed choice of the individual and that the employment outcome be located in the most integrated setting possible.

Changes: The Secretary has revised § 361.56 to require in all instances that an individual shall maintain employment for a period of at least 90 days in order to be considered to have achieved an employment outcome.

§ 361.57 Review of rehabilitation counselor and coordinator determinations

Comments: One commenter requested that the prohibition in paragraph (b)(2) of this section against suspending services being provided under an IWRP pending resolution of a dispute be broadened to cover assessment services. Another commenter stated that this prohibition should apply to any service identified in an IWRP, including those services that the individual has yet to receive.

Two commenters stated that State policies used as a basis for an impartial hearing officer's decision under paragraph (b)(4) of this section, or for a DSU director's decision under paragraph (b)(9) of this section, must be consistent with Federal requirements. Other commenters recommended that paragraph (b)(7) of this section identify specific Federal standards of review for determining whether a DSU can review the decision of a hearing officer. In addition, one commenter stated that, anytime the DSU director reverses the decision of an impartial hearing officer, the director should be required to inform the individual of the statutory, regulatory, or policy basis for the reversal.

Several commenters opposed the removal of the current regulatory timelines governing key stages of the review process. These commenters asserted that the timelines in the current regulations represent essential protections for individuals with disabilities and are critical to the timeliness of appeal procedures. These commenters also stated that the current timelines are reasonable, do not pose significant difficulties for DSUs, and are necessary to ensure that issues related to

the provision of VR services are resolved in a timely fashion.

Finally, some commenters recommended that the regulations require DSUs to inform individuals at each stage of the rehabilitation process of their right to appeal a counselor's determination.

Discussion: The Secretary believes that it is necessary to clarify in the final regulations that time extensions for informally resolving an individual's appeal of a counselor's determination under paragraph (a) of this section must be agreed to by both parties and must be specific in length. This change is necessary to ensure the timely resolution of disputes through formal review procedures.

Section 102(d)(5) of the Act, which is implemented by paragraph (b)(2) of this section, states that the DSU may not institute a suspension, reduction, or termination of services being provided under the individual's IWRP pending final resolution of an individual's challenge to a determination of a rehabilitation counselor unless the individual so requests or the services have been obtained through misrepresentation, fraud, collusion, or criminal conduct on the part of the individual. This statutory prohibition does not apply to assessment or other services that are not included in the IWRP. Similarly, the statutory reference to services ''being provided under the IWRP'' means that the DSU is prohibited from suspending only those services in the IWRP that the individual has begun to receive prior to requesting a review of a counselor's determination. However, the Secretary notes that the DSU cannot discontinue a service during a regular interruption in that service (e.g., between semesters at an institution of higher education in which training is provided) as long as the service is included in the IWRP and has been initiated.

The Secretary agrees that any State policy used as a basis for an impartial hearing officer's decision under paragraph (b)(4) of this section or for a modification of that decision by the director of the DSU under paragraph (b)(9) of this section must be consistent with Federal statutory and regulatory requirements.

Section 361.57(b)(7) of the proposed and final regulations requires that any decision by a DSU director to review the decision of an impartial hearing officer must be based on standards of review established under written State policy. Although DSUs have the discretion to establish appropriate standards of review, the Secretary intends that standards developed under paragraph (b)(7) of this section be consistent with RSA policy, specifically Chapter 0545 of the *Rehabilitation Services Manual* (Clients'' Rights to Appeal Decisions), which specifies a number of fundamental issues that should be addressed in connection with determining whether to review a hearing officer's decision (e.g., Is the initial decision arbitrary, capricious, an abuse of discretion or otherwise unreasonable? Is the initial decision consistent with the facts of the case and applicable Federal and State policies?).

Section 361.57(b)(10) of the proposed regulations provided that if the DSU director decided to review the decision of an impartial hearing officer, the director would provide to the individual a full report of the director's final decision and of the findings and grounds for the decision. The Secretary intended the term ''grounds'' to include any applicable law or policy on which the decision was based and believes that changing that term in the final regulations to ''statutory, regulatory, and policy grounds'' will clarify this intention. As stated previously, any State policy that is used to support the director's decision must be consistent with Federal statutory and regulatory requirements.

The proposed regulations would have afforded DSUs the discretion to develop timelines for the prompt handling of appeals instead of specifying Federal timelines for certain stages of the appeals process. However, there was near-unanimity among commenters in opposing this change from current regulations. The commenters stressed the importance of protecting individuals from delays in the resolution of issues affecting an individual's receipt of VR services and vigorously asserted that Federal timelines are the best means of ensuring that State appeal procedures are conducted in a timely fashion.

For the reasons stated by the commenters, the Secretary agrees that the current regulatory timelines should be retained in the final regulations. State units have not indicated that the Federal timelines are unreasonable or unnecessarily burdensome. Moreover, commenters on the proposed regulations indicated that a number of DSUs have failed to meet the current timelines in the past. In light of these comments, the Secretary believes that at this time affording DSUs the additional flexibility to develop their own timelines for handling appeals is neither warranted nor appropriate and that retaining the current timelines does not impose additional costs on DSUs.

Finally, the Secretary agrees that individuals must be informed of their appeal rights during key stages of the rehabilitation process. Section 361.46 (a)(8) and (a)(9) requires that these rights, as well as the availability of representation through the Client Assistance Program (CAP) under 34 CFR part 370, be clearly delineated in the IWRP. Moreover, § 361.43(c) requires DSUs to provide individuals with information concerning the CAP whenever an individual is found ineligible to receive VR services. The Secretary believes that these provisions sufficiently ensure that individuals are apprised of their right to challenge any determination made by a counselor regarding the provision or denial of services.

Changes: The Secretary has revised § 361.57 to clarify that time extensions for informally resolving an individual's request for review of a counselor's determination under paragraph (a) must be specific and agreed upon by both parties. In addition, paragraphs (b)(4) and (b)(9) of this section have been revised to clarify that any State policy on which the decision of an impartial hearing officer or DSU director is based must be consistent with applicable Federal requirements. Paragraph (b)(10) of this section also has been amended to clarify that the director's decision and corresponding report must specify the statutory, regulatory, or policy grounds for the decision. Finally, the Secretary also has revised this section by applying specific timelines to certain stages of the appeals process. Like the current regulations, the final regulations require that an impartial hearing officer conduct a formal hearing within 45 days of an individual's request for review; that the hearing officer render a decision within 30 days of the completion of the hearing; and that the DSU director issue a final decision within 30 days of notifying the individual of the director's intent to review the initial decision. The requirement that the individual be notified of the director's intent to review the initial decision within 20 days of its issuance is specified in the Act and is implemented by § 361.57(b)(5) of the regulations. Because the current regulatory timelines have been reinserted into this section of the final regulations, the Secretary has removed from the final regulations the requirement under paragraph (c) of the proposed regulations that the DSU develop timelines applicable to these stages of the review process.

§ 361.60 Matching Requirements

Comments: Two commenters opposed the prohibition in this section against using third party in-kind contributions to meet the non-Federal share under the

VR program. Another commenter expressed concern about the impact of this prohibition on the use, as non-Federal match, of funds provided by other public agencies under third-party cooperative arrangements.

Discussion: ''Third party in-kind contributions,'' which are a permissible source of State matching funds under the Education Department General Administrative Regulations (EDGAR), are defined in 34 CFR 80.3 as ''property or services which benefit a federally assisted project or program and which are contributed by non-Federal third parties without charge to the grantee. * * *'' However, it is RSA's policy to not allow the use of third-party in-kind contributions to meet the State matching requirement under the VR program in the absence of specific statutory authority. Where the Act permits the use of in-kind expenditures as match for certain programs, that authority is expressed (e.g., the State Independent Living Program under section 712(b)(2) of the Act). Thus, § 361.60(b)(2) specifies that these contributions may not be used as part of the DSU's non-Federal share under the program. This provision is consistent with the definition of ''State and local funds'' under § 361.76 of the current regulations and with the current regulatory prohibition on the use of in-kind contributions as match in § 361.24(c).

Nevertheless, this prohibition has no effect on a DSU's ability to enter into third-party cooperative arrangements under § 361.28 of the regulations for providing VR services with another public agency that is furnishing part or all of the non-Federal share under the program. As long as the third party is contributing funds to support VR services, those dollars may be used as part of the DSU's non-Federal share (e.g., staff salaries paid by the third party that are allowable matching expenditures). If, on the other hand, the DSU enters into an arrangement under which a third party provides equipment or property used in the administration of the VR program, the costs associated with those items cannot be used as non-Federal matching funds.

Changes: None.

§ 361.62 Maintenance of Effort Requirements

Comments: One commenter suggested that recoveries of State maintenance of effort deficits should always be deducted from the State's allotment in a future fiscal year.

Discussion: Section 111(a)(2)(B)(ii) of the Act, which is implemented by § 361.62(a)(1) of the regulations, requires the Department to recover maintenance of effort deficits through a deduction in the State's allotment for the following Federal fiscal year. However, there is no statutory authority to deduct an allotment other than in the year immediately following a maintenance of effort shortfall. Thus, § 361.62(a)(2) of the regulations specifies that when a maintenance of effort deficit is discovered too late to adjust the allotment for the following year, then the deficit will be recovered through an audit disallowance.

Changes: None.

§ 361.71 Procedures for Developing the Strategic Plan

Comments: Two commenters recommended that the DSU be required to consult the State Client Assistance Program prior to developing its strategic plan. Other commenters recommended that DSUs be required only to review rather than to revise the strategic plan on an annual basis under paragraph (c) of this section.

Discussion: Section 122(b) of the Act specifies that, prior to developing the strategic plan, the DSU shall hold public forums and solicit recommendations specifically from the State Rehabilitation Advisory Council and the Statewide Independent Living Council. The Secretary agrees that the views of the CAP also should be considered in connection with the development of the strategic plan. The public participation requirements in § 361.71(a) afford the CAP and other interested parties the opportunity to provide the DSU with its comments and recommendations. The annual revision requirement under paragraph (c) of this section is based on section 122(a) of the Act, which states that the strategic plan must be updated on an annual basis to reflect actual experience over the previous year and input from the Council and other interested parties. The Secretary believes that merely requiring an annual review would be inconsistent with this statutory requirement.

Changes: None.

Paperwork Reduction Act of 1995

Under the Paperwork Reduction Act of 1995, no persons are required to respond to a collection of information unless it displays a valid OMB control number. The valid OMB control number assigned to the collections of information in these final regulations is displayed at the end of the affected sections of the regulations.

Intergovernmental Review

This program is subject to the requirements of Executive Order 12372 and the regulations in 34 CFR part 79. The objective of the Executive order is to foster an intergovernmental partnership and a strengthened federalism by relying on processes developed by State and local governments for coordination and review of proposed Federal financial assistance.

In accordance with the order, this document is intended to provide early notification of the Department's specific plans and actions for this program.

Assessment of Educational Impact

In the notice of proposed rulemaking, the Secretary requested comments on whether the proposed regulations would require transmission of information that is being gathered by or is available from any other agency or authority of the United States.

Based on the response to the proposed regulations and on its own review, the Department has determined that the regulations in this document do not require transmission of information that is being gathered by or is available from any other agency or authority of the United States.

List of Subjects

34 CFR Part 361

Reporting and recordkeeping requirements, State-administered grant program—education, Vocational rehabilitation.

34 CFR Part 363

State-administered grant program—education, Supported employment.

34 CFR Part 376

Special projects and demonstrations, Transitional rehabilitation services.

34 CFR Part 380

Special projects and demonstrations, Supported employment, Technical assistance.

Dated: December 1, 1996.

Richard W. Riley,

Secretary of Education.

(Catalog of Federal Domestic Assistance Numbers: 84.126 The State Vocational Rehabilitation Services Program; 84.187 The State Supported Employment Services Program; 84.235 Special Projects and Demonstrations for Providing Transitional Rehabilitation Services to Youth with Disabilities; 84.128 Special Projects and Demonstrations for Providing Supported Employment Services to Individuals with the Most Severe Disabilities and Technical Assistance Projects)

The Secretary amends Title 34, Chapter III, of the Code of Federal Regulations as follows:

1. Part 361 is revised to read as follows:

PART 361—THE STATE VOCATIONAL REHABILITATION SERVICES PROGRAM

Subpart A—General

Subpart B—State Plan for Vocational Rehabilitation Services

Subpart C—Financing of State Vocational Rehabilitation Programs

Subpart D—Strategic Plan for Innovation and Expansion of Vocational Rehabilitation Services

Authority: 29 U.S.C. 711(c), unless otherwise noted.

Subpart A—General

§ 361.1 Purpose.

Under the State Vocational Rehabilitation Services Program (program), the Secretary provides grants to assist States in operating a comprehensive, coordinated, effective, efficient, and accountable program that is designed to assess, plan, develop, and provide vocational rehabilitation services for individuals with disabilities, consistent with their strengths, resources, priorities, concerns, abilities, capabilities, and informed choice, so that they may prepare for and engage in gainful employment.

(Authority: Sec. 12(c) and 100(a)(2) of the Act; 29 U.S.C. 711(c) and 720(a)(2))

§ 361.2 Eligibility for a grant.

Any State that submits to the Secretary a State plan that meets the requirements of section 101(a) of the Act and this part is eligible for a grant under this program.

(Authority: Sec. 101(a) of the Act; 29 U.S.C. 721(a))

§ 361.3 Authorized activities.

The Secretary makes payments to a State to assist in—

(a) The costs of providing vocational rehabilitation services under the State plan;

(b) Administrative costs under the State plan; and

(c) The costs of developing and implementing the strategic plan.

(Authority: Sec. 111(a)(1) of the Act; 29 U.S.C. 731(a)(1))

§ 361.4 Applicable regulations.

The following regulations apply to this program:

(a) The Education Department General Administrative Regulations (EDGAR) as follows:

(1) 34 CFR part 74 (Administration of Grants to Institutions of Higher Education, Hospitals, and Nonprofit Organizations), with respect to subgrants to entities that are not State or local governments or Indian tribal organizations.

(2) 34 CFR part 76 (State-Administered Programs).

(3) 34 CFR part 77 (Definitions that Apply to Department Regulations).

(4) 34 CFR part 79 (Intergovernmental Review of Department of Education Programs and Activities).

(5) 34 CFR part 80 (Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments), except for § 80.24(a)(2).

(6) 34 CFR part 81 (General Education Provisions Act-Enforcement).

(7) 34 CFR part 82 (New Restrictions on Lobbying).

(8) 34 CFR part 85 (Governmentwide Debarment and Suspension (Nonprocurement) and Governmentwide Requirements for Drug-Free Workplace (Grants)).

(9) 34 CFR part 86 (Drug-Free Schools and Campuses).

(b) The regulations in this part 361.

(Authority: Sec. 12(c) of the Act; 29 U.S.C. 711(c))

§ 361.5 Applicable definitions.

(a) *Definitions in EDGAR.* The following terms used in this part are defined in 34 CFR 77.1:

Department
EDGAR
Fiscal year
Nonprofit
Private
Public
Secretary

(b) *Other definitions.* The following definitions also apply to this part:

(1) *Act* means the Rehabilitation Act of 1973 (29 U.S.C. 701 *et seq.*), as amended.

(Authority: Sec. 12(c) of the Act; 29 U.S.C. 711(c))

(2) *Administrative costs under the State plan* means expenditures incurred in the performance of administrative functions under the vocational rehabilitation program. Administrative costs include expenses related to program planning, development, monitoring, and evaluation, including, but not limited to, quality assurance; budgeting, accounting, financial management, information systems, and related data processing; providing information about the program to the public; technical assistance to other State agencies, private nonprofit organizations, and businesses and industries, except for technical assistance and support services described in § 361.49(a)(4); the State Rehabilitation Advisory Council and other advisory committees; professional organization membership dues for State unit employees; the removal of architectural barriers in State vocational rehabilitation agency offices and State-operated rehabilitation facilities; operating and maintaining State unit facilities, equipment, and grounds; supplies; administration of the comprehensive system of personnel development, including personnel administration, administration of affirmative action plans, and training and staff development; administrative salaries, including clerical and other support staff salaries, in support of these functions; travel costs related to carrying out the program, other than travel costs related to the provision of services; costs incurred in conducting reviews of rehabilitation counselor or coordinator determinations under § 361.57; and legal expenses required in the administration of the program.

(Authority: Sec. 12(c) of the Act; 29 U.S.C. 711(c))

(3) *American Indian* means an individual who is a member of an Indian tribe.

(Authority: Sec. 7(20) of the Act; 29 U.S.C. 706(20))

(4) *Applicant* means an individual who submits an application for vocational rehabilitation services in accordance with § 361.41(b)(2).

(Authority: Sec. 12(c) of the Act; 29 U.S.C. 711(c))

(5) *Appropriate modes of communication* means specialized aids and supports that enable an individual with a disability to comprehend and respond to information that is being communicated. Appropriate modes of communication include, but are not limited to, the use of interpreters, open and closed captioned videos, specialized telecommunications services and audio recordings, Brailled and large print materials, materials in electronic formats, augmentative communication devices, graphic presentations, and simple language materials.

(Authority: Sec. 12(c) of the Act; 29 U.S.C. 711(c))

(6) *Assistive technology device* means any item, piece of equipment, or product system, whether acquired commercially off the shelf, modified, or customized, that is used to increase, maintain, or improve the functional capabilities of an individual with a disability.

(Authority: Sec. 7(23) of the Act; 29 U.S.C. 706(23))

(7) *Assistive technology service* means any service that directly assists an individual with a disability in the selection, acquisition, or use of an assistive technology device, including—

(i) The evaluation of the needs of an individual with a disability, including a functional evaluation of the individual in his or her customary environment;

(ii) Purchasing, leasing, or otherwise providing for the acquisition by an individual with a disability of an assistive technology device;

(iii) Selecting, designing, fitting, customizing, adapting, applying, maintaining, repairing, or replacing assistive technology devices;

(iv) Coordinating and using other therapies, interventions, or services with assistive technology devices, such as those associated with existing education and rehabilitation plans and programs;

(v) Training or technical assistance for an individual with a disability or, if appropriate, the family members, guardians, advocates, or authorized representatives of the individual; and

(vi) Training or technical assistance for professionals (including individuals providing education and rehabilitation services), employers, or others who provide services to, employ, or are otherwise substantially involved in the major life functions of individuals with disabilities, to the extent that training or technical assistance is necessary to the achievement of an employment outcome by an individual with a disability.

(Authority: Sec. 7(24) and 12(c) of the Act; 29 U.S.C. 706(24) and 711(c))

(8) *Community rehabilitation program.*

(i) *Community rehabilitation program* means a program that provides directly or facilitates the provision of one or more of the following vocational rehabilitation services to individuals with disabilities to enable those individuals to maximize their opportunities for employment, including career advancement:

(A) Medical, psychiatric, psychological, social, and vocational services that are provided under one management.

(B) Testing, fitting, or training in the use of prosthetic and orthotic devices.

(C) Recreational therapy.

(D) Physical and occupational therapy.

(E) Speech, language, and hearing therapy.

(F) Psychiatric, psychological, and social services, including positive behavior management.

(G) Assessment for determining eligibility and vocational rehabilitation needs.

(H) Rehabilitation technology.

(I) Job development, placement, and retention services.

(J) Evaluation or control of specific disabilities.

(K) Orientation and mobility services for individuals who are blind.

(L) Extended employment.

(M) Psychosocial rehabilitation services.

(N) Supported employment services and extended services.

(O) Services to family members if necessary to enable the applicant or eligible individual to achieve an employment outcome.

(P) Personal assistance services.

(Q) Services similar to the services described in paragraphs (A) through (P) of this definition.

(ii) For the purposes of this definition, the word *program* means an agency, organization, or institution, or unit of an agency, organization, or institution, that provides directly or facilitates the provision of vocational rehabilitation services as one of its major functions.

(Authority: Sec. 7(25) and 12(c) of the Act; 29 U.S.C. 706(25) and 711(c))

(9) *Comparable services and benefits* means services and benefits that are—

(i) Provided or paid for, in whole or in part, by other Federal, State, or local public agencies, by health insurance, or by employee benefits;

(ii) Available to the individual at the time needed to achieve the intermediate rehabilitation objectives in the individual's Individualized Written Rehabilitation Program (IWRP) in accordance with § 361.53; and

(iii) Commensurate to the services that the individual would otherwise receive from the vocational rehabilitation agency.

(Authority: Sec. 12(c) and 101(a)(8) of the Act; 29 U.S.C. 711(c) and 721(a)(8))

(10) *Competitive employment* means work

(i) In the competitive labor market that is performed on a full-time or part-time basis in an integrated setting; and

(ii) For which an individual is compensated at or above the minimum wage, but not less than the customary wage and level of benefits paid by the employer for the same or similar work performed by individuals who are not disabled.

(Authority: Sec. 7(5), 7(18), and 12(c) of the Act; 29 U.S.C. 706(5), 706(18), and 711(c))

(11) *Construction of a facility for a public or nonprofit community rehabilitation program* means—

(i) The acquisition of land in connection with the construction of a new building for a community rehabilitation program;

(ii) The acquisition of existing buildings;

(iii) The remodeling, alteration, or renovation of existing buildings;

(iv) The construction of new buildings and expansion of existing buildings;

(v) Architect's fees, site surveys, and soil investigation, if necessary, in connection with the construction project;

(vi) The acquisition of initial fixed or movable equipment of any new, newly acquired, newly expanded, newly remodeled, newly altered, or newly renovated buildings that are to be used for community rehabilitation program purposes; and

(vii) Other direct expenditures appropriate to the construction project, except costs of off-site improvements.

(Authority: Sec. 7(1) and 12(c) of the Act; 29 U.S.C. 706(1) and 711(c))

(12) *Designated State agency* or *State agency* means the sole State agency, designated in accordance with § 361.13(a), to administer, or supervise local administration of, the State plan for vocational rehabilitation services. The term includes the State agency for individuals who are blind, if designated as the sole State agency with respect to that part of the plan relating to the vocational rehabilitation of individuals who are blind.

(Authority: Sec. 7(3)(A) and 101(a)(1)(A) of the Act; 29 U.S.C. 706(3)(A) and 721(a)(1)(A))

(13) *Designated State unit* or *State unit* means either—

(i) The State agency vocational rehabilitation bureau, division, or other organizational unit that is primarily concerned with vocational rehabilitation or vocational and other rehabilitation of individuals with disabilities and that is responsible for the administration of the vocational rehabilitation program of the State agency, as required under § 361.13(b); or

(ii) The independent State commission, board, or other agency that has vocational rehabilitation, or vocational and other rehabilitation, as its primary function.

(Authority: Sec. 7(3)(B) and 101(a)(2)(A) of the Act; 29 U.S.C. 706(3)(B) and 721(a)(2)(A))

(14) *Eligible individual* means an applicant for vocational rehabilitation services who meets the eligibility requirements of § 361.42(a).

(Authority: Sec. 7(8)(a) and 102(a)(1) of the Act; 29 U.S.C. 706(8) and 722(a)(1))

(15) *Employment outcome* means, with respect to an individual, entering or retaining full-time or, if appropriate, part-time competitive employment in the integrated labor market to the greatest extent practicable; supported employment; or any other type of employment that is consistent with an individual's strengths, resources, priorities, concerns, abilities, capabilities, interests, and informed choice.

(Authority: Sec. 7(5), 12(c), 100(a)(2), and 102(b)(1)(B)(i) of the Act; 29 U.S.C. 706(5), 711(c), 720(a)(2), and 722(b)(1)(B)(i))

(16) *Establishment, development, or improvement of a public or nonprofit community rehabilitation program* means—

(i) The establishment of a facility for a public or nonprofit community rehabilitation program as defined in paragraph (b)(17) of this section to provide vocational rehabilitation services to applicants or eligible individuals;

(ii) Staffing, if necessary to establish, develop, or improve a community rehabilitation program for the purpose of providing vocational rehabilitation services to applicants or eligible individuals, for a maximum period of four years, with Federal financial participation available at the applicable matching rate for the following levels of staffing costs:

(A) 100 percent of staffing costs for the first year.

(B) 75 percent of staffing costs for the second year.

(C) 60 percent of staffing costs for the third year.

(D) 45 percent of staffing costs for the fourth year; and

(iii) Other expenditures related to the establishment, development, or improvement of a community rehabilitation program that are necessary to make the program functional or increase its effectiveness in providing vocational rehabilitation services to applicants or eligible individuals, but are not ongoing operating expenses of the program.

(Authority: Secs. 7(6) and 12(c) of the Act; 29 U.S.C. 706(6) and 711(c))

(17) *Establishment of a facility for a public or nonprofit community rehabilitation program* means—

(i) The acquisition of an existing building, and if necessary the land in connection with the acquisition, if the building has been completed in all respects for at least one year prior to the date of acquisition and the Federal share of the cost of the acquisition is not more than $300,000;

(ii) The remodeling or alteration of an existing building, provided the estimated cost of remodeling or alteration does not exceed the appraised value of the existing building;

(iii) The expansion of an existing building, provided that—

(A) The existing building is complete in all respects;

(B) The total size in square footage of the expanded building, notwithstanding the number of expansions, is not greater than twice the size of the existing building;

(C) The expansion is joined structurally to the existing building and does not constitute a separate building; and

(D) The costs of the expansion do not exceed the appraised value of the existing building;

(iv) Architect's fees, site survey, and soil investigation, if necessary in connection with the acquisition, remodeling, alteration, or expansion of an existing building; and

(v) The acquisition of fixed or movable equipment, including the costs of installation of the equipment, if necessary to establish, develop, or improve a community rehabilitation program;

(Authority: Sec. 12(c) of the Act; 29 U.S.C. 711(c))

(18) *Extended employment* means work in a non-integrated or sheltered setting for a public or private nonprofit

agency or organization that provides compensation in accordance with the Fair Labor Standards Act and any needed support services to an individual with a disability to enable the individual to continue to train or otherwise prepare for competitive employment, unless the individual through informed choice chooses to remain in extended employment.

(Authority: Sec. 12(c) of the Act; 29 U.S.C. 711(c))

(19) *Extended services,* as used in the definition of ''Supported employment,'' means ongoing support services and other appropriate services that are needed to support and maintain an individual with a most severe disability in supported employment and that are provided by a State agency, a private nonprofit organization, employer, or any other appropriate resource, from funds other than funds received under this part, 34 CFR part 363, 34 CFR part 376, or 34 CFR part 380, after an individual with a most severe disability has made the transition from support provided by the designated State unit.

(Authority: Sec. 7(27) of the Act; 29 U.S.C. 706(27))

(20) *Extreme medical risk* means a probability of substantially increasing functional impairment or death if medical services, including mental health services, are not provided expeditiously.

(Authority: Secs. 12(c) and 101(a)(8) of the Act; 29 U.S.C. 711(c) and 721(a)(8))

(21) *Family member,* for purposes of receiving vocational rehabilitation services in accordance with § 361.48(a)(9), means an individual—

(i) Who either—

(A) Is a relative or guardian of an applicant or eligible individual; or

(B) Lives in the same household as an applicant or eligible individual;

(ii) Who has a substantial interest in the well-being of that individual; and

(iii) Whose receipt of vocational rehabilitation services is necessary to enable the applicant or eligible individual to achieve an employment outcome.

(Authority: Secs. 12(c) and 103(a)(3) of the Act; 29 U.S.C. 711(c) and 723(a)(3))

(22) *Impartial hearing officer.*

(i) Impartial hearing officer means an individual who—

(A) Is not an employee of a public agency (other than an administrative law judge, hearing examiner, or employee of an institution of higher education);

(B) Is not a member of the State Rehabilitation Advisory Council for the designated State unit;

(C) Has not been involved in previous decisions regarding the vocational rehabilitation of the applicant or eligible individual;

(D) Has knowledge of the delivery of vocational rehabilitation services, the State plan, and the Federal and State regulations governing the provision of services;

(E) Has received training with respect to the performance of official duties; and

(F) Has no personal, professional, or financial interest that would be in conflict with the objectivity of the individual.

(ii) An individual may not be considered to be an employee of a public agency for the purposes of this definition solely because the individual is paid by the agency to serve as a hearing officer.

(Authority: Sec. 7(28) of the Act; 29 U.S.C. 706(28))

(23) *Indian tribe* means any Federal or State Indian tribe, band, rancheria, pueblo, colony, or community, including any Alaskan native village or regional village corporation (as defined in or established pursuant to the Alaska Native Claims Settlement Act).

(Authority: Sec. 7(21) of the Act; 29 U.S.C. 706(21))

(24) *Individual who is blind* means a person who is blind within the meaning of the applicable State law.

(Authority: Sec. 12(c) of the Act; 29 U.S.C. 711(c))

(25) I*ndividual with a disability,* except in §§ 361.17 (a), (b), (c), and (j), 361.19, 361.20, and 361.51(b)(2), means an individual—

(i) Who has a physical or mental impairment;

(ii) Whose impairment constitutes or results in a substantial impediment to employment; and

(iii) Who can benefit in terms of an employment outcome from the provision of vocational rehabilitation services.

(Authority: Sec. 7(8)(A) of the Act; 29 U.S.C. 706(8)(A))

(26) *Individual with a disability,* for purposes of §§ 361.17 (a), (b), (c), and (j), 361.19, 361.20, and 361.51(b)(2), means an individual—

(i) Who has a physical or mental impairment that substantially limits one or more major life activities;

(ii) Who has a record of such an impairment; or

(iii) Who is regarded as having such an impairment.

(Authority: Sec. 7(8)(B) of the Act; 29 U.S.C. 706(8)(B))

(27) *Individual with a most severe disability* means an individual with a severe disability who meets the designated State unit's criteria for an individual with a most severe disability. These criteria must be consistent with the requirements in § 361.36(c)(3).

(Authority: Sec. 101(a)(5) of the Act; 29 U.S.C. 721(a)(5))

(28) *Individual with a severe disability* means an individual with a disability—

(i) Who has a severe physical or mental impairment that seriously limits one or more functional capacities (such as mobility, communication, self-care, self-direction, interpersonal skills, work tolerance, or work skills) in terms of an employment outcome;

(ii) Whose vocational rehabilitation can be expected to require multiple vocational rehabilitation services over an extended period of time; and

(iii) Who has one or more physical or mental disabilities resulting from amputation, arthritis, autism, blindness, burn injury, cancer, cerebral palsy, cystic fibrosis, deafness, head injury, heart disease, hemiplegia, hemophilia, respiratory or pulmonary dysfunction, mental retardation, mental illness, multiple sclerosis, muscular dystrophy, musculo-skeletal disorders, neurological disorders (including stroke and epilepsy), spinal cord conditions (including paraplegia and quadriplegia), sickle cell anemia, specific learning disability, end-stage renal disease, or another disability or combination of disabilities determined on the basis of an assessment for determining eligibility and vocational rehabilitation needs to cause comparable substantial functional limitation.

(Authority: Sec. 7(15)(A) of the Act; 29 U.S.C. 708(15)(A))

(29) *Individual's representative* means any representative chosen by an applicant or eligible individual, including a parent, guardian, other family member, or advocate, unless a representative has been appointed by a court to represent the individual, in which case the court-appointed representative is the individual's representative.

(Authority: Sec. 12(c) of the Act; 29 U.S.C. 711(c))

(30) *Integrated setting,*—

(i) With respect to the provision of services, means a setting typically found in the community in which applicants or eligible individuals interact with non-disabled individuals other than non-disabled individuals who are providing services to those applicants or eligible individuals;

(ii) With respect to an employment outcome, means a setting typically found in the community in which applicants or eligible individuals interact with non-disabled individuals, other than non-disabled individuals who are providing services to those applicants or eligible individuals, to the same extent that non-disabled individuals in comparable positions interact with other persons.

(Authority: Sec. 12(c) of the Act; 29 U.S.C. 711(c))

(31) *Maintenance* means monetary support provided to an eligible individual or an individual receiving extended evaluation services for those expenses, such as food, shelter, and clothing, that are in excess of the normal expenses of the individual and that are necessitated by the individual's participation in a program of vocational rehabilitation services.

(Authority: Secs. 12(c) and 103(a)(5) of the Act; 29 U.S.C. 711(c) and 723(a)(5))

Note: The following are examples of expenses that would meet the definition of maintenance. The examples are purely illustrative, do not address all possible circumstances, and are not intended to substitute for individual counselor judgement.

Example: The cost of a uniform or other suitable clothing that is required for an individual's job placement or job seeking activities.

Example: The cost of short-term shelter that is required in order for an individual to participate in vocational training at a site that is not within commuting distance of an individual's home.

Example: The initial one-time costs, such as a security deposit or charges for the initiation of utilities, that are required in order for an individual to relocate for a job placement.

Example: The costs of an individual's participation in enrichment activities related to that individual's training program.

(32) *Nonprofit,* with respect to a community rehabilitation program, means a community rehabilitation program carried out by a corporation or association, no part of the net earnings of which inures, or may lawfully inure, to the benefit of any private shareholder or individual and the income of which is exempt from taxation under section 501(c)(3) of the Internal Revenue Code of 1954.

(Authority: Sec. 7(10) of the Act; 29 U.S.C. 706(10))

(33) *Ongoing support services,* as used in the definition of ''Supported employment''—

(i) Means services that are—

(A) Needed to support and maintain an individual with a most severe disability in supported employment;

(B) Identified based on a determination by the designated State unit of the individual's needs as specified in an individualized written rehabilitation program; and

(C) Furnished by the designated State unit from the time of job placement until transition to extended services, unless post-employment services are provided following transition, and thereafter by one or more extended services providers throughout the individual's term of employment in a particular job placement or multiple placements if those placements are being provided under a program of transitional employment;

(ii) Must include an assessment of employment stability and provision of specific services or the coordination of services at or away from the worksite that are needed to maintain stability based on—

(A) At a minimum, twice-monthly monitoring at the worksite of each individual in supported employment; or

(B) If under special circumstances, especially at the request of the individual, the individualized written rehabilitation program provides for off-site monitoring, twice-monthly meetings with the individual;

(iii) Consist of—

(A) Any particularized assessment supplementary to the comprehensive assessment of rehabilitation needs described in this part;

(B) The provision of skilled job trainers who accompany the individual for intensive job skill training at the work site;

(C) Job development and placement;

(D) Social skills training;

(E) Regular observation or supervision of the individual;

(F) Follow-up services including regular contact with the employers, the individuals, the parents, family members, guardians, advocates or authorized representatives of the individuals, and other suitable professional and informed advisors, in order to reinforce and stabilize the job placement;

(G) Facilitation of natural supports at the worksite;

(H) Any other service identified in the scope of vocational rehabilitation services for individuals, described in § 361.48; or

(I) Any service similar to the foregoing services.

(Authority: Sec. 7(33) and 12(c) of the Act; 29 U.S.C. 706(33) and 711(c))

(34) *Personal assistance services* means a range of services provided by one or more persons designed to assist an individual with a disability to perform daily living activities on or off the job that the individual would typically perform without assistance if the individual did not have a disability. The services must be designed to increase the individual's control in life and ability to perform everyday activities on or off the job. The services must be necessary to the achievement of an employment outcome and may be provided only while the individual is receiving other vocational rehabilitation services. The services may include training in managing, supervising, and directing personal assistance services.

(Authority: Sec. 7(11) and 103(a)(15) of the Act; 29 U.S.C. 706(11) and 29 U.S.C. 723)

(35) *Physical and mental restoration services* means—

(i) Corrective surgery or therapeutic treatment that is likely, within a reasonable period of time, to correct or modify substantially a stable or slowly progressive physical or mental impairment that constitutes a substantial impediment to employment;

(ii) Diagnosis of and treatment for mental or emotional disorders by qualified personnel in accordance with State licensure laws;

(iii) Dentistry;

(iv) Nursing services;

(v) Necessary hospitalization (either inpatient or outpatient care) in connection with surgery or treatment and clinic services;

(vi) Drugs and supplies;

(vii) Prosthetic, orthotic, or other assistive devices, including hearing aids;

(viii) Eyeglasses and visual services, including visual training, and the examination and services necessary for the prescription and provision of eyeglasses, contact lenses, microscopic lenses, telescopic lenses, and other special visual aids prescribed by personnel that are qualified in accordance with State licensure laws;

(ix) Podiatry;

(x) Physical therapy;

(xi) Occupational therapy;

(xii) Speech or hearing therapy;

(xiii) Mental health services;

(xiv) Treatment of either acute or chronic medical complications and emergencies that are associated with or arise out of the provision of physical and mental restoration services, or that are inherent in the condition under treatment;

(xv) Special services for the treatment of individuals with end-stage renal disease, including transplantation, dialysis, artificial kidneys, and supplies; and

(xvi) Other medical or medically related rehabilitation services.

(Authority: Sec. 12(c) and 103(a)(4) of the Act; 29 U.S.C. 711(c) and 723(a)(4))

(36) *Physical or mental impairment* means an injury, disease, or other condition that materially limits, or if not treated is expected to materially limit, mental or physical functioning.

(Authority: Sec. 7(8)(A) and 12(c) of the Act; 29 U.S.C. 706(8)(A) and 711(c))

(37) *Post-employment services* means one or more of the services identified in § 361.48 that are provided subsequent to the achievement of an employment outcome and that are necessary for an individual to maintain, regain, or advance in employment, consistent with the individual's strengths, resources, priorities, concerns, abilities, capabilities, and interests.

(Authority: Sec. 12(c) of the Act; 29 U.S.C. 711(c))

Note: Post-employment services are intended to ensure that the employment outcome remains consistent with the individual's strengths, resources, priorities, concerns, abilities, capabilities, and interests. These services are available to meet rehabilitation needs that do not require a complex and comprehensive provision of services and, thus, should be limited in scope and duration. If more comprehensive services are required, then a new rehabilitation effort should be considered. Post-employment services are to be provided under an amended individualized written rehabilitation program; thus, a re-determination of eligibility is not required. The provision of post-employment services is subject to the same requirements in this part as the provision of any other vocational rehabilitation service. Post-employment services are available to assist an individual to maintain employment, e.g., the individual's employment is jeopardized because of conflicts with supervisors or co-workers and the individual needs mental health services and counseling to maintain the employment; to regain employment, e.g., the individual's job is eliminated through reorganization and new placement services are needed; and to advance in employment, e.g., the employment is no longer consistent with the individual's strengths, resources, priorities, concerns, abilities, capabilities, and interests.

(38) *Rehabilitation engineering* means the systematic application of engineering sciences to design, develop, adapt, test, evaluate, apply, and distribute technological solutions to problems confronted by individuals with disabilities in functional areas, such as mobility, communications, hearing, vision, and cognition, and in activities associated with employment, independent living, education, and integration into the community.

(Authority: Secs. 7(13) and 12(c) of the Act; 29 U.S.C. 706(13) and 711(c))

(39) *Rehabilitation technology* means the systematic application of technologies, engineering methodologies, or scientific principles to meet the needs of, and address the barriers confronted by, individuals with disabilities in areas that include education, rehabilitation, employment, transportation, independent living, and recreation. The term includes rehabilitation engineering, assistive technology devices, and assistive technology services.

(Authority: Sec. 7(13) of the Act; 29 U.S.C. 706(13))

(40) *Reservation* means a Federal or State Indian reservation, public domain Indian allotment, former Indian reservation in Oklahoma, and land held by incorporated Native groups, regional corporations, and village corporations under the provisions of the Alaska Native Claims Settlement Act.

(Authority: Sec. 130(c) of the Act; 29 U.S.C. 750(c))

(41) *Sole local agency* means a unit or combination of units of general local government or one or more Indian tribes that has the sole responsibility under an agreement with, and the supervision of, the State agency to conduct a local or tribal vocational rehabilitation program, in accordance with the State plan.

(Authority: Sec. 7(9) of the Act; 29 U.S.C. 706(9))

(42) *State* means any of the 50 States, the District of Columbia, the Commonwealth of Puerto Rico, the United States Virgin Islands, Guam, American Samoa, and the Commonwealth of the Northern Mariana Islands.

(Authority: Sec. 7(16) of the Act; 29 U.S.C. 706(16))

(43) *State plan* means the State plan for vocational rehabilitation services or the vocational rehabilitation services part of a consolidated rehabilitation plan under § 361.10(c).

(Authority: Secs. 12(c) and 101 of the Act; 29 U.S.C. 711(c) and 721)

(44) *Substantial impediment to employment* means that a physical or mental impairment (in light of attendant medical, psychological, vocational, educational, and other related factors) hinders an individual from preparing for, entering into, engaging in, or retaining employment consistent with the individual's abilities and capabilities.

(Authority: Secs. 7(8)(A) and 12(c) of the Act; 29 U.S.C. 706(8)(A) and 711(c))

(45) *Supported employment* means—

(i) Competitive employment in an integrated setting with ongoing support services for individuals with the most severe disabilities—

(A) For whom competitive employment has not traditionally occurred or for whom competitive employment has been interrupted or intermittent as a result of a severe disability; and

(B) Who, because of the nature and severity of their disabilities, need intensive supported employment services from the designated State unit and extended services after transition in order to perform this work; or

(ii) Transitional employment for individuals with the most severe disabilities due to mental illness.

(Authority: Sec. 7(18) of the Act; 29 U.S.C. 706(18)(A))

(46) *Supported employment services* means ongoing support services and other appropriate services needed to support and maintain an individual with a most severe disability in supported employment that are provided by the designated State unit—

(i) For a period of time not to exceed 18 months, unless under special circumstances the eligible individual and the rehabilitation counselor or coordinator jointly agree to extend the time in order to achieve the rehabilitation objectives identified in the individualized written rehabilitation program; and

(ii) Following transition, as post-employment services that are unavailable from an extended services provider and that are necessary to maintain or regain the job placement or advance in employment.

(Authority: Sec. 7(34) and 12(c) of the Act; 29 U.S.C. 706(34) and 711(c))

(47) *Transition services* means a coordinated set of activities for a student designed within an outcome-oriented process that promotes movement from school to post-school activities, including postsecondary education, vocational training, integrated employment (including supported employment), continuing and adult education, adult services, independent living, or community participation. The coordinated set of activities must be based upon the individual student's needs, taking into account the student's preferences and interests, and must include instruction, community experiences, the development of employment and other post-school adult living objectives, and, if appropriate, acquisition of daily living skills and functional vocational evaluation. Transition services must

promote or facilitate the accomplishment of long-term rehabilitation goals and intermediate rehabilitation objectives identified in the student's IWRP.

(Authority: Section 7(35) and 103(a)(14) of the Act; 29 U.S.C. 706(35) and 723(a)(14))

(48) *Transitional employment,* as used in the definition of ''Supported employment,'' means a series of temporary job placements in competitive work in integrated settings with ongoing support services for individuals with the most severe disabilities due to mental illness. In transitional employment, the provision of ongoing support services must include continuing sequential job placements until job permanency is achieved.

(Authority: Secs. 7(18) and 12(c) of the Act; 29 U.S.C. 706(18) and 711(c))

(49) *Transportation* means travel and related expenses that are necessary to enable an applicant or eligible individual to participate in a vocational rehabilitation service.

(Authority: Secs. 12(c) and 103(a)(10) of the Act; 29 U.S.C. 711(c) and 723(a)(10))

Note: The following are examples of expenses that would meet the definition of transportation. The examples are purely illustrative, do not address all possible circumstances, and are not intended to substitute for individual counselor judgement.

Example: Travel and related expenses for a personal care attendant or aide if the services of that person are necessary to enable the applicant or eligible individual to travel to participate in any vocational rehabilitation service.

Example: Short-term travel-related expenses, such as food and shelter, incurred by an applicant participating in evaluation or assessment services that necessitates travel.

Example: Relocation expenses incurred by an eligible individual in connection with a job placement that is a significant distance from the eligible individual's current residence.

Example: The purchase and repair of vehicles, including vans, but not the modification of these vehicles, as modification would be considered a rehabilitation technology service.

(50) *Vocational rehabilitation services—*

(i) If provided to an individual, means those services listed in § 361.48; and

(ii) If provided for the benefit of groups of individuals, also means those services listed in § 361.49.

(Authority: Sec. 103 (a) and (b) of the Act; 29 U.S.C. 723 (a) and (b))

Subpart B—State Plan for Vocational Rehabilitation Services

§ 361.10 Submission, approval, and disapproval of the State plan.

(a) *Purpose.* In order for a State to receive a grant under this part, the designated State agency shall submit to the Secretary, and obtain approval of, a State plan that contains a description of the State's vocational rehabilitation services program, the plans and policies to be followed in carrying out the program, and other information requested by the Secretary, in accordance with the requirements of this part.

(b) *Separate part relating to rehabilitation of individuals who are blind.* If a separate State agency administers or supervises the administration of a separate part of the State plan relating to the rehabilitation of individuals who are blind, that part of the State plan must separately conform to all requirements under this part that are applicable to a State plan.

(c) *Consolidated rehabilitation plan.* The State may choose to submit a consolidated rehabilitation plan that includes the State plan for vocational rehabilitation services and the State's plan for its program for persons with developmental disabilities. The State planning and advisory council for developmental disabilities and the agency administering the State's program for persons with developmental disabilities must concur in the submission of a consolidated rehabilitation plan. A consolidated rehabilitation plan must comply with, and be administered in accordance with, the Act and the Developmental Disabilities Assistance and Bill of Rights Act, as amended.

(d) *Public participation.* The State shall develop the State plan with input from the public, through public meetings, in accordance with the requirements of § 361.20.

(e) *Duration.* The State plan must cover a multi-year period to be determined by the Secretary.

(f) *Submission of the State plan.* The State shall submit the State plan to the Secretary for approval—

(1) No later than July 1 of the year preceding the first fiscal year for which the State plan is submitted; or

(2) With the prior approval of the Secretary, no later than the date on which the State is required to submit a State plan under another Federal law.

(g) *Revisions to the State plan.* The State shall submit to the Secretary for approval revisions to the State plan in accordance with the requirements of this part and 34 CFR 76.140.

(h) *Approval.* The Secretary approves a State plan and revisions to the State plan that conform to the requirements of this part and section 101(a) of the Act.

(i) *Disapproval.* The Secretary disapproves a State plan that does not conform to the requirements of this part and section 101(a) of the Act, in accordance with the following procedures:

(1) *Informal resolution.* Prior to disapproving a State plan, the Secretary attempts to resolve disputes informally with State officials.

(2) *Notice.* If, after reasonable effort has been made to resolve the dispute, no resolution has been reached, the Secretary provides notice to the State agency of the intention to disapprove the State plan and of the opportunity for a hearing.

(3) *State plan hearing.* If the State agency requests a hearing, the Secretary designates one or more individuals, either from the Department or elsewhere, not responsible for or connected with the administration of this program, to conduct a hearing in accordance with the provisions of 34 CFR Part 81, Subpart A.

(4) *Initial decision.* The hearing officer issues an initial decision in accordance with 34 CFR 81.41.

(5) *Petition for review of an initial decision.* The State agency may seek the Secretary's review of the initial decision in accordance with 34 CFR part 81.

(6) *Review by the Secretary.* The Secretary reviews the initial decision in accordance with 34 CFR 81.43.

(7) *Final decision of the Department.* The final decision of the Department is made in accordance with 34 CFR 81.44.

(8) *Judicial review.* A State may appeal the Secretary's decision to disapprove the State plan by filing a petition for review with the United States Court of Appeals for the circuit in which the State is located, in accordance with section 107(d) of the Act.

(Approved by the Office of Management and Budget under control number 1820–0500.

(Authority: Sec. 6, 101 (a) and (b), and 107(d) of the Act; 20 U.S.C. 1231g(a); and 29 U.S.C. 705, 721 (a) and (b), and 727(d))

§ 361.11 Withholding of funds.

(a) *Basis for withholding.* The Secretary may withhold or limit payments under sections 111, 124, or 632(a) of the Act, as provided by section 107 (c) and (d) of the Act, if the Secretary determines that—

(1) The State plan, including the supported employment supplement, has been so changed that it no longer conforms with the requirements of this part or 34 CFR part 363; or

(2) In the administration of the State plan, there has been a failure to comply substantially with any provision of that plan or a program improvement plan established in accordance with section 106 of the Act.

(b) *Informal resolution.* Prior to withholding or limiting payments in accordance with this section, the Secretary attempts to resolve disputed issues informally with State officials.

(c) *Notice.* If, after reasonable effort has been made to resolve the dispute, no resolution has been reached, the Secretary provides notice to the State agency of the intention to withhold or limit payments and of the opportunity for a hearing.

(d) *Withholding hearing.* If the State agency requests a hearing, the Secretary designates one or more individuals, either from the Department or elsewhere, not responsible for or connected with the administration of this program, to conduct a hearing in accordance with the provisions of 34 CFR part 81, Subpart A.

(e) *Initial decision.* The hearing officer issues an initial decision in accordance with 34 CFR 81.41.

(f) *Petition for review of an initial decision.* The State agency may seek the Secretary's review of the initial decision in accordance with 34 CFR 81.42.

(g) *Review by the Secretary.* The Secretary reviews the initial decision in accordance with 34 CFR 81.43.

(h) *Final decision of the Department.* The final decision of the Department is made in accordance with 34 CFR 81.44

(i) *Judicial review.* A State may appeal the Secretary's decision to withhold or limit payments by filing a petition for review with the U.S. Court of Appeals for the circuit in which the State is located, in accordance with section 107(d) of the Act.

(Authority: Secs. 101(b), 107(c), and 107(d) of the Act; 29 U.S.C. 721(b), 727(c)(1) and (2), and 727(d))

State Plan Content: Administration

§ 361.12 Methods of administration.

The State plan must assure that the State agency, and the designated State unit if applicable, employs methods of administration found necessary by the Secretary for the proper and efficient administration of the plan and for carrying out all functions for which the State is responsible under the plan and this part. These methods must include procedures to ensure accurate data collection and financial accountability.

(Authority: Sec. 101(a)(6) of the Act; 29 U.S.C. 721(a)(6))

§ 361.13 State agency for administration.

(a) *Designation of State agency.* The State plan must designate a State agency as the sole State agency to administer the State plan, or to supervise its administration in a political subdivision of the State by a sole local agency, in accordance with the following requirements:

(1) *General.* Except as provided in paragraphs (a) (2) and (3) of this section, the State plan must provide that the designated State agency is one of the following types of agencies:

(i) A State agency that is an independent State commission, board, or other agency that has as its major function vocational rehabilitation or vocational and other rehabilitation of individuals with disabilities.

(ii) The State agency administering or supervising the administration of education or vocational education in the State, provided that it includes a vocational rehabilitation unit as provided in paragraph (b) of this section.

(iii) A State agency that includes a vocational rehabilitation unit, as provided in paragraph (b) of this section, and at least two other major organizational units, each of which administers one or more of the State's major programs of public education, public health, public welfare, or labor.

(2) *American Samoa.* In the case of American Samoa, the State plan must designate the Governor.

(3) *Designated State agency for individuals who are blind.* If a State commission or other agency that provides assistance or services to individuals who are blind is authorized under State law to provide vocational rehabilitation services to individuals who are blind, and this commission or agency is primarily concerned with vocational rehabilitation or includes a vocational rehabilitation unit as provided in paragraph (b) of this section, the State plan may designate that agency as the sole State agency to administer the part of the plan under which vocational rehabilitation services are provided for individuals who are blind or to supervise its administration in a political subdivision of the State by a sole local agency.

(b) *Designation of State unit.* (1) If the designated State agency is of the type specified in paragraph (a)(1)(ii) or (a)(1)(iii) of this section, or if the designated State agency specified in paragraph (a)(3) of this section does not have as its major function vocational rehabilitation or vocational and other rehabilitation of individuals with disabilities, the State plan must assure that the agency (or each agency if two agencies are designated) includes a vocational rehabilitation bureau, division, or unit that—

(i) Is primarily concerned with vocational rehabilitation or vocational and other rehabilitation of individuals with disabilities and is responsible for the administration of the State agency's vocational rehabilitation program under the State plan, including those responsibilities specified in paragraph (c) of this section;

(ii) Has a full-time director;

(iii) Has a staff, at least 90 percent of whom are employed full time on the rehabilitation work of the organizational unit; and

(iv) Is located at an organizational level and has an organizational status within the State agency comparable to that of other major organizational units of the agency or, in the case of an agency described in paragraph (a)(1)(ii) of this section, is so located and has that status or has a director who is the executive officer of the State agency.

(2) In the case of a State that has not designated a separate State agency for individuals who are blind, as provided for in paragraph (a)(3) of this section, the State may assign responsibility for the part of the plan under which vocational rehabilitation services are provided to individuals who are blind to one organizational unit of the designated State agency and may assign responsibility for the rest of the plan to another organizational unit of the designated State agency, with the provisions of paragraph (b)(1) of this section applying separately to each of these units.

(c) *Responsibility for administration.* (1) The State plan must assure that, at a minimum, the following activities are the responsibility of the designated State unit or the sole local agency under the supervision of the State unit:

(i) All decisions affecting eligibility for vocational rehabilitation services, the nature and scope of available services, and the provision of these services.

(ii) The determination that an individual has achieved an employment outcome under § 361.56.

(iii) Policy formulation and implementation.

(iv) The allocation and expenditure of vocational rehabilitation funds.

(2) This responsibility may not be delegated to any other agency or individual.

(Approved by the Office of Management and Budget under control number 1820–0500.)

(*Authority:* Sec. 101(a)(1) and 101(a)(2) of the Act; 29 U.S.C. 721(a)(1) and 721(a)(2))

§ 361.14 Substitute State agency.

(a) *General provisions.* (1) If the Secretary has withheld all funding from a State under § 361.11, the State may designate another agency to substitute for the designated State agency in carrying out the State's program of vocational rehabilitation services.

(2) Any public or nonprofit private organization or agency within the State or any political subdivision of the State is eligible to be a substitute agency.

(3) The substitute agency shall submit a State plan that meets the requirements of this part.

(4) The Secretary makes no grant to a substitute agency until the Secretary approves its plan.

(b) *Substitute agency matching share.* The Secretary does not make any payment to a substitute agency unless it has provided assurances that it will contribute the same matching share as the State would have been required to contribute if the State agency were carrying out the vocational rehabilitation program.

(Approved by the Office of Management and Budget under control number 1820–0500.)

(Authority: Sec. 107(c)(3) of the Act; 29 U.S.C. 727(c)(3))

§ 361.15 Local administration.

(a) If the State plan provides for local administration, it must—

(1) Identify each local agency;

(2) Assure that each local agency is under the supervision of the designated State unit and is the sole local agency as defined in § 361.5(b)(41) that is responsible for the administration of the program within the political subdivision that it serves; and

(3) Describe the methods each local agency will use to administer the vocational rehabilitation program, in accordance with the State plan.

(b) A separate local agency serving individuals who are blind may administer that part of the plan relating to vocational rehabilitation of individuals who are blind, under the supervision of the designated State unit for individuals who are blind.

(Approved by the Office of Management and Budget under control number 1820–0500.)

(Authority: Sec. 7(9) and 101(a)(1)(A) of the Act; 29 U.S.C. 706(9) and 721(a)(1)(A))

§ 361.16 Establishment of an independent commission or a State Rehabilitation Advisory Council.

(a) *General requirement.* Except as provided in paragraph (b) of this section, the State plan must contain one of the following two assurances:

(1) An assurance that the State agency is an independent State commission that—

(i) Is primarily concerned with vocational rehabilitation or vocational and other rehabilitation services, in accordance with § 361.13(a)(1)(i);

(ii) Is consumer-controlled by persons who—

(A) Are individuals with physical or mental impairments that substantially limit major life activities; and

(B) Represent individuals with a broad range of disabilities;

(iii) Includes individuals representing family members, advocates, and authorized representatives of individuals with mental impairments; and

(iv) Conducts a review and analysis of the effectiveness of and consumer satisfaction with vocational rehabilitation services and providers in the State, in accordance with the provisions in § 361.17(h)(3).

(2) An assurance that—

(i) The State has established a State Rehabilitation Advisory Council (Council) that meets the requirements of § 361.17;

(ii) The designated State unit seeks and seriously considers, on a regular and ongoing basis, advice from the Council regarding the development, implementation, and amendment of the State plan, the strategic plan, and other policies and procedures of general applicability pertaining to the provision of vocational rehabilitation services in the State;

(iii) The designated State unit transmits to the Council—

(A) All plans, reports, and other information required under the Act to be submitted to the Secretary;

(B) Copies of all written policies, practices, and procedures of general applicability provided to or used by rehabilitation personnel; and

(C) Copies of due process hearing decisions in a manner that preserves the confidentiality of the participants in the hearings; and

(iv) The State plan summarizes annually the advice provided by the Council, including recommendations from the annual report of the Council, the survey of consumer satisfaction, and other reports prepared by the Council, and the State agency's response to the advice and recommendations, including the manner in which the State will modify its policies and procedures based on the survey of consumer satisfaction and explanations of reasons for rejecting any advice or recommendations of the Council.

(b) *Exception for separate State agency for individuals who are blind.* In the ase of a State that designates a separate State agency, under § 361.13(a)(3), to administer the part of the State plan under which vocational rehabilitation services are provided to individuals who are blind, the State plan must contain one of the following four assurances:

(1) An assurance that an independent commission in accordance with paragraph (a)(1) of this section is responsible under State law for operating or overseeing the operation of the vocational rehabilitation program of both the State agency that administers the part of the State plan under which vocational rehabilitation services are provided to individuals who are blind and the State agency that administers the remainder of the State plan.

(2) An assurance that—

(i) An independent commission that is consumer-controlled by, and represents the interests of, individuals who are blind and conducts a review and analysis of the effectiveness of and consumer satisfaction with vocational rehabilitation services and providers, in accordance with the provisions of § 361.17(h)(3), is responsible under State law for operating, or overseeing the operation of, the vocational rehabilitation program in the State for individuals who are blind; and

(ii) An independent commission that is consumer-controlled in accordance with paragraph (a)(1)(i) of this section and conducts a review and analysis of the effectiveness of and consumer satisfaction with vocational rehabilitation services and providers, in accordance with § 361.17(h)(3), is responsible under State law for operating, or overseeing the operation of, the vocational rehabilitation program in the State for all individuals with disabilities, except individuals who are blind.

(3) An assurance that—

(i) An independent commission that is consumer-controlled by, and represents the interests of, individuals who are blind and that conducts a review and analysis of the effectiveness of and consumer satisfaction with vocational rehabilitation services and providers, in accordance with § 361.17(h)(3), is responsible under State law for operating, or overseeing the operation of, the vocational rehabilitation program in the State for individuals who are blind; and

(ii) The State has established a State Rehabilitation Advisory Council that meets the criteria in § 361.17 and carries out the duties of a Council with respect to functions for, and services provided to, individuals with disabilities, except for individuals who are blind.

(4) An assurance that—

(i) An independent commission that is consumer-controlled in accordance

with paragraph (a)(1)(i) of this section and conducts a review and analysis of the effectiveness of and consumer satisfaction with vocational rehabilitation services and providers, in accordance with the provisions of § 361.17(h)(3), is responsible under State law for operating or overseeing the operation of the vocational rehabilitation services for all individuals in the State, except individuals who are blind; and

(ii) The State has established a State Rehabilitation Advisory Council that meets the criteria in § 361.17 and carries out the duties of a Council with respect to functions for, and services provided to, individuals who are blind.

(Approved by the Office of Management and Budget under control number 1820–0500.)

(Authority: Sec. 101(a)(32) and 101(a)(36) of the Act; 29 U.S.C. 721(a)(32) and 721(a)(36))

§ 361.17 Requirements for a State Rehabilitation Advisory Council.

If the State plan contains an assurance that the State has established a Council under § 361.16(a)(2), (b)(3)(ii), or (b)(4)(ii), the State plan must also contain an assurance that the Council meets the following requirements:

(a) *Appointment.* (1) The members of the Council shall be—

(i) Appointed by the Governor; or

(ii) If State law vests appointment authority in an entity other than, or in conjunction with, the Governor (such as one or more houses of the State legislature or an independent board that has general appointment authority), appointed by that entity or entities.

(2) The appointing authority shall select members of the Council after soliciting recommendations from representatives of organizations representing a broad range of individuals with disabilities and organizations interested in individuals with disabilities.

(b) *Composition.*—(1) *General.* Except as provided in paragraph (b)(3) of this section, the Council shall be composed of at least 13 members, including—

(i) At least one representative of the Statewide Independent Living Council, who shall be the chairperson of, or other individual recommended by, the Statewide Independent Living Council;

(ii) At least one representative of a parent training and information center established pursuant to section 631(e)(1) of IDEA;

(iii) At least one representative of the Client Assistance Program (CAP), established under 34 CFR Part 370, who shall be the director of, or other individual recommended by, the CAP;

(iv) At least one vocational rehabilitation counselor with knowledge of and experience with vocational rehabilitation programs who serves as an ex officio, nonvoting member if employed by the designated State agency;

(v) At least one representative of community rehabilitation program service providers;

(vi) Four representatives of business, industry, and labor;

(vii) Representatives of disability groups that include a cross section of—

(A) Individuals with physical, cognitive, sensory, and mental disabilities; and

(B) Parents, family members, guardians, advocates, or authorized representatives of individuals with disabilities who have difficulty representing themselves due to their disabilities;

(viii) Current or former applicants for, or recipients of, vocational rehabilitation services; and

(ix) The director of the designated State unit as an ex officio, nonvoting member.

(2) *Employees of the designated State agency.* Employees of the designated State agency may serve only as nonvoting members of the Council.

(3) *Composition of a separate Council for a separate State agency for individuals who are blind.* Except as provided in paragraph (b)(4) of this section, if the State establishes a separate Council for a separate State agency for individuals who are blind, that Council shall—

(i) Conform with all of the composition requirements for a Council under paragraph (b)(1) of this section, except the requirements in paragraph (b)(1)(vii), unless the exception in paragraph (b)(4) of this section applies; and

(ii) Include—

(A) At least one representative of a disability advocacy group representing individuals who are blind; and

(B) At least one parent, family member, guardian, advocate, or authorized representative of an individual who is blind, has multiple disabilities, and has difficulty representing himself or herself due to disabilities.

(4) *Exception.* If State law in effect on October 29, 1992 requires a separate Council under paragraph (b)(3) of this section to have fewer than 13 members, the separate Council is deemed to be in compliance with the composition requirements in paragraphs (b)(1)(vi) and (b)(1)(viii) of this section if it includes at least one representative who meets the requirements for each of those paragraphs.

(c) *Majority.* A majority of the Council members shall be individuals with disabilities who are not employed by the designated State unit.

(d) *Chairperson.* The chairperson shall be—

(1) Selected by the members of the Council from among the voting members of the Council, subject to the veto power of the Governor; or

(2) If the Governor does not have veto power pursuant to State law, selected by the Governor, or by the Council if required by the Governor, from among the voting members of the Council.

(e) *Terms of appointment.* (1) Each member of the Council shall be appointed for a term of no more than three years and may serve for no more than two consecutive full terms.

(2) A member appointed to fill a vacancy occurring prior to the end of the term for which the predecessor was appointed shall be appointed for the remainder of the predecessor's term.

(3) The terms of service of the members initially appointed must be for varied numbers of years to ensure that terms expire on a staggered basis.

(f) *Vacancies.* (1) A vacancy in the membership of the Council must be filled in the same manner as the original appointment.

(2) No vacancy affects the power of the remaining members to execute the duties of the Council.

(g) *Conflict of interest.* No member of the Council shall cast a vote on any matter that would provide direct financial benefit to the member or the member's organization or otherwise give the appearance of a conflict of interest under State law.

(h) *Functions.* The Council shall—

(1) Review, analyze, and advise the designated State unit regarding the performance of the State unit's responsibilities under this part, particularly responsibilities related to—

(i) Eligibility, including order of selection;

(ii) The extent, scope, and effectiveness of services provided; and

(iii) Functions performed by State agencies that affect or potentially affect the ability of individuals with disabilities to achieve rehabilitation goals and objectives under this part;

(2) Advise, and at the discretion of the State agency assist, the State unit in the preparation of applications, the State plan, the strategic plan, and amendments to the plans, reports, needs assessments, and evaluations required by this part;

(3) To the extent feasible, conduct a review and analysis of the effectiveness of, and consumer satisfaction with—

(i) The functions performed by State agencies and other public and private

entities responsible for serving individuals with disabilities; and

(ii) The vocational rehabilitation services provided by State agencies and other public and private entities responsible for providing vocational rehabilitation services to individuals with disabilities from funds made available under the Act or through other public or private sources;

(4) Prepare and submit to the Governor, or appropriate State entity, and to the Secretary no later than 90 days after the end of the Federal fiscal year an annual report on the status of vocational rehabilitation programs operated within the State and make the report available to the public through appropriate modes of communication;

(5) Coordinate with other councils within the State, including the Statewide Independent Living Council established under 34 CFR part 364, the advisory panel established under section 613(a)(12) of IDEA, the State Planning Council described in section 124 of the Developmental Disabilities Assistance and Bill of Rights Act, and the State mental health planning council established under section 1916(e) of the Public Health Service Act;

(6) Advise the designated State agency and provide for coordination and the establishment of working relationships between the designated State agency and the Statewide Independent Living Council and centers for independent living within the State; and

(7) Perform other comparable functions, consistent with the purpose of this part, that the Council determines to be appropriate.

(i) *Resources.* (1) The Council, in conjunction with the designated State unit, shall prepare a plan for the provision of resources, including staff and other personnel, that may be necessary for the Council to carry out its functions under this part.

(2) In implementing the resources plan, the Council shall rely on existing resources to the maximum extent possible.

(3) Any disagreements between the designated State unit and the Council regarding the amount of resources necessary must be resolved by the Governor or other appointing entity, consistent with paragraphs (i)(1) and (2) of this section.

(4) The Council shall, consistent with State law, supervise and evaluate the staff and personnel that are necessary to carry out its functions.

(5) Those staff and personnel that are assisting the Council in carrying out its functions may not be assigned duties by the designated State unit or any other agency or office of the State that would create a conflict of interest.

(j) *Meetings.* The Council shall—

(1) Convene at least four meetings a year to conduct Council business that are publicly announced, open and accessible to the public, including individuals with disabilities, unless there is a valid reason for an executive session; and

(2) Conduct forums or hearings, as appropriate, that are publicly announced, open and accessible to the public, including individuals with disabilities.

(k) *Compensation.* Funds appropriated under Title I of the Act, except funds to carry out sections 112 and 130 of the Act, may be used to compensate and reimburse the expenses of Council members in accordance with section 105(g) of the Act.

(Approved by the Office of Management and Budget under control number 1820–0500.)

(Authority: Sec. 105 of the Act; 29 U.S.C. 725)

§ 361.18 Comprehensive system of personnel development.

The State plan must describe the procedures and activities the State agency will undertake to establish and maintain a comprehensive system of personnel development designed to ensure an adequate supply of qualified rehabilitation personnel, including professionals and paraprofessionals, for the designated State unit. If the State agency has a State Rehabilitation Advisory Council, this description must, at a minimum, specify that the Council has an opportunity to review and comment on the development of plans, policies, and procedures necessary to meet the requirements of paragraphs (b) through (d) and paragraph (f) of this section. This description must also conform with the following requirements:

(a) *Data system on personnel and personnel development.* The State plan must describe the development and maintenance of a system by the State agency for collecting and analyzing on an annual basis data on qualified personnel needs and personnel development, in accordance with the following requirements:

(1) Data on qualified personnel needs must include—

(i) The number of personnel who are employed by the State agency in the provision of vocational rehabilitation services in relation to the number of individuals served, broken down by personnel category;

(ii) The number of personnel currently needed by the State agency to provide vocational rehabilitation services, broken down by personnel category; and

(iii) Projections of the number of personnel, broken down by personnel category, who will be needed by the State agency to provide vocational rehabilitation services in the State in five years based on projections of the number of individuals to be served, including individuals with severe disabilities, the number of personnel expected to retire or leave the field, and other relevant factors.

(2) Data on personnel development must include—

(i) A list of the institutions of higher education in the State that are preparing vocational rehabilitation professionals, by type of program;

(ii) The number of students enrolled at each of those institutions, broken down by type of program; and

(iii) The number of students who graduated during the prior year from each of those institutions with certification or licensure, or with the credentials for certification or licensure, broken down by the personnel category for which they have received, or have the credentials to receive, certification or licensure.

(b) *Plan for recruitment, preparation, and retention of qualified personnel.* The State plan must describe the development, updating, and implementation of a plan to address the current and projected needs for personnel who are qualified in accordance with paragraph (c) of this section. The plan must identify the personnel needs based on the data collection and analysis system described in paragraph (a) of this section and must provide for the coordination and facilitation of efforts between the designated State unit and institutions of higher education and professional associations to recruit, prepare, and retain personnel who are qualified in accordance with paragraph (c) of this section, including personnel from minority backgrounds and personnel who are individuals with disabilities.

(c) *Personnel standards.* (1) The State plan must include the State agency's policies and describe the procedures the State agency will undertake to establish and maintain standards to ensure that professional and paraprofessional personnel needed within the State unit to carry out this part are appropriately and adequately prepared and trained, including—

(i) Standards that are consistent with any national or State-approved or -recognized certification, licensing, or registration requirements, or, in the absence of these requirements, other

comparable requirements (including State personnel requirements), that apply to the profession or discipline in which that category of personnel is providing vocational rehabilitation services; and

(ii) To the extent that existing standards are not based on the highest requirements in the State, the steps the State is currently taking and the steps the State plans to take to retrain or hire personnel to meet standards that are based on the highest requirements in the State, including measures to notify State unit personnel, the institutions of higher education identified under paragraph (a)(2)(i) of this section, and other public agencies of these steps and the timelines for taking each step.

(2) As used in this section—

(i) *Highest requirements in the State applicable to that profession or discipline* means the highest entry-level academic degree needed for any national or State-approved or -recognized certification, licensing, registration, or other comparable requirements that apply to that profession or discipline. The current requirements of all State statutes and regulations of other agencies in the State applicable to that profession or discipline must be considered and must be kept on file by the designated State unit and available to the public.

(ii) *Profession or discipline* means a specific occupational category, including any paraprofessional occupational category, that—

(A) Provides rehabilitation services to individuals with disabilities;

(B) Has been established or designated by the State; and

(C) Has a specified scope of responsibility.

(d) *Staff development.* (1) The State plan must include the State agency's policies and describe the procedures and activities the State agency will undertake to ensure that all personnel employed by the State unit receive appropriate and adequate training, including a description of—

(i) A system of staff development for rehabilitation professionals and paraprofessionals within the State unit, particularly with respect to rehabilitation technology; and

(ii) Procedures for acquiring and disseminating to rehabilitation professionals and paraprofessionals within the designated State unit significant knowledge from research and other sources, including procedures for providing training regarding the amendments to the Rehabilitation Act of 1973 made by the Rehabilitation Act Amendments of 1992.

(2) The specific training areas for staff development must be based on the needs of each State unit and may include, but are not limited to, training with respect to the requirements of the Americans with Disabilities Act, IDEA, and Social Security work incentive programs, training to facilitate informed choice under this program, and training to improve the provision of services to culturally diverse populations.

(e) *Personnel to address individual communication needs.* The State plan must describe how the State unit—

(1) Includes among its personnel, or obtains the services of, individuals able to communicate in the native languages of applicants and eligible individuals who have limited English speaking ability; and

(2) Includes among its personnel, or obtains the services of, individuals able to communicate with applicants and eligible individuals in appropriate modes of communication.

(f) *Performance evaluation system.* The State plan must describe how the system for evaluating the performance of rehabilitation counselors, coordinators, and other personnel used in the State unit facilitates, and in no way impedes, the accomplishment of the purpose and policy of the program as described in sections 100(a)(2) and 100(a)(3) of the Act, including the policy of serving, among others, individuals with the most severe disabilities.

(g) *Coordination with personnel development under IDEA.* The State plan must describe the procedures and activities the State agency will undertake to coordinate its comprehensive system of personnel development under the Act with personnel development under IDEA.

(Approved by the Office of Management and Budget under control number 1820–0500.)

(Authority: Sec. 101 (a)(7) and (a)(35) of the Act; 29 U.S.C. 721(a) (7) and (35))

Note: Under the Act and the regulations in this part, the State agency is required to collect and analyze data regarding personnel needs by type or category of personnel. The personnel data must be collected and analyzed according to personnel category breakdowns that are based on the major categories of staff in the State unit. Similarly, the data from institutions of higher education must be broken down by type of program to correspond as closely as possible with the personnel categories of the State unit.

§ 361.19 Affirmative action for individuals with disabilities.

The State plan must assure that the State agency takes affirmative action to employ and advance in employment qualified individuals with disabilities.

(Approved by the Office of Management and Budget under control number 1820–0500.)

(Authority: Sec. 101(a)(6)(A) of the Act; 29 U.S.C. 721(a)(6)(A))

§ 361.20 State plan development.

(a) *Public participation requirements.*—(1) *Plan development and revisions.* The State plan must assure that the State unit conducts public meetings throughout the State to provide all segments of the public, including interested groups, organizations, and individuals, an opportunity to comment on the State plan prior to its development and to comment on any revisions to the State plan.

(2) *Notice requirements.* The State plan must assure that the State unit, prior to conducting public meetings, provides appropriate and sufficient notice throughout the State of the meetings in accordance with—

(i) State law governing public meetings; or

(ii) In the absence of State law governing public meetings, procedures developed by the State unit in consultation with the State Rehabilitation Advisory Council.

(3) *Revisions based on consumer satisfaction surveys.* The State plan must describe the manner in which the State's policies and procedures will be revised based on the results of consumer satisfaction surveys conducted by the State Rehabilitation Advisory Council under § 361.17(h)(3) or by the State agency if it is an independent commission in accordance with the requirements of § 361.16.

(b) *Special consultation requirements.* The State plan must assure that, as appropriate, the State unit actively consults in the development and revision of the State plan with the CAP director, the State Rehabilitation Advisory Council, and, as appropriate, those Indian tribes, tribal organizations, and native Hawaiian organizations that represent significant numbers of individuals with disabilities within the State.

(c) *Summary of public comments.* The State plan must include a summary of the public comments on the State plan, including comments on revisions to the State plan and the State unit's response to those comments.

(d) *Appropriate modes of communication.* The State unit shall provide, through appropriate modes of communication, the notices of the public meetings, any materials furnished prior to or during the public meetings, and the approved State plan.

(Approved by the Office of Management and Budget under control number 1820–0500.)

(Authority: Sec. 101(a)(20), 101(a)(23), 101(a)(32), and 105(c)(2) of the Act; 29 U.S.C. 721(a)(20), (23), and (32) and 725(c)(2))

§ 361.21 Consultations regarding the administration of the State plan.

(a) The State plan must assure that, in connection with matters of general policy development and implementation arising in the administration of the State plan, the State unit seeks and takes into account the views of—

(1) Individuals who receive vocational rehabilitation services or, as appropriate, the individuals' representatives;

(2) Personnel working in the field of vocational rehabilitation;

(3) Providers of vocational rehabilitation services;

(4) The CAP director; and

(5) The State Rehabilitation Advisory Council, if the State has a Council.

(b) The State plan must specifically describe the manner in which the State unit will take into account the views regarding State policy and administration of the State plan that are expressed in the consumer satisfaction surveys conducted by the State Rehabilitation Advisory Council under § 361.17(h)(3) or by the State agency if it is an independent commission in accordance with the requirements of § 361.16(a)(1).

(Approved by the Office of Management and Budget under control number 1820–0500.)

(Authority: Secs. 101(a)(18), 101(a)(32), and 105(c)(2) of the Act; 29 U.S.C. 721(a)(18), 721(a)(32), and 725(c)(2))

§ 361.22 Cooperation with agencies responsible for students with disabilities.

(a) *Students with disabilities who are receiving special education services.*—(1) *General.* The State plan must contain plans, policies, and procedures that are designed to facilitate the transition of students who are receiving special education services from the provision of a free appropriate public education under the responsibility of an educational agency to the provision of vocational rehabilitation services under the responsibility of the designated State unit. These plans, policies, and procedures must provide for the development and completion of the IWRP before the student leaves the school setting for each student determined to be eligible for vocational rehabilitation services or, if the designated State unit is operating under an order of selection, for each eligible student able to be served under the order. The IWRP must, at a minimum, identify the long-term rehabilitation goals, intermediate rehabilitation objectives, and goals and objectives related to enabling the student to live independently, to the extent these goals and objectives are included in the student's individualized education program.

(2) *Formal interagency agreement.* The State plan must assure that the State unit enters into formal interagency agreements with the State educational agency and, as appropriate, with local educational agencies, that are responsible for the free appropriate public education of students with disabilities who are receiving special education services. Formal interagency agreements must, at a minimum, identify—

(i) Policies, practices, and procedures that can be coordinated between the agencies, including definitions, standards for eligibility, policies and procedures for making referrals, procedures for outreach to and identification of youth who are receiving special education services and are in need of transition services, and procedures and timeframes for evaluation and follow-up of those students;

(ii) The roles of each agency, including provisions for determining State lead agencies and qualified personnel responsible for transition services;

(iii) Procedures for providing training for staff of State and local educational agencies as to the availability, benefits of, and eligibility standards for vocational rehabilitation services, to the extent practicable;

(iv) Available resources, including sources of funds for the development and expansion of services;

(v) The financial responsibility of each agency in providing services to students with disabilities who are receiving special education services, consistent with State law;

(vi) Procedures for resolving disputes between the agencies that are parties to the agreement; and

(vii) All other components necessary to ensure meaningful cooperation among agencies, including procedures to facilitate the development of local teams to coordinate the provision of services to individuals, sharing data, and coordinating joint training of staff in the provision of transition services.

(b) *Students with disabilities who are not receiving special education services.* The State plan must contain plans, policies, and procedures, including cooperation with appropriate agencies, designed to ensure that students with disabilities who are not receiving special education services have access to and can receive vocational rehabilitation services, if appropriate, and to ensure outreach to and identification of those students.

(Approved by the Office of Management and Budget under control number 1820–0500.)

(Authority: Secs. 101(a)(11)(C), 101(a)(24) and 101(a)(30) of the Act; 29 U.S.C. 721 (a)(11), (a)(24), and (a)(30))

Note: The following excerpt from page 33 of Senate Report No. 102–357 further clarifies the provision of transition services by the State vocational rehabilitation agency:

The overall purpose of this provision is to ensure that all students who require vocational rehabilitation services receive those services in a timely manner. There should be no gap in services between the education system and the vocational rehabilitation system * * *. The committee intends that students with disabilities who are eligible for, and who need, vocational rehabilitation services will receive those services as soon as possible, consistent with Federal and State law. These provisions are not intended in any way to shift the responsibility of service delivery from education to rehabilitation during the transition years. School officials will continue to be responsible for providing a free and appropriate public education as defined by the IEP. The role of the rehabilitation system is primarily one of planning for the student's years after leaving school. (S. Rep. No. 357, 102d Cong., 2d. Sess. 33 (1992))

§ 361.23 Cooperation with other public agencies.

(a) *Coordination of services with vocational education and Javits-Wagner-O'Day programs.* The State plan must assure that specific arrangements or agreements are made for the coordination of services for any individual who is eligible for vocational rehabilitation services and is also eligible for services under the Carl D. Perkins Vocational and Applied Technology Education Act or the Javits-Wagner-O'Day Act.

(b) *Cooperation with other Federal, State, and local public agencies providing services related to the rehabilitation of individuals with disabilities.* (1) The State plan must assure that the State unit cooperates with other Federal, State, and local public agencies providing services related to the rehabilitation of individuals with disabilities, including, as appropriate, establishing interagency working groups or entering into formal interagency cooperative agreements with, and using the services and facilities of—

(i) Federal agencies providing services related to the rehabilitation of individuals with disabilities, including the Social Security Administration, the Office of Workers' Compensation Programs of the Department of Labor,

and the Department of Veterans Affairs; and

(ii) State and local public agencies providing services related to the rehabilitation of individuals with disabilities, including State and local public agencies administering the State's social services and financial assistance programs and other State programs for individuals with disabilities, such as the State's developmental disabilities program, veterans programs, health and mental health programs, education programs (including adult education, higher education, and vocational education programs), workers' compensation programs, job training and placement programs, and public employment offices.

(2) Interagency cooperation under paragraph (b)(1) of this section, to the extent practicable, must provide for training for staff of the agencies as to the availability, benefits of, and eligibility standards for vocational rehabilitation services.

(3) If the State unit chooses to enter into formal interagency cooperative agreements developed under paragraph (b)(1) of this section, the agreements must—

(i) Identify policies, practices, and procedures that can be coordinated among the agencies (particularly definitions, standards for eligibility, the joint sharing and use of evaluations and assessments, and procedures for making referrals);

(ii) Identify available resources and define the financial responsibility of each agency for paying for necessary services (consistent with State law) and procedures for resolving disputes between agencies; and

(iii) Include all additional components necessary to ensure meaningful cooperation and coordination.

(c) *Reciprocal referral services with a separate agency for individuals who are blind.* If there is a separate State unit for individuals who are blind, the State plan must assure that the two State units establish reciprocal referral services, use each other's services and facilities to the extent feasible, jointly plan activities to improve services in the State for individuals with multiple impairments, including visual impairments, and otherwise cooperate to provide more effective services, including, if appropriate, entering into a written cooperative agreement.

(Authority: Secs. 101(a)(11) and 101(a)(22) of the Act; 29 U.S.C. 721(a)(11) and 721(a)(22))

§ 361.24 Coordination with the Statewide Independent Living Council.

The State plan must assure that the State unit will coordinate and establish working relationships with the Statewide Independent Living Council established under 34 CFR Part 364 and with independent living centers within the State.

(Authority: Sec. 101(a)(33) of the Act; 29 U.S.C. 721(a)(33))

§ 361.25 Statewideness.

The State plan must assure that services provided under the State plan will be available in all political subdivisions of the State, unless a waiver of statewideness is requested and approved in accordance with § 361.26.

(Authority: Section 101(a)(4) of the Act; 29 U.S.C. 721(a)(4))

§ 361.26 Waiver of statewideness.

(a) *Availability.* The State unit may provide services in one or more political subdivisions of the State that increase services or expand the scope of services that are available statewide under the State plan if—

(1) The non-Federal share of the cost of these services is met from funds provided by a local public agency, including funds contributed to a local public agency by a private agency, organization, or individual;

(2) The services are likely to promote the vocational rehabilitation of substantially larger numbers of individuals with disabilities or of individuals with disabilities with particular types of impairments; and

(3) The State includes in its State plan, and the Secretary approves, a request for a waiver of the statewideness requirement, in accordance with the requirements of paragraph (b) of this section.

(b) *Request for waiver.* The request for a waiver of statewideness must—

(1) Identify the types of services to be provided;

(2) Contain a written assurance from the local public agency that it will make available to the State unit the non-Federal share of funds;

(3) Contain a written assurance that State unit approval will be obtained for each proposed service before it is put into effect; and

(4) Contain a written assurance that all other State plan requirements, including a State's order of selection requirements, will apply to all services approved under the waiver.

(Approved by the Office of Management and Budget under control number 1820–0500.)

(Authority: Sec. 101(a)(4) of the Act; 29 U.S.C. 721(a)(4))

§ 361.27 Shared funding and administration of joint programs.

(a) If the State plan provides for a joint program involving shared funding and administrative responsibility with another State agency or a local public agency to provide services to individuals with disabilities, the plan must include a description of the nature and scope of the joint program, the services to be provided, the respective roles of each participating agency in the provision of services and in their administration, and the share of the costs to be assumed by each agency.

(b) If a proposed joint program does not comply with the statewideness requirement in § 361.25, the State unit shall obtain a waiver of statewideness, in accordance with § 361.26.

(Approved by the Office of Management and Budget under control number 1820–0500.)

(Authority: Section 101(a)(1)(A) of the Act; 29 U.S.C. 721(a)(1)(A))

§ 361.28 Third-party cooperative arrangements involving funds from other public agencies.

(a) If the designated State unit enters into a third-party cooperative arrangement for providing or administering vocational rehabilitation services with another State agency or a local public agency that is furnishing part or all of the non-Federal share, the State plan must assure that—

(1) The services provided by the cooperating agency are not the customary or typical services provided by that agency but are new services that have a vocational rehabilitation focus or existing services that have been modified, adapted, expanded, or reconfigured to have a vocational rehabilitation focus;

(2) The services provided by the cooperating agency are only available to applicants for, or recipients of, services from the designated State unit;

(3) Program expenditures and staff providing services under the cooperative arrangement are under the administrative supervision of the designated State unit; and

(4) All State plan requirements, including a State's order of selection, will apply to all services provided under the cooperative program.

(b) If a third party cooperative agreement does not comply with the statewideness requirement in § 361.25, the State unit shall obtain a waiver of statewideness, in accordance with § 361.26.

(Authority: Sec. 101(a)(1)(A) of the Act; 29 U.S.C. 721(a)(1)(A))

§ 361.29 Statewide studies and evaluations.

(a) *Statewide studies.* The State plan must assure that the State unit conducts continuing statewide studies to determine the current needs of individuals with disabilities within the State and the best methods to meet those needs. As part of the development of the State plan, the continuing statewide studies, at a minimum, must include—

(1) A triennial comprehensive assessment of the rehabilitation needs of individuals with severe disabilities who reside in the State;

(2) A triennial review of the effectiveness of outreach procedures used to identify and serve individuals with disabilities who are minorities and individuals with disabilities who are unserved and underserved by the vocational rehabilitation system; and

(3) A triennial review of a broad variety of methods to provide, expand, and improve vocational rehabilitation services to individuals with the most severe disabilities, including individuals receiving supported employment services under 34 CFR part 363.

(b) *Annual evaluation.* The State plan must assure that the State unit conducts an annual evaluation of the effectiveness of the State's vocational rehabilitation program in providing vocational rehabilitation and supported employment services, especially to individuals with the most severe disabilities. The annual evaluation must analyze the extent to which—

(1) The State has achieved the goals and priorities established in the State plan and annual amendments to the plan; and

(2) The State is in compliance with the evaluation standards and performance indicators established by the Secretary pursuant to section 106 of the Act.

(c) *Reporting requirements.* (1) The State plan must describe annually those changes that have been adopted in policy, in the State plan and its amendments, and in the strategic plan and its amendments as a result of the statewide studies and the annual program evaluation.

(2) The State plan must contain an annual description of the methods used to expand and improve vocational rehabilitation services to individuals with the most severe disabilities, including the State unit's criteria for determining which individuals are individuals with the most severe disabilities.

(3) The State plan must contain an annual analysis of the characteristics of individuals determined to be ineligible for services and the reasons for the ineligibility determinations.

(4) The State unit shall maintain copies of the statewide studies and the annual evaluations and shall make the copies available to the Secretary upon request.

(d) *Role of the State Rehabilitation Advisory Council.* The State plan must assure that the State unit seeks the advice of the State Rehabilitation Advisory Council, if the State has a Council, regarding the continuing statewide studies and the annual evaluation and, at the discretion of the State agency, seeks assistance from the Council in the preparation and analysis of the studies and evaluation.

(Approved by the Office of Management and Budget under control number 1820–0500.)

(Authority: Sections 101(a)(5) (A) and (B), 101(a)(9)(D), 101(a)(15) (A), (C), and (D), 101(a)(19), and 105(c)(2) of the Act; 29 U.S.C. 721(a) (5), (9), (15), and (19) and 725(c)(2))

§ 361.30 Services to special groups of individuals with disabilities.

(a) *Civil employees of the United States.* The State plan must assure that vocational rehabilitation services are available to civil employees of the U.S. Government who are disabled in the line of duty, under the same terms and conditions applied to other individuals with disabilities.

(b) *Public safety officers.* (1) The State plan must assure that special consideration will be given to those individuals with disabilities whose disability arose from an impairment sustained in the line of duty while performing as a public safety officer and the immediate cause of that impairment was a criminal act, apparent criminal act, or a hazardous condition resulting directly from the officer's performance of duties in direct connection with the enforcement, execution, and administration of law or fire prevention, firefighting, or related public safety activities.

(2) For the purposes of paragraph (b) of this section, *special consideration* for States under an order of selection means that those public safety officers who meet the requirements of paragraph (b)(1) of this section must receive priority for services over other eligible individuals in the same priority category of the order of selection.

(3) For the purposes of paragraph (b) of this section, *criminal act* means any crime, including an act, omission, or possession under the laws of the United States, a State, or a unit of general local government that poses a substantial threat of personal injury, notwithstanding that by reason of age, insanity, intoxication, or otherwise, the person engaging in the act, omission, or possession was legally incapable of committing a crime.

(4) For the purposes of paragraph (b) of this section, *public safety officer* means a person serving the United States or a State or unit of local government, with or without compensation, in any activity pertaining to—

(i) The enforcement of the criminal laws, including highway patrol, or the maintenance of civil peace by the National Guard or the Armed Forces;

(ii) A correctional program, facility, or institution if the activity is potentially dangerous because of contact with criminal suspects, defendants, prisoners, probationers, or parolees;

(iii) A court having criminal or juvenile delinquent jurisdiction if the activity is potentially dangerous because of contact with criminal suspects, defendants, prisoners, probationers, or parolees; or

(iv) Firefighting, fire prevention, or emergency rescue missions.

(c) *American Indians.* (1) The State plan must assure that vocational rehabilitation services are provided to American Indians with disabilities residing in the State to the same extent that these services are provided to other significant groups of individuals with disabilities residing in the State.

(2) The State plan also must assure that the designated State unit continues to provide vocational rehabilitation services, including, as appropriate, services traditionally used by Indian tribes, to American Indians with disabilities who reside on reservations and are eligible for services by a special tribal program under 34 CFR part 371.

(Authority: Secs. 7, 101(a)(13), 101(a)(20), and 130(b)(3) of the Act; 29 U.S.C. 706, 721(a)(13), 721(a)(20), and 750(b)(3))

§ 361.31 Utilization of community resources.

The State plan must assure that, in providing vocational rehabilitation services, public or other vocational or technical training programs or other appropriate community resources are used to the maximum extent feasible.

(Authority: Sec. 101(a)(12)(A) of the Act; 29 U.S.C. 721(a)(12)(A))

§ 361.32 Utilization of profitmaking organizations for on-the-job training in connection with selected projects.

The State plan must assure that the State unit has the authority to enter into contracts with profitmaking organizations for the purpose of providing on-the-job training and related programs for individuals with

disabilities under the Projects With Industry program, 34 CFR part 379, if it has been determined that they are better qualified to provide needed services than nonprofit agencies, organizations, or programs in the State.

(Authority: Sec. 101(a)(21) of the Act; 29 U.S.C. 721(a)(21))

§ 361.33 Use, assessment, and support of community rehabilitation programs.

(a) The State plan must contain a description of how the designated State unit uses community rehabilitation programs to the maximum extent feasible to provide vocational rehabilitation services in the most integrated settings possible, consistent with the informed choices of the individuals. This description must—

(1) Include the methods the designated State unit uses to ensure the appropriate use of community rehabilitation programs;

(2) Provide, as appropriate, for entering into agreements with the operators of those community rehabilitation programs;

(3) Specify the manner in which the designated State unit will establish cooperative agreements with private nonprofit vocational rehabilitation service providers;

(4) Contain the findings resulting from an assessment of the capacity and effectiveness of community rehabilitation programs, including programs under the Javits-Wagner-O'Day Act, based on the use of those programs; and

(5) Contain plans for improving community rehabilitation programs based on the assessment in paragraph (a)(4) of this section.

(b) If the State plan provides for the establishment, development, or improvement of a public or nonprofit community rehabilitation program, the State plan must contain a description of the need to establish, develop, or improve, as appropriate, the community rehabilitation program to provide vocational rehabilitation services to applicants and eligible individuals, based on the assessment and improvement plans required in paragraphs (a)(4) and (a)(5) of this section.

(Approved by the Office of Management and Budget under control number 1820–0500.)

(Authority: Secs. 101(a)(5)(A), 101(a)(12)(B), 101(a)(15)(B), 101(a)(27), 101(a)(28), and 103(b)(2) of the Act; 29 U.S.C. 721(a)(5), (12), (15), (27), and (28) and 723(b)(2))

§ 361.34 Supported employment plan.

(a) The State plan must assure that the State has an acceptable plan under 34 CFR part 363 that provides for the use of funds under that part to supplement funds under this part for the cost of services leading to supported employment.

(b) The supported employment plan, including any needed annual revisions, must be submitted as a supplement to the State plan.

(Approved by the Office of Management and Budget under control number 1820–0500.)

(Authority: Secs. 101(a)(25) and 635(a) of the Act; 29 U.S.C. 721(a)(25))

§ 361.35 Strategic plan.

(a) The State plan must assure that the State—

(1) Has developed and implemented a strategic plan for expanding and improving vocational rehabilitation services for individuals with disabilities on a statewide basis in accordance with subpart D of this part; and

(2) Will use at least 1.5 percent of its allotment under this program for expansion and improvement activities in accordance with § 361.73(b).

(b) The strategic plan must be submitted at the same time as the State plan.

(Approved by the Office of Management and Budget under control number 1820–0500.)

(Authority: Secs. 101(a)(34) and 120 of the Act; 29 U.S.C. 721(a)(34) and 740)

§ 361.36 Ability to serve all eligible individuals; order of selection for services.

(a) *General provisions.* (1) The State plan must contain—

(i) An assurance that the designated State unit is able to provide the full range of services listed in section 103(a) of the Act, as appropriate, to all eligible individuals. The assurance must be supported by an explanation that satisfies the requirements of paragraph (a)(2) or (a)(3) of this section and describes how, on the basis of the designated State unit's projected fiscal and personnel resources and its assessment of the rehabilitation needs of individuals with severe disabilities within the State, it will—

(A) Continue to provide services to all individuals currently receiving services;

(B) Provide assessment services to all individuals expected to apply for services in the next fiscal year;

(C) Provide services to all individuals who are expected to be determined eligible in the next fiscal year; and

(D) Meet all program requirements; or

(ii) The order to be followed in selecting eligible individuals to be provided services, a justification of that order of selection, and a description of the outcome and service goals and service costs to be achieved for individuals with disabilities in each category within the order and the time within which these goals may be achieved.

(2) For those designated State units that provided assurances in their State plans for the current fiscal year and the preceding fiscal year that they are able to provide the full range of services, as appropriate, to all eligible individuals, the explanation required by paragraph (a)(1)(i) of this section must include a statement that, during the current fiscal year and the preceding fiscal year, the DSU has in fact—

(i) Provided assessment services to all applicants and the full range of services, as appropriate, to all eligible individuals;

(ii) Made referral forms widely available throughout the State;

(iii) Conducted outreach efforts to identify and serve individuals with disabilities who have been unserved or underserved by the vocational rehabilitation system; and

(iv) Not delayed, through waiting lists or other means, determinations of eligibility, the development of individualized written rehabilitation programs (IWRPs) for individuals determined eligible, or the provision of services for eligible individuals for whom IWRPs have been developed.

(3) For those designated State units unable to provide the full range of services to all eligible individuals during the current or preceding fiscal year, or unable to provide the statement required in paragraph (a)(2) of this section, the explanation required by paragraph (a)(1)(i) of this section must include—

(i) A description of the circumstances that have changed that will allow the DSU to meet the requirements of paragraph (a)(1)(i) of this section in the next fiscal year, including a description of—

(A) The estimated number of and projected costs of serving, in the next fiscal year, individuals with existing IWRPs;

(B) The projected number of individuals with disabilities who will apply for services and will be determined eligible in the next fiscal year and the projected costs of serving those individuals;

(C) The projected costs of administering the program in the next fiscal year, including, but not limited to, costs of staff salaries and benefits, outreach activities, and required statewide studies; and

(D) The projected revenues and projected number of qualified personnel for the program in the next fiscal year;

(ii) Comparable data, as relevant, for the current or preceding fiscal year, or for both years, of the costs listed in

paragraphs (a)(3)(i) (A) through (C) of this section and the resources identified in paragraph (a)(3)(i)(D) of this section and an explanation of any projected increases or decreases in these costs and resources; and

(iii) A demonstration that the projected revenues and the projected number of qualified personnel for the program in the next fiscal year are adequate to cover the costs identified in paragraphs (a)(3)(i) (A) through (C) of this section so as to ensure the provision of the full range of services, as appropriate, to all eligible individuals.

(b) Time for determining need for an order of selection. (1) The designated State unit shall determine, prior to the beginning of each fiscal year, whether to establish and implement an order of selection.

(2) If the designated State unit determines that it does not need to establish an order of selection, it shall reevaluate this determination whenever changed circumstances during the course of a fiscal year, such as a decrease in its fiscal or personnel resources or an increase in its program costs, indicate that it may no longer be able to provide the full range of services, as appropriate, to all eligible individuals.

(c) *Establishing an order of selection*—(1) *Basis for order of selection.* An order of selection must be based on a refinement of the three criteria in the definition of ''individual with a severe disability'' in section 7(15)(A) of the Act.

(2) *Factors that cannot be used in determining order of selection of eligible individuals.* An order of selection may not be based on any other factors, including—

(i) Any duration of residency requirement, provided the individual is present in the State;

(ii) Type of disability;

(iii) Age, gender, race, color, creed, or national origin;

(iv) Source of referral;

(v) Type of expected employment outcome;

(vi) The need for specific services or anticipated cost of services required by an individual; or

(vii) The income level of an individual or an individual's family.

(3) *Priority for individuals with the most severe disabilities.* The State plan must assure that those individuals with the most severe disabilities are selected for service before other individuals with disabilities. The designated State unit shall establish criteria for determining which individuals are individuals with the most severe disabilities. The criteria must be consistent with the definition of ''individual with a severe disability'' in section 7(15)(A) of the Act and the requirements in paragraphs (c) (1) and (2) of this section.

(d) *Administrative requirements.* In administering the order of selection, the designated State unit shall—

(1) Implement the order of selection on a statewide basis;

(2) Notify all eligible individuals of the priority categories in a State's order of selection, their assignment to a particular category, and their right to appeal their category assignment;

(3) Continue to provide all needed services to any eligible individual who has begun to receive services under an IWRP prior to the effective date of the order of selection, irrespective of the severity of the individual's disability;

(4) Ensure that its funding arrangements for providing services under the State plan, including third-party arrangements and awards under the establishment authority, are consistent with the order of selection. If any funding arrangements are inconsistent with the order of selection, the designated State unit shall renegotiate these funding arrangements so that they are consistent with the order of selection.

(e) *State Rehabilitation Advisory Council.* The designated State unit shall consult with and seriously consider the advice of the State Rehabilitation Advisory Council regarding the—

(1) Need to establish an order of selection, including any reevaluation of the need under paragraph (b)(2) of this section;

(2) Priority categories of the particular order of selection;

(3) Criteria for determining individuals with the most severe disabilities; and

(4) Administration of the order of selection.

(Approved by the Office of Management and Budget under control number 1820–0500.)

(Authority: Sec. 7(15)(A); 12(d); 17; 101(a)(4); 101(a)(5)(A); 101(a)(7); 101(a)(11)(A); 101(a)(15)(D); 101(a)(24); 101(a)(30); 101(a)(36)(A)(ii); 107(a)(4)(B); and 504(a) of the Act; 29 U.S.C. 706(15)(A), 711(d), 716, 721(a)(4), 721(a)(5)(A), 721(a)(7), 721(a)(11)(A), 721(a)(15)(D), 721(a)(24), 721(a)(30), 721(a)(36)(A)(ii), 727(a)(4)(B), and 794(a))

§ 361.37 Establishment and maintenance of information and referral programs.

(a) *General provisions.* The State plan must assure that—

(1) The designated State unit will establish and maintain information and referral programs adequate to ensure that individuals with disabilities within the State are given accurate information about State vocational rehabilitation services, independent living services, vocational rehabilitation services available from other agencies, organizations, and community rehabilitation programs, and, to the extent possible, other Federal and State services and programs that assist individuals with disabilities, including client assistance and other protection and advocacy programs;

(2) The State unit will refer individuals with disabilities to other appropriate Federal and State programs that might be of benefit to them; and

(3) The State unit will use existing information and referral systems in the State to the greatest extent possible.

(b) *Appropriate modes of communication.* The State plan further must assure that information and referral programs use appropriate modes of communication.

(c) *Special circumstances.* If the State unit is operating under an order of selection for services, the State unit may elect to establish an expanded information and referral program that includes counseling, guidance, and referral for job placements for those eligible individuals who are not in the priority category or categories to receive vocational rehabilitation services under the State's order of selection.

(1) If a State unit elects to establish an expanded information and referral program under paragraph (c) of this section, the State plan must include—

(i) A description of how the expanded information and referral program will be established and how it will function, including the level of commitment of State unit staff and resources; and

(ii) An assurance that, in carrying out this program, the State unit will not use funds that are needed to provide vocational rehabilitation services under IWRPs for eligible individuals in the priority category or categories receiving services under the State unit's order of selection or for other eligible individuals who have begun to receive services prior to the effective date of the order of selection.

(2) If the designated State unit chooses to track the individuals who obtain employment through participation in an expanded information and referral program established under paragraph (c) of this section, the State plan must include a report of the number of individuals served and the number of individuals who obtain employment through this program.

(Approved by the Office of Management and Budget under control number 1820–0500.)

(Authority: Sec. 101(a)(22) of the Act; 29 U.S.C. 721(a)(22))

§ 361.38 Protection, use, and release of personal information.

(a) *General provisions.* (1) The State plan must assure that the State agency and the State unit will adopt and implement policies and procedures to safeguard the confidentiality of all personal information, including photographs and lists of names. These policies and procedures must assure that—

(i) Specific safeguards protect current and stored personal information;

(ii) All applicants and eligible individuals and, as appropriate, those individuals' representatives, service providers, cooperating agencies, and interested persons are informed through appropriate modes of communication of the confidentiality of personal information and the conditions for accessing and releasing this information;

(iii) All applicants or their representatives are informed about the State unit need to collect personal information and the policies governing its use, including—

(A) Identification of the authority under which information is collected;

(B) Explanation of the principal purposes for which the State unit intends to use or release the information;

(C) Explanation of whether providing requested information to the State unit is mandatory or voluntary and the effects of not providing requested information;

(D) Identification of those situations in which the State unit requires or does not require informed written consent of the individual before information may be released; and

(E) Identification of other agencies to which information is routinely released;

(iv) An explanation of State policies and procedures affecting personal information will be provided to each individual in that individual's native language or through the appropriate mode of communication; and

(v) These policies and procedures provide no fewer protections for individuals than State laws and regulations.

(2) The State unit may establish reasonable fees to cover extraordinary costs of duplicating records or making extensive searches and shall establish policies and procedures governing access to records.

(b) *State program use.* All personal information in the possession of the State agency or the designated State unit must be used only for the purposes directly connected with the administration of the vocational rehabilitation program. Information containing identifiable personal information may not be shared with advisory or other bodies that do not have official responsibility for administration of the program. In the administration of the program, the State unit may obtain personal information from service providers and cooperating agencies under assurances that the information may not be further divulged, except as provided under paragraphs (c), (d), and (e) of this section.

(c) *Release to applicants and eligible individuals.* (1) Except as provided in paragraphs (c)(2) and (c)(3) of this section, if requested in writing by an applicant or eligible individual, the State unit shall make all requested information in that individual's record of services accessible to and shall release the information to the individual or the individual's representative in a timely manner.

(2) Medical, psychological, or other information that the State unit determines may be harmful to the individual may not be released directly to the individual, but must be provided to the individual through a third party chosen by the individual, which may include, among others, an advocate, a family member, or a qualified medical or mental health professional, unless a representative has been appointed by a court to represent the individual, in which case the information must be released to the court-appointed representative.

(3) If personal information has been obtained from another agency or organization, it may be released only by, or under the conditions established by, the other agency or organization.

(4) An applicant or eligible individual who believes that information in the individual's record of services is inaccurate or misleading may request that the designated State unit amend the information. If the information is not amended, the request for an amendment must be documented in the record of services.

(d) *Release for audit, evaluation, and research.* Personal information may be released to an organization, agency, or individual engaged in audit, evaluation, or research only for purposes directly connected with the administration of the vocational rehabilitation program, or for purposes that would significantly improve the quality of life for applicants and eligible individuals and only if the organization, agency, or individual assures that—

(1) The information will be used only for the purposes for which it is being provided;

(2) The information will be released only to persons officially connected with the audit, evaluation, or research;

(3) The information will not be released to the involved individual;

(4) The information will be managed in a manner to safeguard confidentiality; and

(5) The final product will not reveal any personal identifying information without the informed written consent of the involved individual or the individual's representative.

(e) *Release to other programs or authorities.* (1) Upon receiving the informed written consent of the individual or, if appropriate, the individual's representative, the State unit may release personal information to another agency or organization for its program purposes only to the extent that the information may be released to the involved individual or the individual's representative and only to the extent that the other agency or organization demonstrates that the information requested is necessary for its program.

(2) Medical or psychological information that the State unit determines may be harmful to the individual may be released if the other agency or organization assures the State unit that the information will be used only for the purpose for which it is being provided and will not be further released to the individual.

(3) The State unit shall release personal information if required by Federal law or regulations.

(4) The State unit shall release personal information in response to investigations in connection with law enforcement, fraud, or abuse, unless expressly prohibited by Federal or State laws or regulations, and in response to an order issued by a judge, magistrate, or other authorized judicial officer.

(5) The State unit also may release personal information in order to protect the individual or others if the individual poses a threat to his or her safety or to the safety of others.

(Authority: Secs. 12(c) and 101(a)(6)(A) of the Act; 29 U.S.C. 711(c) and 721(a)(6)(A))

§ 361.39 State-imposed requirements.

The State plan must assure that the designated State unit identifies upon request those regulations and policies relating to the administration or operation of its vocational rehabilitation program that are State-imposed, including any regulations or policy based on State interpretation of any Federal law, regulations, or guideline.

(Authority: Sect. 17 of the Act; 29 U.S.C. 716)

§ 361.40 Reports.

The State plan must assure that the State unit—

(a) Will submit reports in the form and detail and at the time required by the Secretary, including reports required under sections 13, 14, and 101(a)(10) of the Act; and

(b) Will comply with any requirements necessary to ensure the correctness and verification of those reports.

(Approved by the Office of Management and Budget under control number 1820–0500.)

(Authority: Sec. 101(a)(10) of the Act; 29 U.S.C. 721(a)(10))

State Plan Content: Provision and Scope of Services

§ 361.41 Processing referrals and applications.

(a) *Referrals.* The State plan must assure that the designated State unit has established and implemented standards for the prompt and equitable handling of referrals of individuals for vocational rehabilitation services. The standards must include timelines for making good faith efforts to inform these individuals of application requirements and to gather information necessary to initiate an assessment for determining eligibility and priority for services.

(b) *Applications.* (1) The State plan must assure that once an individual has submitted an application for vocational rehabilitation services, an eligibility determination will be made within 60 days, unless—

(i) Exceptional and unforeseen circumstances beyond the control of the agency preclude a determination within 60 days and the agency and the individual agree to a specific extension of time; or

(ii) An extended evaluation is necessary, in accordance with § 361.42(d).

(2) An individual is considered to have submitted an application when the individual or the individual's representative, as appropriate,—

(i) Has completed and signed an agency application form or has otherwise requested services;

(ii) Has provided information necessary to initiate an assessment to determine eligibility and priority for services; and

(iii) Is available to complete the assessment process.

(3) The designated State unit shall ensure that its application forms are widely available throughout the State.

(Authority: Sec. 101(a)(6)(A) and 102(a)(5)(A) of the Act; 29 U.S.C. 721(a)(6)(A) and 722(a)(5)(A))

§ 361.42 Assessment for determining eligibility and priority for services.

The State plan must assure that, in order to determine whether an individual is eligible for vocational rehabilitation services and the individual's priority under an order of selection for services (if the State is operating under an order of selection), the designated State unit will conduct an assessment for determining eligibility and priority for services. The assessment must be conducted in the most integrated setting possible, consistent with the individual's needs and informed choice, and in accordance with the following provisions:

(a) *Eligibility requirements.—(1) Basic requirements.* The State plan must assure that the State unit's determination of an applicant's eligibility for vocational rehabilitation services is based only on the following requirements:

(i) A determination that the applicant has a physical or mental impairment.

(ii) A determination that the applicant's physical or mental impairment constitutes or results in a substantial impediment to employment for the applicant.

(iii) A presumption, in accordance with paragraph (a)(2) of this section, that the applicant can benefit in terms of an employment outcome from the provision of vocational rehabilitation services.

(iv) A determination that the applicant requires vocational rehabilitation services to prepare for, enter into, engage in, or retain gainful employment consistent with the applicant's strengths, resources, priorities, concerns, abilities, capabilities, and informed choice.

(2) *Presumption of benefit.* The State plan must assure that the designated State unit will presume that an applicant who meets the eligibility requirements in paragraphs (a)(1) (i) and (ii) of this section can benefit in terms of an employment outcome unless it demonstrates, based on clear and convincing evidence, that the applicant is incapable of benefitting in terms of an employment outcome from vocational rehabilitation services.

(3) *Limited presumption for Social Security beneficiaries.* The State plan must assure that, if an applicant has appropriate evidence, such as an award letter, that establishes the applicant's eligibility for Social Security benefits under Title II or Title XVI of the Social Security Act, the designated State unit will presume that the applicant—

(i) Meets the eligibility requirements in paragraphs (a)(1) (i) and (ii) of this section; and

(ii) Has a severe physical or mental impairment that seriously limits one or more functional capacities in terms of an employment outcome.

(b) *Prohibited factors.* The State plan must assure that— (1) No duration of residence requirement is imposed that excludes from services any applicant who is present in the State;

(2) No applicant or group of applicants is excluded or found ineligible solely on the basis of the type of disability;

(3) The eligibility requirements are applied without regard to the age, gender, race, color, creed, or national origin of the applicant; and

(4) The eligibility requirements are applied without regard to the particular service needs or anticipated cost of services required by an applicant or the income level of an applicant or applicant's family.

(c) *Review and assessment of data for eligibility determination.* Except as provided in paragraph (d) of this section, the designated State unit shall base its determination of each of the basic eligibility requirements in paragraph (a) of this section on—

(1) A review and assessment of existing data, including counselor observations, education records, information provided by the individual or the individual's family, information used by the Social Security Administration, and determinations made by officials of other agencies; and

(2) To the extent existing data do not describe the current functioning of the individual or are unavailable, insufficient, or inappropriate to make an eligibility determination, an assessment of additional data resulting from the provision of vocational rehabilitation services, including assistive technology devices and services and worksite assessments, that are necessary to determine whether an individual is eligible.

(d) *Extended evaluation for individuals with severe disabilities.* (1) Prior to any determination that an individual with a severe disability is incapable of benefitting from vocational rehabilitation services in terms of an employment outcome because of the severity of that individual's disability, the State unit shall conduct an extended evaluation to determine whether or not there is clear and convincing evidence to support such a determination.

(2) During the extended evaluation period, which may not exceed 18 months, vocational rehabilitation services must be provided in the most integrated setting possible, consistent with the informed choice of the individual.

(3) During the extended evaluation period, the State unit shall develop a written plan for determining eligibility and for determining the nature and scope of services required to achieve an employment outcome. The State unit may provide during this period only those services that are necessary to make these two determinations.

(4) The State unit shall assess the individual's progress as frequently as necessary, but at least once every 90 days, during the extended evaluation period.

(5) The State unit shall terminate extended evaluation services at any point during the 18-month extended evaluation period if the State unit determines that—

(i) There is sufficient evidence to conclude that the individual can benefit from the provision of vocational rehabilitation services in terms of an employment outcome; or

(ii) There is clear and convincing evidence that the individual is incapable of benefiting from vocational rehabilitation services in terms of an employment outcome.

(e) *Data for determination of priority for services under an order of selection.* If the State unit is operating under an order of selection for services, as provided in § 361.36, the State unit shall base its priority assignments on—

(1) A review of the data that was developed under paragraphs (c) and (d) of this section to make the eligibility determination; and

(2) An assessment of additional data, to the extent necessary.

(Authority: Secs. 7(22)(A)(ii), 7(22)(C)(iii), 101(a)(9)(A), 101(a)(14), 101(a)(31), 102(a)(1), 102(a)(2), 102(a)(3), 102(a)(4), 103(a)(4), and 103(a)(6) of the Act; 29 U.S.C. 706(22)(A)(ii), 706(22)(C)(iii), 721(a)(9)(a), 721(a)(14), 721(a)(31), 722(a)(1), 722(a)(2), 722(a)(3), 722(a)(4), 723(a)(4), and 723(a)(6))

Note: *Clear and convincing evidence* means that the designated State unit shall have a high degree of certainty before it can conclude that an individual is incapable of benefiting from services in terms of an employment outcome. The ''clear and convincing'' standard constitutes the highest standard used in our civil system of law and is to be individually applied on a case-by-case basis. The term *clear* means unequivocal. Given these requirements, a review of existing information generally would not provide clear and convincing evidence. For example, the use of an intelligence test result alone would not constitute clear and convincing evidence. Clear and convincing evidence might include a description of assessments, including situational assessments and supported employment assessments, from service providers who have concluded that they would be unable to meet the individual's needs due to the severity of the individual's disability. The demonstration of ''clear and convincing evidence'' must include, if appropriate, a functional assessment of skill development activities, with any necessary supports (including assistive technology), in real life settings. (S. Rep. No. 357, 102d Cong., 2d. Sess. 37–38 (1992))

§ 361.43 Procedures for ineligibility determination.

The State plan must assure that if the State unit determines that an applicant is ineligible for vocational rehabilitation services or determines that an individual receiving services under an individualized written rehabilitation program is no longer eligible for services, the State unit shall—

(a) Make the determination only after providing an opportunity for full consultation with the individual or, as appropriate, with the individual's representative;

(b) Inform the individual in writing, supplemented as necessary by other appropriate modes of communication consistent with the informed choice of the individual, of the ineligibility determination, including the reasons for that determination, the requirements under this section, and the means by which the individual may express and seek remedy for any dissatisfaction, including the procedures for review of a determination by the rehabilitation counselor or coordinator in accordance with § 361.57;

(c) Provide the individual with a description of services available from a client assistance program established under 34 CFR part 370 and information on how to contact that program; and

(d) Review within 12 months and annually thereafter if requested by the individual or, if appropriate, by the individual's representative any ineligibility determination that is based on a finding that the individual is incapable of achieving an employment outcome. This review need not be conducted in situations in which the individual has refused it, the individual is no longer present in the State, the individual's whereabouts are unknown, or the individual's medical condition is rapidly progressive or terminal.

(Authority: Secs. 101(a)(9)(D), 102(a)(6), and 102(c) of the Act; 29 U.S.C. 721(a)(9), 722(a)(6), and 722(c))

§ 361.44 Closure without eligibility determination.

The State plan must assure that the State unit may not close an applicant's record of services prior to making an eligibility determination unless the applicant declines to participate in, or is unavailable to complete an assessment for determining eligibility and priority for services, and the State unit has made a reasonable number of attempts to contact the applicant or, if appropriate, the applicant's representative to encourage the applicant's participation.

(Authority: Secs. 12(c) and 101(a)(6)(A) of the Act; 29 U.S.C. 711(c) and 721(a)(6))

§ 361.45 Development of the individualized written rehabilitation program.

(a) *Purpose.* The State plan must assure that the State unit conducts an assessment for determining vocational rehabilitation needs for each eligible individual or, if the State is operating under an order of selection, for each eligible individual to whom the State is able to provide services. The purpose of this assessment is to determine the long-term vocational goal, intermediate rehabilitation objectives, and the nature and scope of vocational rehabilitation services to be included in the IWRP, which must be designed to achieve an employment outcome that is consistent with the individual's unique strengths, priorities, concerns, abilities, capabilities, career interests, and informed choice.

(b) *Procedural requirements.* The State plan must assure that—

(1) The IWRP is developed jointly, agreed to, and signed by the vocational rehabilitation counselor or coordinator and the individual or, as appropriate, the individual's representative within the framework of a counseling and guidance relationship;

(2) The State unit has established and implemented standards for the prompt development of IWRPs for the individuals identified under paragraph (a) of this section, including timelines that take into consideration the needs of the individual;

(3) The State unit advises each individual or, as appropriate, the individual's representative of all State unit procedures and requirements affecting the development and review of an IWRP, including the availability of appropriate modes of communication;

(4) In developing an IWRP for a student with a disability who is receiving special education services, the State unit considers the student's individualized education program;

(5) The State unit reviews the IWRP with the individual or, as appropriate, the individual's representative as often as necessary, but at least once each year to assess the individual's progress in meeting the objectives identified in the IWRP;

(6) The State unit incorporates into the IWRP any revisions that are necessary to reflect changes in the individual's vocational goal, intermediate objectives, or vocational rehabilitation services, and obtains the

agreement and signature of the individual or, as appropriate, of the individual's representative to the revisions; and

(7) The State unit promptly provides each individual or, as appropriate, the individual's representative, a copy of the IWRP and its amendments in the native language, or appropriate mode of communication, of the individual or, as appropriate, of the individual's representative.

(c) *Data for preparing the IWRP.*—(1) *Preparation without comprehensive assessment.* To the extent possible, the vocational goal, intermediate objectives, and the nature and scope of rehabilitation services to be included in the individual's IWRP must be determined based on the data used for the assessment of eligibility and priority for services under section § 361.42.

(2) *Preparation based on comprehensive assessment.* (i) If additional data are necessary to prepare the IWRP, the designated State unit shall conduct a comprehensive assessment of the unique strengths, resources, priorities, concerns, abilities, capabilities, interests, and needs, including the need for supported employment services, of an eligible individual, in the most integrated setting possible, consistent with the informed choice of the individual.

(ii) The comprehensive assessment must be limited to information that is necessary to identify the rehabilitation needs of the individual and develop the IWRP and may, to the extent needed, include—

(A) An analysis of pertinent medical, psychiatric, psychological, neuropsychological, and other pertinent vocational, educational, cultural, social, recreational, and environmental factors, and related functional limitations, that affect the employment and rehabilitation needs of the individual;

(B) An analysis of the individual's personality, career interests, interpersonal skills, intelligence and related functional capacities, educational achievements, work experience, vocational aptitudes, personal and social adjustments, and employment opportunities;

(C) An appraisal of the individual's patterns of work behavior and services needed to acquire occupational skills and to develop work attitudes, work habits, work tolerance, and social and behavior patterns suitable for successful job performance; and

(D) An assessment, through provision of rehabilitation technology services, of the individual's capacities to perform in a work environment, including in an integrated setting, to the maximum extent feasible and consistent with the individual's informed choice.

(iii) In preparing a comprehensive assessment, the State unit shall use, to the maximum extent possible and appropriate and in accordance with confidentiality requirements, existing information, including information that is provided by the individual, the family of the individual, and education agencies.

(Authority: Secs. 7(22)(B), 102(b)(1)(A), and 102(b)(2); 29 U.S.C. 706(5), 721(a)(9), 722, and 723(a)(1))

§ 361.46 Content of the individualized written rehabilitation program.

(a) *General requirements.* The State plan must assure that each IWRP includes, as appropriate, statements concerning—

(1) The specific long-term vocational goal, which must be based on the assessment for determining vocational rehabilitation needs, including the individual's career interests, and must be, to the extent appropriate and consistent with the informed choice of the individual, in an integrated setting;

(2) The specific intermediate rehabilitation objectives related to the attainment of the long-term vocational goal, based on the assessment for determining vocational rehabilitation needs and consistent with the informed choice of the individual;

(3) The specific rehabilitation services under § 361.48 to be provided to achieve the established intermediate rehabilitation objectives, including, if appropriate, rehabilitation technology services and on-the-job and related personal assistance services;

(4) The projected dates for the initiation of each vocational rehabilitation service, the anticipated duration of each service, and the projected timeframe for the achievement of the individual's vocational goal;

(5) A procedure and schedule for periodic review and evaluation of progress toward achieving intermediate rehabilitation objectives based upon objective criteria;

(6) How, in the words of the individual or, as appropriate, in the words of the individual's representative, the individual was informed about and involved in choosing among alternative goals, objectives, services, providers, and methods used to procure or provide services;

(7) The terms and conditions for the provision of vocational rehabilitation services, including—

(i) The responsibilities of the individual in implementing the IWRP;

(ii) The extent of the individual's participation in the cost of services;

(iii) The extent to which goods and services will be provided in the most integrated settings possible, consistent with the informed choices of the individual;

(iv) The extent to which comparable services and benefits are available to the individual under any other program; and

(v) The entity or entities that will provide the services and the process used to provide or procure the services;

(8) The rights of the individual under this part and the means by which the individual may express and seek remedy for any dissatisfaction, including the opportunity for a review of rehabilitation counselor or coordinator determinations under § 361.57;

(9) The availability of a client assistance program established under 34 CFR part 370; and

(10) The basis on which the individual has been determined to have achieved an employment outcome in accordance with § 361.56.

(b) *Supported employment requirements.* The State plan must assure that the IWRP for individuals with the most severe disabilities for whom a vocational goal in a supported employment setting has been determined to be appropriate will also contain—

(1) A description of the supported employment services to be provided by the State unit; and

(2) A description of the extended services needed and identification of the source of extended services or, in the event that identification of the source is not possible at the time the IWRP is developed, a statement explaining the basis for concluding that there is a reasonable expectation that services will become available.

(c) *Post-employment services.* The State plan must assure that the IWRP for each individual contains statements concerning—

(1) The expected need for post-employment services, based on an assessment during the development of the IWRP;

(2) A reassessment of the need for post-employment services prior to the determination that the individual has achieved an employment outcome;

(3) A description of the terms and conditions for the provision of any post-employment services, including the anticipated duration of those services, subsequent to the achievement of an employment outcome by the individual; and

(4) If appropriate, a statement of how post-employment services will be provided or arranged through

cooperative agreements with other service providers.

(d) *Coordination of services for students with disabilities who are receiving special education services.* The State plan must assure that the IWRP for a student with a disability who is receiving special education services is coordinated with the individualized education program (IEP) for that individual in terms of the goals, objectives, and services identified in the IEP.

(e) *Ineligibility.* The State plan must assure that the decision that an individual is not capable of achieving an employment outcome and is no longer eligible to receive services under an IWRP is made in accordance with the requirements in § 361.43. The decision, and the reasons on which the decision was based, must be included as an amendment to the IWRP.

(Approved by the Office of Management and Budget under control number 1820–0500.)

(Authority: Secs. 101(a)(9), 102(b)(1), 102(c), and 635(b)(6) of the Act; 29 U.S.C. 721(a)(9), 722, and 795n)

§ 361.47 Record of services.

The State plan must assure that the designated State unit maintains for each applicant or eligible individual a record of services that includes, to the extent pertinent, the following documentation:

(a) If an applicant has been determined to be an eligible individual, documentation supporting that determination in accordance with the requirements in § 361.42.

(b) If an applicant has been determined to be ineligible, documentation supporting that determination in accordance with the requirements of § 361.43.

(c) Documentation supporting the determination that an individual has a severe disability or a most severe disability.

(d) If an individual with a severe disability requires an extended evaluation in order to determine whether the individual is an eligible individual, documentation supporting the need for an extended evaluation, documentation supporting the periodic assessments conducted during the extended evaluation, and the written plan developed during the extended evaluation, in accordance with the requirements in § 361.42(d).

(e) The IWRP, and any amendments to the IWRP, containing the information required under § 361.46.

(f) In accordance with § 361.45(a), documentation supporting the development of the long-term vocational goal, intermediate rehabilitation objectives, and nature and scope of services included in the individual's IWRP and, for students with disabilities who are receiving special education services, in the student's IEP.

(g) In the event that an individual's IWRP provides for services or a job placement in a non-integrated setting, a justification for that non-integrated setting.

(h) Documentation of the periodic reviews and evaluations of progress toward achieving intermediate rehabilitation objectives conducted under § 361.46(a)(5).

(i) In the event that an individual obtains competitive employment, verification that the individual is compensated at or above the minimum wage and that the individual's wage and level of benefits are not less than that customarily paid by the employer for the same or similar work performed by non-disabled individuals in accordance with § 361.5(b)(10)(ii).

(j) Documentation concerning any action and decision resulting from a request by an individual for review of a rehabilitation counselor or coordinator determination under § 361.57.

(Authority: Secs. 101(a)(6) and 101(a)(9) of the Act; 29 U.S.C. 721(a)(6) and 721(a)(9))

§ 361.48 Scope of vocational rehabilitation services for individuals with disabilities.

(a) The State plan must assure that, as appropriate to the vocational rehabilitation needs of each individual and consistent with each individual's informed choice, the following vocational rehabilitation services are available:

(1) Assessment for determining eligibility and priority for services in accordance with § 361.42.

(2) Assessment for determining vocational rehabilitation needs in accordance with § 361.45.

(3) Vocational rehabilitation counseling and guidance.

(4) Referral and other services necessary to help applicants and eligible individuals secure needed services from other agencies and to advise those individuals about client assistance programs established under 34 CFR part 370.

(5) Physical and mental restoration services in accordance with the definition of that term in § 361.5(b)(35).

(6) Vocational and other training services, including personal and vocational adjustment training, books, tools, and other training materials, except that no training or training services in an institution of higher education (universities, colleges, community or junior colleges, vocational schools, technical institutes, or hospital schools of nursing) may be paid for with funds under this part unless maximum efforts have been made by the State unit and the individual to secure grant assistance in whole or in part from other sources to pay for that training.

(7) Maintenance, in accordance with the definition of that term in § 361.5(b)(31).

(8) Transportation in connection with the rendering of any vocational rehabilitation service and in accordance with the definition of that term in § 361.5(b)(49).

(9) Vocational rehabilitation services to family members of an applicant or eligible individual if necessary to enable the applicant or eligible individual to achieve an employment outcome.

(10) Interpreter services for individuals who are deaf and tactile interpreting services for individuals who are deaf-blind.

(11) Reader services, rehabilitation teaching services, and orientation and mobility services for individuals who are blind.

(12) Recruitment and training services to provide new employment opportunities in the fields of rehabilitation, health, welfare, public safety, law enforcement, and other appropriate public service employment.

(13) Job search and placement assistance and job retention services.

(14) Supported employment services in accordance with the definition of that term in § 361.5(b)(46).

(15) Personal assistance services in accordance with the definition of that term in § 361.5(b)(34).

(16) Post-employment services in accordance with the definition of that term in § 361.5(b)(37).

(17) Occupational licenses, tools, equipment, initial stocks, and supplies.

(18) Rehabilitation technology in accordance with the definition of that term in § 361.5(b)(39), including vehicular modification, telecommunications, sensory, and other technological aids and devices.

(19) Transition services in accordance with the definition of that term in § 361.5(b)(47).

(20) Other goods and services determined necessary for the individual with a disability to achieve an employment outcome.

(b) The State plan also must describe—

(1) The manner in which a broad range of rehabilitation technology services will be provided at each stage of the rehabilitation process and on a statewide basis;

(2) The training that will be provided to vocational rehabilitation counselors, client assistance personnel, and other

related services personnel on the provision of rehabilitation technology services;

(3) The manner in which assistive technology devices and services will be provided or worksite assessments will be made as part of the assessment for determining eligibility and vocational rehabilitation needs of an individual; and

(4) The manner in which on-the-job and other related personal assistance services will be provided to assist individuals while they are receiving vocational rehabilitation services.

(Approved by the Office of Management and Budget under control number 1820–0500.)

(Authority: Secs. 101(a)(5)(C), 101(a)(26), 101(a)(31), and 103(a) of the Act; 29 U.S.C. 721(a)(5)(C), 721(a)(26), 721(a)(31), and 723(a))

§ 361.49 Scope of vocational rehabilitation services for groups of individuals with disabilities.

(a) The State plan may also provide for the following vocational rehabilitation services for the benefit of groups of individuals with disabilities:

(1) The establishment, development, or improvement of a public or other nonprofit community rehabilitation program that is used to provide services that promote integration and competitive employment, including under special circumstances, the construction of a facility for a public or nonprofit community rehabilitation program. Examples of ''special circumstances'' include the destruction by natural disaster of the only available center serving an area or a State determination that construction is necessary in a rural area because no other public agencies or private nonprofit organizations are currently able to provide services to individuals.

(2) Telecommunications systems that have the potential for substantially improving vocational rehabilitation service delivery methods and developing appropriate programming to meet the particular needs of individuals with disabilities, including telephone, television, video description services, satellite, tactile-vibratory devices, and similar systems, as appropriate.

(3) Special services to provide recorded material or video description services for individuals who are blind, captioned television, films, or video cassettes for individuals who are deaf, tactile materials for individuals who are deaf-blind, and other special services that provide information through tactile, vibratory, auditory, and visual media.

(4) Technical assistance and support services, such as job site modification and other reasonable accommodations, to businesses that are not subject to Title I of the Americans with Disabilities Act of 1990 and that are seeking to employ individuals with disabilities.

(5) In the case of small business enterprises operated by individuals with the most severe disabilities under the supervision of the State unit, including enterprises established under the Randolph-Sheppard program, management services and supervision, acquisition of equipment, initial stocks and supplies, and initial operating expenses, in accordance with the following requirements:

(i) ''Management services and supervision'' includes inspection, quality control, consultation, accounting, regulating, in-service training, and related services provided on a systematic basis to support and improve small business enterprises operated by individuals with the most severe disabilities. ''Management services and supervision'' may be provided throughout the operation of the small business enterprise.

(ii) ''Initial stocks and supplies'' includes those items necessary to the establishment of a new business enterprise during the initial establishment period, which may not exceed six months.

(iii) Costs of establishing a small business enterprise may include operational costs during the initial establishment period, which may not exceed six months.

(iv) If the State plan provides for these services, it must contain an assurance that only individuals with the most severe disabilities will be selected to participate in this supervised program.

(v) If the State plan provides for these services and the State unit chooses to set aside funds from the proceeds of the operation of the small business enterprises, the State plan also must assure that the State unit maintains a description of the methods used in setting aside funds and the purposes for which funds are set aside. Funds may be used only for small business enterprises purposes, and benefits that are provided to operators from set-aside funds must be provided on an equitable basis.

(6) Other services that promise to contribute substantially to the rehabilitation of a group of individuals but that are not related directly to the IWRP of any one individual. Examples of those other services might include the purchase or lease of a bus to provide transportation to a group of applicants or eligible individuals or the purchase of equipment or instructional materials that would benefit a group of applicants or eligible individuals.

(b) If the State plan provides for vocational rehabilitation services for groups of individuals, the State plan must assure that the designated State unit—

(1) Develops and maintains written policies covering the nature and scope of each of the vocational rehabilitation services it provides and the criteria under which each service is provided; and

(2) Maintains information to ensure the proper and efficient administration of those services in the form and detail and at the time required by the Secretary, including the types of services provided, the costs of those services, and, to the extent feasible, estimates of the numbers of individuals benefitting from those services.

(Approved by the Office of Management and Budget under control number 1820–0500.)

(Authority: Secs. 12(c), 101(a)(6), and 103(b) of the Act; 29 U.S.C. 711(c), 721(a)(6), and 723(b))

§ 361.50 Written policies governing the provision of services for individuals with disabilities.

The State plan must assure that the State unit develops and maintains written policies covering the nature and scope of each of the vocational rehabilitation services specified in § 361.48 and the criteria under which each service is provided. The policies must ensure that the provision of services is based on the rehabilitation needs of each individual as identified in that individual's IWRP and is consistent with the individual's informed choice. The written policies may not establish any arbitrary limits on the nature and scope of vocational rehabilitation services to be provided to the individual to achieve an employment outcome. The policies must be developed in accordance with the following provisions:

(a) *Out-of-State services.* (1) The State unit may establish a preference for in-State services, provided that the preference does not effectively deny an individual a necessary service. If the individual chooses an out-of-State service at a higher cost than an in-State service, if either service would meet the individual's rehabilitation needs, the designated State unit is not responsible for those costs in excess of the cost of the in-State service.

(2) The State unit may not establish policies that effectively prohibit the provision of out-of-State services.

(b) *Payment for services.* (1) The State unit shall establish and maintain written policies to govern the rates of payment for all purchased vocational rehabilitation services.

(2) The State unit may establish a fee schedule designed to ensure a reasonable cost to the program for each service, provided that the schedule is—

(i) Not so low as to effectively deny an individual a necessary service; and

(ii) Not absolute and permits exceptions so that individual needs can be addressed.

(3) The State unit may not place absolute dollar limits on specific service categories or on the total services provided to an individual.

(c) *Duration of services.* (1) The State unit may establish reasonable time periods for the provision of services provided that the time periods are—

(i) Not so short as to effectively deny an individual a necessary service; and

(ii) Not absolute and permit exceptions so that individual needs can be addressed.

(2) The State unit may not establish absolute time limits on the provision of specific services or on the provision of services to an individual. The duration of each service needed by an individual must be determined on an individual basis and reflected in that individual's IWRP.

(d) *Authorization of services.* The State unit shall establish policies related to the timely authorization of services, including any conditions under which verbal authorization can be given.

(Approved by the Office of Management and Budget under control number 1820–0500.)

(Authority: Secs. 12(c), 12(e)(2)(A), and 101(a)(6) of the Act and 29 U.S.C. 711(c), 711(e)(2)(A), and 721(a)(6))

§ 361.51 Written standards for facilities and providers of services.

The State plan must assure that the designated State unit establishes, maintains, makes available to the public, and implements written minimum standards for the various types of facilities and providers of services used by the State unit in providing vocational rehabilitation services, in accordance with the following requirements:

(a) *Accessibility of facilities.* Any facility in which vocational rehabilitation services are provided must be accessible to individuals receiving services and must comply with the requirements of the Architectural Barriers Act of 1968, the Uniform Accessibility Standards and their implementing regulations in 41 CFR part 101, subpart 101–19.6, the Americans with Disabilities Act of 1990, and section 504 of the Act.

(b) *Personnel standards.* (1) *Qualified personnel.* Providers of vocational rehabilitation services shall use qualified personnel, in accordance with any applicable national or State-approved or -recognized certification, licensing, or registration requirements, or, in the absence of these requirements, other comparable requirements (including State personnel requirements), that apply to the profession or discipline in which that category of personnel is providing vocational rehabilitation services.

(2) *Affirmative action.* Providers of vocational rehabilitation services shall take affirmative action to employ and advance in employment qualified individuals with disabilities.

(3) *Special communication needs personnel.* Providers of vocational rehabilitation services shall—

(i) Include among their personnel, or obtain the services of, individuals able to communicate in the native languages of applicants and eligible individuals who have limited English speaking ability; and

(ii) Ensure that appropriate modes of communication for all applicants and eligible individuals are used.

(c) *Fraud, waste, and abuse.* Providers of vocational rehabilitation services shall have adequate and appropriate policies and procedures to prevent fraud, waste, and abuse.

(Approved by the Office of Management and Budget under control number 1820–0500.)

(Authority: Secs. 12(e)(2) (B), (D), and (E) and 101(a)(6)(B) of the Act; 29 U.S.C. 711(e) and 721(a)(6)(B))

§ 361.52 Opportunity to make informed choices.

The State plan must describe the manner in which the State unit will provide each applicant, including individuals who are receiving services during an extended evaluation, and each eligible individual the opportunity to make informed choices throughout the vocational rehabilitation process in accordance with the following requirements:

(a) Each State unit, in consultation with its State Rehabilitation Advisory Council, if it has one, shall develop and implement written policies and procedures that enable each individual to make an informed choice with regard to the selection of a long-term vocational goal, intermediate rehabilitation objectives, vocational rehabilitation services, including assessment services, and service providers. These policies and procedures must ensure that each individual receives, through appropriate modes of communication, information concerning the availability and scope of informed choice, the manner in which informed choice may be exercised, and the availability of support services for individuals with cognitive or other disabilities who require assistance in exercising informed choice.

(b) In developing an individual's IWRP, the State unit shall provide the individual, or assist the individual in acquiring, information necessary to make an informed choice about the specific services, including the providers of those services, that are needed to achieve the individual's vocational goal. This information must include, at a minimum, information relating to the cost, accessibility, and duration of potential services, the consumer satisfaction with those services to the extent that information relating to consumer satisfaction is available, the qualifications of potential service providers, the types of services offered by those providers, and the degree to which services are provided in integrated settings.

(c) In providing, or assisting the individual in acquiring, the information required under paragraph (b) of this section, the State unit may use, but is not limited to, the following methods or sources of information:

(1) State or regional lists of services and service providers.

(2) Periodic consumer satisfaction surveys and reports.

(3) Referrals to other consumers, local consumer groups, or disability advisory councils qualified to discuss the services or service providers.

(4) Relevant accreditation, certification, or other information relating to the qualifications of service providers.

(Approved by the Office of Management and Budget under control number 1820–0500.)

(Authority: Secs. 12(e)(1), 12(e)(2) (C) and (F), and 101(a)(29) of the Act; 29 U.S.C. 711(e) and 721(a)(29))

§ 361.53 Availability of comparable services and benefits.

(a) The State plan must assure that—

(1) Prior to providing any vocational rehabilitation services to an eligible individual, or to members of the individual's family, except those services listed in paragraph (b) of this section, the State unit shall determine whether comparable services and benefits exist under any other program and whether those services and benefits are available to the individual;

(2) If comparable services or benefits exist under any other program and are available to the eligible individual at the time needed to achieve the rehabilitation objectives in the individual's IWRP, the State unit shall use those comparable services or benefits to meet, in whole or in part, the

cost of vocational rehabilitation services; and

(3) If comparable services or benefits exist under any other program, but are not available to the individual at the time needed to satisfy the rehabilitation objectives in the individual's IWRP, the State unit shall provide vocational rehabilitation services until those comparable services and benefits become available.

(b) The following services are exempt from a determination of the availability of comparable services and benefits under paragraph (a) of this section:

(1) Assessment for determining eligibility and priority for services.

(2) Assessment for determining vocational rehabilitation needs.

(3) Vocational rehabilitation counseling, guidance, and referral services.

(4) Vocational and other training services, such as personal and vocational adjustment training, books (including alternative format books accessible by computer and taped books), tools, and other training materials in accordance with § 361.48(a)(6).

(5) Placement services.

(6) Rehabilitation technology.

(7) Post-employment services consisting of the services listed under paragraphs (b) (1) through (6) of this section.

(c) The requirements of paragraph (a) of this section also do not apply if—

(1) The determination of the availability of comparable services and benefits under any other program would delay the provision of vocational rehabilitation services to any individual who is determined to be at extreme medical risk, based on medical evidence provided by an appropriate qualified medical professional; or

(2) An immediate job placement would be lost due to a delay in the provision of comparable services and benefits.

(Authority: Sec. 101(a)(8) of the Act; 29 U.S.C. 721(a)(8))

§ 361.54 Participation of individuals in cost of services based on financial need.

(a) *No Federal requirement.* There is no Federal requirement that the financial need of individuals be considered in the provision of vocational rehabilitation services.

(b) *State unit requirements.* (1) The State unit may choose to consider the financial need of eligible individuals or individuals who are receiving services during an extended evaluation for purposes of determining the extent of their participation in the costs of vocational rehabilitation services, other than those services identified in paragraph (b)(3) of this section.

(2) If the State unit chooses to consider financial need—

(i) It shall maintain written policies covering the determination of financial need;

(ii) The State plan must specify the types of vocational rehabilitation services for which the unit has established a financial needs test;

(iii) The policies must be applied uniformly to all individuals in similar circumstances;

(iv) The policies may require different levels of need for different geographic regions in the State, but must be applied uniformly to all individuals within each geographic region; and

(v) The policies must ensure that the level of an individual's participation in the cost of vocational rehabilitation services is—

(A) Reasonable;

(B) Based on the individual's financial need, including consideration of any disability-related expenses paid by the individual; and

(C) Not so high as to effectively deny the individual a necessary service.

(3) The State plan must assure that no financial needs test is applied and no financial participation is required as a condition for furnishing the following vocational rehabilitation services:

(i) Assessment for determining eligibility and priority for services, except those non-assessment services that are provided during an extended evaluation for an individual with a severe disability under § 361.42(d).

(ii) Assessment for determining vocational rehabilitation needs.

(iii) Vocational rehabilitation counseling, guidance, and referral services.

(iv) Placement services.

(Approved by the Office of Management and Budget under control number 1820–0500.)

(Authority: Sec. 12(c) of the Act; 29 U.S.C. 711(c))

§ 361.55 Review of extended employment in community rehabilitation programs or other employment under section 14(c) of the Fair Labor Standards Act.

The State plan must assure that the State unit—

(a) Reviews and re-evaluates at least annually the status of each individual determined by the State unit to have achieved an employment outcome in an extended employment setting in a community rehabilitation program or other employment setting in which the individual is compensated in accordance with section 14(c) of the Fair Labor Standards Act. This review or re-evaluation must include input from the individual or, in an appropriate case, the individual's representative to determine the interests, priorities, and needs of the individual for employment in, or training for, competitive employment in an integrated setting in the labor market;

(b) Makes maximum effort, including the identification of vocational rehabilitation services, reasonable accommodations, and other support services, to enable the eligible individual to benefit from training in, or to be placed in employment in, an integrated setting; and

(c) Provides services designed to promote movement from extended employment to integrated employment, including supported employment, independent living, and community participation.

(Authority: Sec. 101(a)(16) of the Act; 29 U.S.C. 721(a)(16))

§ 361.56 Individuals determined to have achieved an employment outcome.

The State plan must assure that an individual is determined to have achieved an employment outcome only if the following requirements are met:

(a) The provision of services under the individual's IWRP has contributed to the achievement of the employment outcome.

(b) The employment outcome is consistent with the individual's strengths, resources, priorities, concerns, abilities, capabilities, interests, and informed choice.

(c) The employment outcome is in the most integrated setting possible, consistent with the individual's informed choice.

(d) The individual has maintained the employment outcome for a period of at least 90 days.

(e) At the end of the appropriate period under paragraph (d) of this section, the individual and the rehabilitation counselor or coordinator consider the employment outcome to be satisfactory and agree that the individual is performing well on the job.

(Authority: Secs. 12(c), 101(a)(6), and 106(a)(2) of the Act; 29 U.S.C. 711(c), 721(a)(6), and 726(a)(2))

§ 361.57 Review of rehabilitation counselor or coordinator determinations.

The State plan must contain procedures, including standards of review under paragraph (b)(7) of this section, established by the director of the designated State unit to ensure that any applicant or eligible individual who is dissatisfied with any determinations made by a rehabilitation counselor or coordinator concerning the furnishing or denial of services may request, or, if

appropriate, may request through the individual's representative, a timely review of those determinations. The procedures established by the director of the State unit must be in accordance with the following provisions:

(a) *Informal resolution.* The State unit may establish an informal process to resolve a request for review without conducting a formal hearing. However, a State's informal process must be conducted and concluded within the time period established under paragraph (b)(1) of this section for holding a formal hearing. If informal resolution is not successful, a formal hearing must be conducted by the end of this same period, unless the parties agree to a specific extension of time.

(b) *Formal hearing procedures.* Except as provided in paragraph (d) of this section, the State unit shall establish formal review procedures that provide that—

(1) A hearing by an impartial hearing officer, selected in accordance with paragraph (c) of this section, must be held within 45 days of an individual's request for review, unless informal resolution is achieved prior to the 45th day or the parties agree to a specific extension of time;

(2) The State unit may not institute a suspension, reduction, or termination of services being provided under an IWRP pending a final determination of the formal hearing under this paragraph or informal resolution under paragraph (a) of this section, unless the individual or, in an appropriate case, the individual's representative so requests or the agency has evidence that the services have been obtained through misrepresentation, fraud, collusion, or criminal conduct on the part of the individual;

(3) The individual or, if appropriate, the individual's representative must be afforded an opportunity to present additional evidence, information, and witnesses to the impartial hearing officer, to be represented by counsel or other appropriate advocate, and to examine all witnesses and other relevant sources of information and evidence;

(4) The impartial hearing officer shall make a decision based on the provisions of the approved State plan, the Act, Federal vocational rehabilitation regulations, and State regulations and policies that are consistent with Federal requirements and shall provide to the individual or, if appropriate, the individual's representative and to the director of the designated State unit a full written report of the findings and grounds for the decision within 30 days of the completion of the hearing;

(5) If the director of the designated State unit decides to review the decision of the impartial hearing officer, the director shall notify in writing the individual or, if appropriate, the individual's representative of that intent within 20 days of the mailing of the impartial hearing officer's decision;

(6) If the director of the designated State unit fails to provide the notice required by paragraph (b)(5) of this section, the impartial hearing officer's decision becomes a final decision;

(7) The decision of the director of the designated State unit to review any impartial hearing officer's decision must be based on standards of review contained in written State unit policy;

(8) If the director of the designated State unit decides to review the decision of the impartial hearing officer, the director shall provide the individual or, if appropriate, the individual's representative an opportunity to submit additional evidence and information relevant to the final decision;

(9) The director may not overturn or modify a decision, or part of a decision, of an impartial hearing officer that supports the position of the individual unless the director concludes, based on clear and convincing evidence, that the decision of the impartial hearing officer is clearly erroneous because it is contrary to the approved State plan, the Act, Federal vocational rehabilitation regulations, or State regulations or policies that are consistent with Federal requirements;

(10) Within 30 days of providing notice of intent to review the impartial hearing officer's decision, the director of the designated State unit shall make a final decision and provide a full report in writing of the decision, including the findings and the statutory, regulatory, or policy grounds for the decision, to the individual or, if appropriate, the individual's representative;

(11) The director of the designated State unit may not delegate responsibility to make any final decision to any other officer or employee of the designated State unit; and

(12) Except for the time limitations established in paragraphs (b)(1) and (b)(5) of this section, each State's review procedures may provide for reasonable time extensions for good cause shown at the request of a party or at the request of both parties.

(c) *Selection of impartial hearing officers.* Except as provided in paragraph (d) of this section, the impartial hearing officer for a particular case must be selected—

(1) From among the pool of persons qualified to be an impartial hearing officer, as defined in § 361.5(b)(22), who are identified by the State unit, if the State unit is an independent commission, or jointly by the designated State unit and those members of the State Rehabilitation Advisory Council designated in section 102(d)(2)(C) of the Act, if the State has a Council; and

(2)(i) On a random basis; or

(ii) By agreement between the director of the designated State unit and the individual or, if appropriate, the individual's representative.

(d) *State fair hearing board.* The provisions of paragraphs (b) and (c) of this section are not applicable if the State has a fair hearing board that was established before January 1, 1985, that is authorized under State law to review rehabilitation counselor or coordinator determinations and to carry out the responsibilities of the director of the designated State unit under this section.

(e) *Informing affected individuals.* The State unit shall inform, through appropriate modes of communication, all applicants and eligible individuals of—

(1) Their right to review under this section, including the names and addresses of individuals with whom appeals may be filed; and

(2) The manner in which an impartial hearing officer will be selected consistent with the requirements of paragraph (c) of this section.

(f) *Data collection.* The director of the designated State unit shall collect and submit, at a minimum, the following data to the Secretary for inclusion each year in the annual report to Congress under section 13 of the Act:

(1) The number of appeals to impartial hearing officers and the State director, including the type of complaints and the issues involved.

(2) The number of decisions by the State director reversing in whole or in part a decision of the impartial hearing officer.

(3) The number of decisions affirming the position of the dissatisfied individual assisted through the client assistance program, when that assistance is known to the State unit.

(Approved by the Office of Management and Budget under control number 1820–0500.)

(Authority: Secs. 102(b) and 102(d) of the Act; 29 U.S.C. 722(b) and 722(d))

Subpart C—Financing of State Vocational Rehabilitation Programs

§ 361.60 Matching requirements.

(a) *Federal share*—(1) *General.* Except as provided in paragraphs (a)(2) and (a)(3) of this section, the Federal share for expenditures made by the State unit under the State plan, including

expenditures for the provision of vocational rehabilitation services, administration of the State plan, and the development and implementation of the strategic plan, is 78.7 percent.

(2) *Construction projects.* The Federal share for expenditures made for the construction of a facility for community rehabilitation program purposes may not be more than 50 percent of the total cost of the project.

(3) *Innovation and expansion grant activities.* The Federal share for the cost of innovation and expansion grant activities funded by appropriations under Part C of Title I of the Act is 90 percent.

(b) *Non-Federal share*—(1) *General.* Except as provided in paragraphs (b)(2) and (b)(3) of this section, expenditures made under the State plan to meet the non-Federal share under this section must be consistent with the provisions of 34 CFR 80.24.

(2) *Third party in-kind contributions.* Third party in-kind contributions specified in 34 CFR 80.24(a)(2) may not be used to meet the non-Federal share under this section.

(3) *Contributions by private entities.* Expenditures made from contributions by private organizations, agencies, or individuals that are deposited in the account of the State agency or sole local agency in accordance with State law and that are earmarked, under a condition imposed by the contributor, may be used as part of the non-Federal share under this section if the following requirements are met:

(i) The funds are earmarked for meeting in whole or in part the State's share for establishing a community rehabilitation program or constructing a particular facility for community rehabilitation program purposes.

(ii) If the funds are earmarked for any other purpose under the State plan, the expenditures do not benefit in any way the donor, an individual to whom the donor is related by blood or marriage or with whom the donor has a close personal relationship, or an individual, entity, or organization with whom the donor shares a financial interest. The Secretary does not consider a donor's receipt from the State unit of a grant, subgrant, or contract with funds allotted under this part to be a benefit for the purposes of this paragraph if the grant, subgrant, or contract is awarded under the State's regular competitive procedures.

(Authority: Secs. 7(7), 101(a)(3), and 104 of the Act; 29 U.S.C. 706(7), 721(a)(3) and 724)

Note: The Secretary notes that contributions may be earmarked in accordance with paragraph (b)(3)(ii) of this section for providing particular services (e.g., rehabilitation technology services); serving individuals with certain types of disabilities (e.g., individuals who are blind), consistent with the State's order of selection, if applicable; providing services to special groups that State or Federal law permits to be targeted for services (e.g., students with disabilities who are receiving special education services), consistent with the State's order of selection, if applicable; or carrying out particular types of administrative activities permissible under State law. Contributions also may be restricted to particular geographic areas to increase services or expand the scope of services that are available statewide under the State plan. However, if a contribution is earmarked for a restricted geographic area, expenditures from that contribution may be used to meet the non-Federal share requirement only if the State unit requests and the Secretary approves a waiver of statewideness, in accordance with § 361.26.

§ 361.61 Limitation on use of funds for construction expenditures.

No more than 10 percent of a State's allotment for any fiscal year under section 110 of the Act may be spent on the construction of facilities for community rehabilitation program purposes.

(Authority: Sec. 101(a)(17)(A) of the Act; 29 U.S.C. 721(a)(17)(A))

§ 361.62 Maintenance of effort requirements.

(a) *General requirements.* (1) The Secretary reduces the amount otherwise payable to a State for a fiscal year by the amount by which the total expenditures from non-Federal sources under the State plan for the previous fiscal year were less than the total of those expenditures for the fiscal year two years prior to the previous fiscal year. For example, for fiscal year 1996, a State's maintenance of effort level is based on the amount of its expenditures from non-Federal sources for fiscal year 1994. Thus, if the State's non-Federal expenditures in 1996 are less than they were in 1994, the State has a maintenance of effort deficit, and the Secretary reduces the State's allotment in 1997 by the amount of that deficit.

(2) If, at the time the Secretary makes a determination that a State has failed to meet its maintenance of effort requirements, it is too late for the Secretary to make a reduction in accordance with paragraph (a)(1) of this section, then the Secretary recovers the amount of the maintenance of effort deficit through audit disallowance.

(b) *Specific requirements for construction of facilities.* If the State plan provides for the construction of a facility for community rehabilitation program purposes, the amount of the State's share of expenditures for vocational rehabilitation services under the plan, other than for the construction of a facility for community rehabilitation program purposes or the establishment of a facility for community rehabilitation purposes, must be at least equal to the expenditures for those services for the second prior fiscal year. If a State fails to meet the requirements of this paragraph, the Secretary recovers the amount of the maintenance of effort deficit through audit disallowance.

(c) *Separate State agency for vocational rehabilitation services for individuals who are blind.* If there is a separate part of the State plan administered by a separate State agency to provide vocational rehabilitation services for individuals who are blind—

(1) Satisfaction of the maintenance of effort requirements under paragraphs (a) and (b) of this section are determined based on the total amount of a State's non-Federal expenditures under both parts of the State plan; and

(2) If a State fails to meet any maintenance of effort requirement, the Secretary reduces the amount otherwise payable to the State for that fiscal year under each part of the plan in direct relation to the amount by which expenditures from non-Federal sources under each part of the plan in the previous fiscal year were less than they were for that part of the plan for the fiscal year two years prior to the previous fiscal year.

(d) *Waiver or modification.* (1) The Secretary may waive or modify the maintenance of effort requirement in paragraph (a)(1) of this section if the Secretary determines that a waiver or modification is necessary to permit the State to respond to exceptional or uncontrollable circumstances, such as a major natural disaster or a serious economic downturn, that—

(i) Cause significant unanticipated expenditures or reductions in revenue; and

(ii) Result in—

(A) A general reduction of programs within the State; or

(B) The State making substantial expenditures in the vocational rehabilitation program for long-term purposes due to the one-time costs associated with the construction of a facility for community rehabilitation program purposes, the establishment of a facility for community rehabilitation program purposes, or the acquisition of equipment.

(2) The Secretary may waive or modify the maintenance of effort requirement in paragraph (b) of this section or the 10 percent allotment limitation in § 361.61 if the Secretary

determines that a waiver or modification is necessary to permit the State to respond to exceptional or uncontrollable circumstances, such as a major natural disaster, that result in significant destruction of existing facilities and require the State to make substantial expenditures for the construction of a facility for community rehabilitation program purposes or the establishment of a facility for community rehabilitation program purposes in order to provide vocational rehabilitation services.

(3) A written request for waiver or modification, including supporting justification, must be submitted to the Secretary as soon as the State determines that an exceptional or uncontrollable circumstance will prevent it from making its required expenditures from non-Federal sources.

(Authority: Secs. 101(a)(17) and 111(a)(2) of the Act; 29 U.S.C. 721(a)(17) and 731(a)(2))

§ 361.63 Program income.

(a) *Definition.* Program income means gross income received by the State that is directly generated by an activity supported under this part.

(b) *Sources.* Sources of program income include, but are not limited to, payments from the Social Security Administration for rehabilitating Social Security beneficiaries, payments received from workers' compensation funds, fees for services to defray part or all of the costs of services provided to particular individuals, and income generated by a State-operated community rehabilitation program.

(c) *Use of program income.* (1) Except as provided in paragraph (c)(2) of this section, program income, whenever earned, must be used for the provision of vocational rehabilitation services, the administration of the State plan, and developing and implementing the strategic plan. Program income is considered earned when it is received.

(2) Payments provided to a State from the Social Security Administration for rehabilitating Social Security beneficiaries may also be used to carry out programs under Part B of Title I of the Act (client assistance), Part C of Title I of the Act (innovation and expansion), Part C of Title VI of the Act (supported employment) and Title VII of the Act (independent living).

(3) The State is authorized to treat program income as—

(i) An addition to the grant funds to be used for additional allowable program expenditures, in accordance with 34 CFR 80.25(g)(2); or

(ii) A deduction from total allowable costs, in accordance with 34 CFR 80.25(g)(1).

(4) Program income may not be used to meet the non-Federal share requirement under § 361.60.

(Authority: Sec. 108 of the Act; 29 U.S.C. 728; 34 CFR 80.25)

§ 361.64 Obligation of Federal funds and program income.

(a) Except as provided in paragraph (b) of this section, any Federal funds, including reallotted funds, that are appropriated for a fiscal year to carry out a program under this part that are not obligated by the State unit by the beginning of the succeeding fiscal year and any program income received during a fiscal year that is not obligated by the State unit by the beginning of the succeeding fiscal year must remain available for obligation by the State unit during that succeeding fiscal year.

(b) Federal funds appropriated for a fiscal year remain available for obligation in the succeeding fiscal year only to the extent that the State unit met the matching requirement for those Federal funds by obligating, in accordance with 34 CFR 76.707, the non-Federal share in the fiscal year for which the funds were appropriated.

(Authority: Sec. 19 of the Act; 29 U.S.C. 718)

§ 361.65 Allotment and payment of Federal funds for vocational rehabilitation services.

(a) *Allotment.* (1) The allotment of Federal funds for vocational rehabilitation services for each State is computed in accordance with the requirements of section 110 of the Act, and payments are made to the State on a quarterly basis, unless some other period is established by the Secretary.

(2) If the State plan designates one State agency to administer, or supervise the administration of, the part of the plan under which vocational rehabilitation services are provided for individuals who are blind and another State agency to administer the rest of the plan, the division of the State's allotment is a matter for State determination.

(b) *Reallotment.* (1) The Secretary determines not later than 45 days before the end of a fiscal year which States, if any, will not use their full allotment.

(2) As soon as possible, but not later than the end of the fiscal year, the Secretary reallots these funds to other States that can use those additional funds during the current or subsequent fiscal year, provided the State can meet the matching requirement by obligating the non-Federal share of any reallotted funds in the fiscal year for which the funds were appropriated.

(3) Funds reallotted to another State are considered to be an increase in the recipient State's allotment for the fiscal year for which the funds were appropriated.

(Authority: Secs. 110 and 111 of the Act; 29 U.S.C. 730 and 731)

Subpart D—Strategic Plan for Innovation and Expansion of Vocational Rehabilitation Services

§ 361.70 Purpose of the strategic plan.

The State shall prepare a statewide strategic plan, in accordance with § 361.71, to develop and use innovative approaches for achieving long-term success in expanding and improving vocational rehabilitation services, including supported employment services, provided under the State plan, including the supported employment supplement to the State plan required under 34 CFR part 363.

(Authority: Sec. 120 of the Act; 29 U.S.C. 740)

§ 361.71 Procedures for developing the strategic plan.

(a) *Public input.* (1) The State unit shall meet with and receive recommendations from members of the State Rehabilitation Advisory Council, if the State has a Council, and the Statewide Independent Living Council prior to developing the strategic plan.

(2) The State unit shall solicit public input on the strategic plan prior to or at the public meetings on the State plan, in accordance with the requirements of § 361.20.

(3) The State unit shall consider the recommendations received under paragraphs (a)(1) and (a)(2) of this section and, if the State rejects any recommendations, shall include a written explanation of the reasons for those rejections in the strategic plan.

(4) The State unit shall develop a procedure to ensure ongoing comment from the Council or Councils, if applicable, as the plan is being implemented.

(b) *Duration.* The strategic plan must cover a three-year period.

(c) *Revisions.* The State unit shall revise the strategic plan on an annual basis to reflect the unit's actual experience over the previous year and input from the State Rehabilitation Advisory Council, if the State has a Council, individuals with disabilities, and other interested parties.

(d) *Dissemination.* The State unit shall disseminate widely the strategic plan to individuals with disabilities, disability organizations, rehabilitation professionals, and other interested persons and shall make the strategic plan available in accessible formats and appropriate modes of communication.

(Approved by the Office of Management and Budget under control number 1820–0500.)

(Authority: Sec. 122 of the Act; 29 U.S.C. 742)

§ 361.72 Content of the strategic plan.

The strategic plan must include—

(a) A statement of the mission, philosophy, values, and principles of the vocational rehabilitation program in the State;

(b) Specific goals and objectives for expanding and improving the system for providing vocational rehabilitation services;

(c) Specific multi-faceted and systemic approaches for accomplishing the objectives, including interagency coordination and cooperation, that build upon state-of-the-art practices and research findings and that implement the State plan and the supplement to the State plan submitted under 34 CFR Part 363;

(d) A description of the specific programs, projects, and activities funded under this subpart, including how the programs, projects, and activities accomplish the objectives of the subpart, and the resource allocation and budget for the programs, projects, and activities; and

(e) Specific criteria for determining whether the objectives have been achieved, including an assurance that the State will conduct an annual evaluation to determine the extent to which the objectives have been achieved and, if specific objectives have not been achieved, the reasons that the objectives have not been achieved and a description of alternative approaches that will be taken.

(Approved by the Office of Management and Budget under control number 1820–0500.)

(Authority: Sec. 121 of the Act; 29 U.S.C. 741)

§ 361.73 Use of funds.

(a) A State unit shall use all grant funds received under Title I, Part C of the Act to carry out programs and activities that are identified under the State's strategic plan, including but not limited to those programs and activities that are identified in paragraph (b) of this section.

(b) A State unit shall use at least 1.5 percent of the funds received under section 111 of the Act to carry out one or more of the following types of programs and activities that are identified in the State's strategic plan:

(1) Programs to initiate or expand employment opportunities for individuals with severe disabilities in integrated settings that allow for the use of on-the-job training to promote the objectives of Title I of the Americans with Disabilities Act of 1990.

(2) Programs or activities to improve or expand the provision of employment services in integrated settings to individuals with sensory, cognitive, physical, and mental impairments who traditionally have not been served by the State vocational rehabilitation agency.

(3) Programs or activities to maximize the ability of individuals with disabilities to use rehabilitation technology in employment settings.

(4) Programs or activities that assist employers in accommodating, evaluating, training, or placing individuals with disabilities in the workplace of the employer consistent with the provisions of the Act and Title I of the Americans with Disabilities Act of 1990. These programs or activities may include short-term technical assistance or other effective strategies.

(5) Programs or activities that expand and improve the extent and type of an individual's involvement in the review and selection of his or her training and employment goals.

(6) Programs or activities that expand and improve opportunities for career advancement for individuals with severe disabilities.

(7) Programs, projects, or activities designed to initiate, expand, or improve working relationships between vocational rehabilitation services provided under Title I of the Act and independent living services provided under Title VII of the Act.

(8) Programs, projects, or activities designed to improve functioning of the system for delivering vocational rehabilitation services and to improve coordination and working relationships with other State agencies and local public agencies, business, industry, labor, community rehabilitation programs, and centers for independent living, including projects designed to—

(i) Increase the ease of access to, timeliness of, and quality of vocational rehabilitation services through the development and implementation of policies, procedures, systems, and interagency mechanisms for providing vocational rehabilitation services;

(ii) Improve the working relationships between State vocational rehabilitation agencies and other State agencies, centers for independent living, community rehabilitation programs, educational agencies involved in higher education, adult basic education, and continuing education, and businesses, industry, and labor organizations, in order to create and facilitate cooperation in—

(A) Planning and implementing services; and

(B) Developing an integrated system of community-based vocational rehabilitation services that includes appropriate transitions between service systems; and

(iii) Improve the ability of professionals, advocates, business, industry, labor, and individuals with disabilities to work in cooperative partnerships to improve the quality of vocational rehabilitation services and job and career opportunities for individuals with disabilities.

(9) Projects or activities that ensure that the annual evaluation of the effectiveness of the program in meeting the goals and objectives in the State plan, including the system for evaluating the performance of rehabilitation counselors, coordinators, and other personnel used in the State, facilitates and does not impede the accomplishment of the purpose of this part, including serving individuals with the most severe disabilities.

(10) Projects or activities to support the initiation, expansion, and improvement of a comprehensive system of personnel development.

(11) Programs, projects, or activities to support the provision of training and technical assistance to individuals with disabilities, business, industry, labor, community rehabilitation programs, and others regarding the implementation of the Rehabilitation Act Amendments of 1992, of Title V of the Act, and of the Americans with Disabilities Act of 1990.

(12) Projects or activities to support the funding of the State Rehabilitation Advisory Council and the Statewide Independent Living Council.

(Authority: Secs. 101(a)(34)(B) and 123 of the Act; 29 U.S.C. 721(a)(34)(B) and 743)

§ 361.74 Allotment of Federal funds.

(a) The allotment and any reallotment of Federal funds under Title I, Part C of the Act are computed in accordance with the requirements of section 124 of the Act.

(b) If at any time the Secretary determines that any amount will not be expended by a State in carrying out the purpose of this subpart, the Secretary makes that amount available to one or more other States that the Secretary determines will be able to use additional amounts during the fiscal year. Any amount made available to any State under this paragraph of this section is regarded as an increase in the State's allotment for that fiscal year.

(Authority: Sec. 124 of the Act; 29 U.S.C. 744)

PART 363—THE STATE SUPPORTED EMPLOYMENT SERVICES PROGRAM

2. The authority citation for part 363 continues to read as follows:

Authority: 29 U.S.C. 795j–q, unless otherwise noted.

3. In § 363.6, paragraphs (c)(1), (c)(2)(i), (c)(2)(ii), and the authority citation are revised to read as follows:

§ 363.6 What definitions apply?

* * * * *

(c) * * *

(1) *Supported employment* means—

(i) Competitive employment in an integrated setting with ongoing support services for individuals with the most severe disabilities—

(A) For whom competitive employment has not traditionally occurred or for whom competitive employment has been interrupted or intermittent as a result of a severe disability; and

(B) Who, because of the nature and severity of their disabilities, need intensive supported employment services from the designated State unit and extended services after transition in order to perform this work; or

(ii) Transitional employment for individuals with the most severe disabilities due to mental illness.

(2) As used in the definition of ''Supported employment''—

(i) *Competitive employment* means work—

(A) In the competitive labor market that is performed on a full-time or part-time basis in an integrated setting; and

(B) For which an individual is compensated at or above the minimum wage, but not less than the customary or usual wage paid by the employer for the same or similar work performed by individuals who are not disabled.

(ii) *Integrated setting* means a setting typically found in the community in which an individual with the most severe disabilities interacts with non-disabled individuals, other than non-disabled individuals who are providing services to that individual, to the same extent that non-disabled individuals in comparable positions interact with other persons.

* * * * *

(Authority: 29 U.S.C. 706(18), 711(c), and 795j)

PART 376—SPECIAL PROJECTS AND DEMONSTRATIONS FOR PROVIDING TRANSITIONAL REHABILITATION SERVICES TO YOUTH WITH DISABILITIES

4. The authority citation for part 376 continues to read as follows:

Authority: 29 U.S.C. 777a(b), unless otherwise noted.

5. In § 376.4, paragraph (c) and the authority citation are revised to read as follows:

§ 376.4 What definitions apply to this program?

* * * * *

(c) The definitions of ''Competitive employment'', ''Integrated setting'', ''On-going support services'', ''Transitional employment'', and ''Time-limited services'' in 34 CFR part 380.

* * * * *

(Authority: 29 U.S.C. 711(c) and 777a(b))

PART 380—SPECIAL PROJECTS AND DEMONSTRATIONS FOR PROVIDING SUPPORTED EMPLOYMENT SERVICES TO INDIVIDUALS WITH THE MOST SEVERE DISABILITIES AND TECHNICAL ASSISTANCE PROJECTS

6. The authority citation for part 380 continues to read as follows:

Authority: 29 U.S.C. 711(c) and 777a(c), unless otherwise noted.

7. In § 380.9, paragraphs (c)(1)(i) and (c)(1)(ii) are revised to read as follows:

§ 380.9 What definitions apply?

* * * * *

(c) * * *

(1) * * *

(i) *Competitive employment* means work—

(A) In the competitive labor market that is performed on a full-time or part-time basis in an integrated setting; and

(B) For which an individual is compensated at or above the minimum wage, but not less than the customary or usual wage paid by the employer for the same or similar work performed by individuals who are not disabled.

(ii) *Integrated setting* means a setting typically found in the community in which an individual with the most severe disabilities interacts with non-disabled individuals, other than non-disabled individuals who are providing services to that individual, to the same extent that non-disabled individuals in comparable positions interact with other persons.

* * * * *

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Part III

Environmental Protection Agency

40 CFR Parts 85, 89 and 92

Emission Standards for Locomotives and Locomotive Engines; Proposed Rule

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 85, 89 and 92

[FRL–5686–1]

RIN 2060–AD33

Emission Standards for Locomotives and Locomotive Engines

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of Proposed Rulemaking (NPRM).

SUMMARY: EPA is proposing regulatory requirements for the control of emissions from locomotives and engines used in locomotives as required by Clean Air Act section 213(a)(5). The primary focus of this proposal is reduction of the emissions of oxides of nitrogen (NO_X). The proposed standards will result in more than a 60 percent reduction in NO_X from freshly manufactured locomotives beginning in 2005, with lesser reductions from locomotives originally manufactured from 1973 through 2004. NO_X is a precursor to the formation of ground level ozone, which causes health problems such as damage to lung tissue, reduction of lung function, and sensitization of lungs to other irritants, as well as damage to terrestrial and aquatic ecosystems. EPA is also proposing standards for emissions of hydrocarbons (HC), carbon monoxide (CO), particulate matter (PM), and smoke. The cost effectiveness of today's proposed emissions standards is 173 dollars per ton of NO_X and PM reduced.

Three separate sets of standards are proposed, with applicability of the standards dependent on the date a locomotive is first manufactured. The first set of standards (Tier 0) are proposed to apply to locomotives and locomotive engines originally manufactured from 1973 through 1999, any time they are remanufactured in calendar year 2000 or later. The second set of standards (Tier I) apply to locomotives and locomotive engines originally manufactured from 2000 through 2004. Such locomotives and locomotive engines would be required to meet the Tier I standards at the time of original manufacture and at each subsequent remanufacture. The final set of standards (Tier II) are proposed to apply to locomotives and locomotive engines originally manufactured in 2005 and later. Such locomotives and locomotive engines would be required to meet the Tier II standards at the time of original manufacture and at each subsequent remanufacture.

Today's proposal includes a variety of provisions to implement the standards and to ensure that the standards are met in-use. These provisions include certification test procedures, and assembly line and in-use compliance testing programs. Also included in today's proposal is an emissions averaging, banking and trading program to provide flexibility in achieving compliance with the proposed standards. Finally, EPA is proposing regulations that would preempt certain state and local requirements relating to the control of emissions from new locomotives and new locomotive engines, pursuant to Clean Air Act section 209(e).

DATES: Comments must be received on or before April 14, 1997. A public hearing will be held on March 13, 1997, starting at 9:30 a.m. Persons wishing to present oral testimony are requested to notify EPA on or before March 6, 1997, to allow for an orderly scheduling of oral testimony.

ADDRESSES:

Written comments: Interested parties may submit written comments (in triplicate if possible) for EPA consideration. The comments are to be addressed to: EPA Air and Radiation Docket, Attention: Docket No. A–94–31, Room M–1500, Mail Code 6102, U.S. EPA, 401 M Street, S.W., Washington DC 20460. The docket is open for public inspection from 8 a.m. until 5:30 p.m. Monday through Friday, except on government holidays. As provided in 40 CFR part 2, a reasonable fee may be charged for copying docket materials. Should a commenter wish to provide confidential business information (CBI) to EPA, such CBI should NOT be included with the information sent to the docket. Materials sent to the docket should, however, indicate that CBI was provided to EPA. One copy of CBI, along with the remainder of the written comments, should be sent to Charles Moulis at the address provided in **FOR FURTHER INFORMATION CONTACT** below.

Public hearing: The public hearing will be held at: (Holiday Inn—North Campus, 3600 Plymouth Rd, Ann Arbor, MI 48105, (313) 769–9800).

FOR FURTHER INFORMATION CONTACT: For information on this rulemaking contact: Charles Moulis, U.S. EPA, Engine Programs and Compliance Division, 2565 Plymouth Road, Ann Arbor, MI 48105; Telephone: (313) 741–7826, Fax: (313) 741–7816. Requests for hard copies of the preamble, regulation text and regulatory support document (RSD) should be directed to Carol Connell at (313) 668–4349.

SUPPLEMENTARY INFORMATION:

I. Regulated Entities

Entities potentially regulated by this proposed action are those which manufacture and/or remanufacture locomotives and locomotive engines; those which own and operate railroads; and state and local governments. Regulated categories and entities include:

Category	Examples of regulated entities
Industry	Manufacturers and remanufacturers of locomotives and locomotive engines, railroad owners and operators.
Government	State and local governments.[1]

[1] It should be noted that the proposed provisions do not impose any requirements that state and local governments (other than those that own or operate local and regional railroads) must meet, but rather implement the Clean Air Act preemption provisions for locomotives. It should also be noted that some state and local governments also own or operate local and regional railroads.

This table is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be regulated by this proposal. This table lists the types of entities that EPA is now aware could potentially be regulated by this proposal. Other types of entities not listed in the table could also be regulated. To determine whether your company is regulated by this proposal, you should carefully examine the applicability criteria in §§ 92.001 and 92.901 of the proposed regulatory text. If you have questions regarding the applicability of this proposal to a particular entity, consult the person listed in the preceding **FOR FURTHER INFORMATION CONTACT** section.

II. Statutory Authority

Authority for the actions proposed in this notice is granted to the Environmental Protection Agency (EPA) by sections 114, 203, 204, 205, 206, 207, 208, 209, 213, 215, 216 and 301(a) of the Clean Air Act as amended in 1990 (CAA or ''the Act'') (42 U.S.C. 7414, 7522, 7523, 7524, 7525, 7541, 7542, 7543, 7547, 7549, 7550 and 7601(a)).

EPA is proposing emissions standards for new locomotives and new engines used in locomotives pursuant to its authority under section 213 of the Clean Air Act. Section 213(a)(5) directs EPA to adopt emissions standards for new locomotives and new engines used in locomotives that achieve the greatest degree of emissions reductions achievable through the use of technology that the Administrator determines will be available for such vehicles and engines, taking into account the cost of applying such technology within the available time period, and noise, energy, and safety factors associated with the application of such technology. As described in this notice and in the regulatory support document, EPA has evaluated the available information to determine the technology that will be available for locomotives and engines proposed to be subject to EPA standards.

EPA is also acting under its authority to implement and enforce the locomotive emission standards. Section 213(d) provides that the standards EPA adopts for new locomotives and new engines used in locomotives ''shall be subject to sections 206, 207, 208, and 209'' of the Clean Air Act, with such modifications that the Administrator deems appropriate to the regulations implementing these sections.[1] In addition, the locomotive standards ''shall be enforced in the same manner as [motor vehicle] standards prescribed under section 202'' of the Act. Section 213(d) also grants EPA authority to promulgate or revise regulations as necessary to determine compliance with, and enforce, standards adopted under section 213. Pursuant to this authority, EPA is proposing that manufacturers (including remanufacturers) of new locomotives and new engines used in locomotives must obtain a certificate of compliance with EPA's emissions standards and requirements, and must subject the locomotives and engines to assembly line and in-use testing. The language of section 213(d) directs EPA to generally enforce the locomotive emissions standards in the same manner as it enforces motor vehicle emissions standards. Pursuant to this authority, EPA is proposing regulations similar to those adopted for motor vehicles and engines under section 203 of the Act, which prescribes certain enforcement-related prohibitions, including a prohibition against introducing a new vehicle or engine that is not covered by a valid certificate of conformity into commerce, a prohibition against tampering, and a prohibition on importing a vehicle or engine into the United States without a valid, applicable certificate of conformity. In addition, EPA is proposing emission defect regulations that require manufacturers to report to EPA emissions-related defects that affect a given class or category of engines.

EPA is also proposing regulations to clarify the scope of preemption of state regulation. Section 209(e) prohibits states from adopting and enforcing standards and other requirements relating to the control of emissions from new locomotives and new engines used in locomotives. This provision also grants EPA authority to adopt regulations to implement section 209(e). Pursuant to this authority, EPA is proposing to adopt regulations to implement the express preemption of state emissions standards for new locomotives and new engines used in locomotives, for the purpose of clarifying the scope of preemption for states and industry.

III. Background

A. Locomotives

Locomotives generally fall into three broad categories based on their intended use. Switch locomotives, typically 1500 kilowatts (kW) or less, (2000 horsepower (hp)), are the least powerful locomotives, and are used in freight yards to assemble and disassemble trains, or for short hauls of small trains. Passenger locomotives are powered by engines of approximately 2200 kW (3000 hp), and may be equipped with an auxiliary engine to provide hotel power for the train, although they may also generate hotel power (i.e., electrical power used for lighting, heating, etc. in the passenger cars) with the main engine. Freight or line-haul locomotives are the most powerful locomotives and are used to power freight train operations over long distances. Older line-haul locomotives are typically powered by engines of approximately 2,200 kW (3,000 hp), while newer line-haul locomotives are powered by engines of approximately 3,000 kW (4,000 hp). In some cases, older line-haul locomotives (especially lower powered ones) are used in switch applications. The industry expects that the next generation of freshly manufactured line-haul locomotives will be powered by 4,500 kW (6,000 hp) engines.

One unique feature of locomotives that makes them different than other, currently regulated mobile sources is the way that power is transferred from the engine to the wheels. Most mobile sources utilize mechanical means (i.e., a transmission) to transfer energy from the engine to the wheels (or other site of use). This results in engine operation which is very transient in nature, with respect to changes in both speed and load. In contrast, locomotive engines are typically connected to an electrical generator to convert the mechanical energy to electricity. This electricity is then used to power traction motors which turn the wheels. This lack of a direct, mechanical connection between the engine and the wheels allows the engine to operate in an essentially steady state mode in a number of discrete power settings, or notches. Current locomotives typically have eight power notches, as well as one or two idle settings.

A second unique feature of locomotives setting them apart from other mobile sources is their braking system. In this braking system, called the dynamic brake, the traction motors act as generators, with the generated power being dissipated as heat through an electric resistance grid. While the engine is not generating motive power (i.e., power to propel the locomotive, also known as tractive power) in the dynamic brake mode, it is generating power to operate the resistance grid cooling fans. As such, the engine is operating in a power mode that is different than the power notches or idle settings just discussed. While most diesel electric locomotives have dynamic brakes, some do not (generally switch locomotives).

B. Railroads

In the United States, freight railroads are subdivided into three classes by the Federal Surface Transportation Board (STB), based on annual revenue. In 1994 a railroad was classified as a Class I railroad if annual revenue was $255.9 million or greater, as a Class II railroad with annual revenue of between $20.5 and 255.8 million, and as a Class III railroad with revenues of under $20.5 million. In 1994, there were 12 Class I railroads and 519 Class II and III railroads operating in the U.S. Due to a recent merger of two railroads, there are currently 11 Class I railroads operating in the U.S. Class I railroads presently operate approximately 18,500 locomotives in the U.S., while Class II and III railroads operate approximately 2,650 locomotives.[2]

[1] Sections 206, 207, 208, and 209 of the Act cover compliance testing and certification, in-use compliance, information collection, and state standards, respectively.

[2] Railroad Facts, 1995 Edition, Association of American Railroads, September, 1995.

C. Locomotive Usage

Movement of freight by Class I railroads totaled approximately 910 billion ton-miles in 1981, increasing to approximately 1,201 billion ton-miles in 1994; an increase of approximately 32 percent. At present, more than ⅓ of total intercity revenue freight ton-miles moved in the U.S. by all transportation means are moved by train.[3]

D. Locomotive Sales and Rebuild Practices

From 1985 through 1994, annual sales of freshly manufactured locomotives fluctuated somewhat, but averaged approximately 450 units. Class I railroads typically purchase all of these freshly manufactured locomotives. Older locomotives owned by Class I railroads are either sold to smaller railroads, scrapped, or purchased by an independent entity for remanufacture and resale. The total life of a locomotive is approximately 40 years, during which period the engine and the locomotive undergo several extensive remanufacturing operations. These remanufacturing operations generally consist of, at a minimum, the replacement of the power assemblies (*i.e.*, pistons, piston rings, cylinder liners, cylinder heads, fuel injectors, valves, etc.) with new components (or components that are in new condition) to bring the locomotive back to the condition it was in when originally manufactured with respect to performance, durability and emissions.

E. Locomotive and Locomotive Engine Manufacturers and Remanufacturers

Locomotives used in the United States are primarily produced by two manufacturers: the Electromotive Division of General Motors (EMD) and General Electric Transportation Systems (GE). These manufacturers produce both the locomotive chassis and the propulsion engines, and also remanufacture engines. MotivePower Industries (formerly MK Rail Corporation) recently entered the market and has manufactured some locomotives using engines manufactured by Caterpillar, Inc. Detroit Diesel Corporation and Cummins Engine Company, Inc. also produce engines which may be used in locomotives. U.S. railroads do not tend to purchase locomotives or locomotive engines from manufacturers outside of the U.S.

The two primary manufacturers of freshly manufactured locomotives also provide remanufacturing services to their customers. Several additional entities also remanufacture locomotives. Many Class I railroads remanufacture locomotive engines for their own units and on a contract basis for other railroads. Additionally, there are a small number of independent remanufacturing operations in existence.

F. Interstate Commerce

Current railroad networks (rail lines) are geographically widespread across the United States, serving every major city in the country. Today, approximately one-third of the freight hauled in the United States is hauled by train. There are very few industries or citizens in the U.S. who are not ultimate consumers of the services provided by the American railroad companies. Efficient train transportation is a vital factor in the strength of the U.S. economy.

Class I railroads operate regionally. This is why railroad companies and the Federal Railroad Administration (FRA), have stressed the importance of unhindered rail access across all state boundaries. If states regulated locomotives differently, a railroad could conceivably be forced to change locomotives at state boundaries, and/or have state-specific locomotive fleets. Currently, facilities for such changes do not exist, and even if switching areas were available at state boundaries, it would be a costly and time consuming disruption of interstate commerce. Any disruption in the efficient interstate movement of trains throughout the U.S. would have an impact on the health and well-being of not only the rail industry but the entire U.S. economy as well.

G. Modal Shift

Another important point requiring consideration in the regulation of locomotives is the potential for modal shift. A modal shift is a change from one form of transportation, such as trains, to another form, such as trucks. Modal shift can have negative or positive effects on national and local emissions inventories. Negative modal shift occurs when there is a shift to a more polluting form of transportation.

Information currently available to EPA shows that truck-based freight movement generates more pollutants per ton-mile of freight hauled than current, unregulated rail-based forms of freight movement. Estimates quantifying the difference indicate that locomotives are on the order of three times cleaner than trucks on an emissions per ton-mile basis.[4] Thus, overly stringent regulation of the rail industry or a disruption in interstate rail movement could cause rail prices to increase and thus cause a negative modal shift. Regulations that were overly stringent could raise equipment and/or operating costs to the point that it might be a wiser economic choice to move current rail freight by truck. Additionally, delays caused by changing locomotives at state boundaries due to separate state locomotive regulations could be costly to railroad companies. These increased costs would be reflected in the price of hauling freight by rail and may even eliminate some rail carriers from the market. In both of these cases customers could switch to trucks for the movement of their freight. Any freight normally carried by rail that is hauled by trucks instead of by rail would increase overall emissions, even at current emissions levels.

H. Health and Environmental Impacts of Ambient NO_X and PM

Oxides of nitrogen (NO_X) are a family of reactive gaseous compounds that contribute to air pollution in both urban and rural environments. NO_X emissions are produced during the combustion of fuels at high temperatures. The primary sources of atmospheric NO_X include highway sources (such as light-duty and heavy-duty vehicles), nonroad sources (such as construction and agricultural equipment, and locomotives) and stationary sources (such as power plants and industrial boilers). Ambient levels of NO_X can be directly harmful to human health and the environment. More importantly, from an overall health and welfare perspective, NO_X contributes to the production of secondary chemical products that in turn cause additional health and welfare effects. Prominent among these are ozone and nitrate particulate.

The component of NO_X that is of most concern from a health standpoint is nitrogen dioxide, NO_2. EPA has set a primary (health-related) NAAQS for NO_2 of 100 micrograms per cubic meter, or 0.053 parts per million. Direct exposure to NO_2 can reduce breathing efficiency and increase lung and airway irritation in healthy people, as well as in the elderly and in people with pre-existing pulmonary conditions. Exposure to NO_2 at or near the level of the ambient standard appears to increase symptoms of respiratory illness, lung congestion, wheeze, and

[3] *Id.* A revenue freight ton-mile is the commercial movement (*i.e.*, for revenue) of one ton of freight one mile.

[4] Note from F. Peter Hutchins to Joanne I. Goldhand, dated 2/14/94, and entitled ''Estimate of Relative NO_X Emissions Resulting from Movement of Freight by Truck and by Train.''

increased bronchitis in children. In addition to the direct effects of NO_X, the chemical transformation products of NO_X also contribute to adverse health and environmental impacts. These secondary impacts of NO_X include ground-level ozone, nitrate particulate matter, acid deposition, eutrophication (plant overgrowth) of coastal waters, and transformation of other pollutants into more dangerous chemical forms.

Ozone is a highly reactive chemical compound that can affect both biological tissues and man-made materials. Ozone exposure causes a range of human pulmonary and respiratory health effects. While ozone's effects on the pulmonary function of sensitive individuals or populations (*e.g.,* asthmatics) are of primary concern, evidence indicates that high ambient levels of ozone can cause respiratory symptoms in healthy adults and children as well. For example, exposure to ozone for several hours at moderate concentrations, especially during outdoor work and exercise, has been found to decrease lung function, increase airway inflammation, increase sensitivity to other irritants, and impair lung defenses against infections in otherwise healthy adults and children. Other symptoms include chest pain, coughing, and shortness of breath.

In recent years, significant efforts have been made on both a national and state level to reduce air quality problems associated with ground-level ozone, with a focus on its main precursors, oxides of nitrogen (NO_X) and volatile organic compounds (VOCs).[5] The precursors to ozone and ozone itself are transported long distances under some commonly occurring meteorological conditions. Specifically, concentrations of ozone and its precursors in a region and the transport of ozone and precursor pollutants into, out of, and within a region are very significant factors in the accumulation of ozone in any given area. Regional-scale transport may occur within a state or across one or more state boundaries. Local source NO_X and VOC controls are key parts of the overall attainment strategy for nonattainment areas. However, the ability of an area to achieve ozone attainment and thereby reduce ozone-related health and environmental effects is often heavily influenced by the ozone and precursor emission levels of upwind areas. Thus, for many of these areas, EPA believes that attainment of the ozone NAAQS will require control programs much broader than strictly locally focused controls to take into account the effect of emissions and ozone far beyond the boundaries of any individual nonattainment area.

EPA therefore believes that effective ozone control requires an integrated strategy that combines cost-effective reductions in emissions from both mobile and stationary sources. EPA's current initiatives, including the national locomotive emissions standards proposed in this action, are components of the Agency's integrated ozone reduction strategy.

In addition to ozone, airborne particulate matter (PM) has been a major air quality concern in many regions. Ozone and PM have both been linked to a range of serious respiratory health problems and a variety of adverse environmental effects. As was previously discussed, ozone causes harmful respiratory effects including chest pain, coughing, and shortness of breath. Similarly, PM exposure is associated with health effects including shortness of breath, aggravation of existing respiratory disease, cancer, and premature death.

Beyond their effects on human health, other negative environmental effects are also associated with ozone, NO_X, and PM. Ozone has been shown to injure plants and materials; NO_X contributes to the secondary formation of PM (nitrates), acid deposition, and the overgrowth of algae in coastal estuaries. PM can damage materials and impair visibility. These effects are extensively discussed in EPA's ''air quality criteria'' documents for NO_X, ozone, and PM.[6][7][8] EPA recently proposed revisions to the national ambient air quality standards (NAAQS) for ozone and PM.[9]

IV. Emissions from Present Locomotives

A. National Inventories

Contributions by locomotives to the national emissions inventories for volatile organic compounds (VOC), carbon monoxide (CO), oxides of nitrogen (NO_X) and particulate matter (as PM–10) are summarized in Table IV–1. The values shown in Table IV–1 are the total national inventories from all sources, from mobile sources, and from locomotives for 1990. The railroad inventories, expressed as the percentage contributions by commercial railroads to the total national inventories and to the transportation sources inventories, are shown in Table IV–2. The Agency recognizes that not all of the locomotives in service are owned and operated by commercial (including public) railroads. The locomotives not operated by the commercial railroads are generally used to transport equipment and materials within an industrial facility. However, in light of the small percentage of in-use locomotives that are not operated by commercial railroads, EPA believes that the emissions from these locomotives are an extremely small percentage of the total emissions from all locomotives in service. Thus, for the purposes of this discussion it is assumed that locomotive and railroad emission inventories are equivalent.

TABLE IV–1[1].—1990 NATIONAL EMISSION INVENTORIES: ALL SOURCES, MOBILE SOURCES, AND LOCOMOTIVES

[millions of metric tons]

Emission	Total from all sources	Mobile sources	Locomotives
NO_X	20.90	9.37	0.98
PM–10	39.31	0.66	.024
VOC	21.41	8.14	.038

[5] VOCs consist mostly of hydrocarbons (HC).

[6] Air Quality Criteria Document for Oxides of Nitrogen, EPA–600/8–91/049aF–cF, August 1993 (NTIS #: PB92–17–6361/REB,– 6379/REB, –6387/REB).

[7] Air Quality Criteria Document for Ozone and Related Photochemical Oxidants (External Review Draft), EPA/600/P–93/004aF–cF, 1996.

[8] Air Quality Criteria for Particulate Matter (External Review Draft), EPA–600/AP–95/001a–a, April 1995.

[9] 61 FR 65638 (PM) and 61 FR 65716 (ozone), December 13, 1996.

TABLE IV–1[1].—1990 NATIONAL EMISSION INVENTORIES: ALL SOURCES, MOBILE SOURCES, AND LOCOMOTIVES—Continued

[millions of metric tons]

Emission	Total from all sources	Mobile sources	Locomotives
CO	91.31	70.31	.11

[1] Data for all pollutants from all sources and mobile sources is taken from ''National Air Pollutant Emission Trends, 1900–1994'', U.S. Environmental Protection Agency, EPA–454/R–95–011, October 1995. Locomotive pollutant estimates are derived from emission factors (contained in Table IV–3), along with fuel consumption data and a bhp–hr/gallon conversion factor. The trends report, based on older locomotive emission factors, reports locomotive PM–10 at 0.04 million metric tons. The trends report mobile source inventories were not updated to reflect the revised railroad inventories, but nonetheless provide an idea of the magnitude of locomotive emissions. The trends report mobile source inventory for VOC does not specify the emissions contribution of locomotives.

TABLE IV–2.—LOCOMOTIVE CONTRIBUTIONS TO NATIONAL INVENTORY IN 1990 AS A PERCENTAGE OF ALL SOURCES AND OF MOBILE SOURCES

Emission	Percent of all sources contributed by locomotives	Percent of mobile sources contributed by locomotives
NO_X	4.67	10.4
PM–10	0.061	3.65
VOC	.18	0.47
CO	.12	0.16

B. Locomotive Emission Rates

EPA received information from EMD, GE and the Association of American Railroads (AAR) regarding emissions of HC, CO, NO_X and PM from locomotives. This information is summarized in the Regulatory Support Document (RSD) for this rulemaking. Based on this information, EPA calculated estimates of average emissions rates for line-haul and switch locomotives. Table IV–3 shows estimated nationwide average emissions for each category, expressed in grams per brake horsepower-hour (g/bhp–hr). It should be noted that, although line-haul locomotives appear to be much cleaner than switch locomotives, this is merely an artifact of the fact that g/bhp–hr emission rates are much higher at low power modes, and switch locomotives operate in low power modes a greater percentage of time than do line-haul locomotives. A description of the methodology used by EPA in determining these emission rates is included in the RSD in the docket. EPA requests comment on these estimated emissions rates. Commenters are encouraged to include additional emissions data where possible.

TABLE IV–3.—CURRENT ESTIMATED LINE-HAUL AND SWITCH LOCOMOTIVE EMISSIONS RATES (G/BHP–HR)

	HC	CO	NO_X	PM	Smoke (percent opacity)
Line-hau	0.5	1.5	13.5	0.34	Equivalent to HDDE [1]
Switch	1.1	2.4	19.8	0.41	Equivalent to HDDE.

[1] Heavy-duty diesel motor vehicle engine.

V. Description of the Proposal

This section contains a description of today's proposed emissions control program for new locomotives and locomotive engines. The subjects discussed are applicability, emission standards, test procedures, certification and testing requirements, enforcement, railroad requirements, preemption, and other miscellaneous topics. This section also includes a discussion of the various options EPA considered in developing the proposal. The Agency requests comments on these other options, as well as on the actual proposal. The interested reader is referred to the proposed regulatory text and the RSD for a more detailed discussion of many of these issues.

A. Applicability

Section 213(a)(5) of the Act specifies that EPA shall establish emission standards for ''new locomotives and new engines used in locomotives.'' Thus, the general applicability of this action is determined by the definition of ''new locomotive'' and ''new locomotive engine''. The Act, however, does not define ''new locomotive'' or ''new locomotive engine,'' which gives the Agency some discretion in defining the category of locomotives and locomotives engines that should be considered ''new''. EPA proposes to define ''new locomotive'' and ''new locomotive engine'' to mean a locomotive or locomotive engine the equitable or legal title to which has never been transferred to an ultimate purchaser; and a locomotive or locomotive engine that has been remanufactured, until it is placed back into service. Where the equitable or legal title to a locomotive or locomotive engine is not transferred before the engine or vehicle is placed into service, then the locomotive or locomotive engine will be new until it is placed into service. EPA also proposes to define imported locomotives and locomotive engines to be new unless they are covered by a certificate of conformity at the time of importation. Finally, EPA proposes to limit the applicability of the definition of new locomotive and new locomotive engine to locomotives and locomotive engines originally manufactured after 1972. As is described in the RSD, the applicability would be limited in this manner to eliminate the unwarranted

burden of bringing very old locomotives into compliance.

EPA is aware of a practice in the locomotive industry known as upgrading. During an upgrade, a locomotive remanufacturer will typically take an older engine model and remanufacture it in such a manner that it is in essentially all respects a more recent model, both in terms of its performance and the expected remaining service life following the upgrade. EPA is proposing a definition of remanufacture that includes this process of upgrading. EPA proposes that any pre-1973 locomotives which are upgraded to post-1972 specifications be required to meet the same emissions standards as locomotives originally manufactured after 1972. Also, for the purposes of the various compliance programs discussed later (certification, production line testing, in-use testing), upgraders will be treated as remanufacturers.[10] The Agency requests comment on its definition of upgrade, as contained in the proposed regulatory text, and whether it should be written to optionally (the remanufacturer's option) include any remanufactured pre-1973 locomotive that complies with the Tier 0 emission standards.

The proposed definition of ''new locomotive'' and ''new locomotive engine'' would be consistent with, but not identical to, the definition of ''new nonroad engine'' and ''new nonroad vehicle'' that EPA promulgated on July 20, 1994 (59 FR 36969), and revised on October 4, 1996 (61 FR 52102). The definition of ''new nonroad engine'' includes only ''freshly manufactured'' engines, while the proposed definition of ''new locomotive'' and ''new locomotive engine'' includes both freshly manufactured and remanufactured locomotives and engines. EPA believes it is appropriate to regulate remanufactured locomotive engines as new engines because of the nature of the remanufacturing process for such engines. Remanufacturing locomotives typically involves inspecting the relevant components and replacing most or all of them as necessary with components that are functionally equivalent to freshly manufactured components. The relevant components include those that control the delivery of fuel to the combustion process, those that control the condition and delivery of air to the combustion process, and those that are directly involved in the combustion process, (at a minimum, the fuel injectors, turbocharger, charge air cooler, pistons and piston rings, cylinders, valves, valve springs, camshaft, and cylinder head). This process is a more complete overhaul than the typical rebuilding of an on-highway diesel engine. Since a remanufactured locomotive engine is in all material ways like a freshly manufactured engine, both mechanically and in terms of how it is used, EPA proposes to define ''new locomotive engine'' to include remanufactured engines. As with freshly manufactured locomotives, such engines would be new until sold or placed into service.

This approach is further supported by the role remanufactured engines play in the locomotive industry. Locomotive engines are typically remanufactured periodically, as many as ten times during their total service lifetimes, and may be used in different locomotives following a remanufacture. Many smaller railroad operators do not purchase freshly manufactured locomotives, relying solely on the purchase of used locomotives from other railroad operators and the subsequent remanufacturing of these engines. Because of these remanufacturing practices, a locomotive engine will generally be used for many years, resulting in an extremely slow industry-wide fleet turnover rate. As a result, a narrow definition of new locomotive engines, limited to freshly manufactured engines, would effectively undercut the ability of the Agency to reduce emissions contribution from this segment of the nonroad inventory. EPA notes that the practices related to the use of remanufactured locomotive engines distinguishes this situation from other kinds of rebuilding, such as for other nonroad engines, and motor vehicle engines, or aircraft engines. Even aircraft engines do not typically remain in active service for 40 years moreover, there are fewer events that could be considered remanufacturing as described here for locomotives, because, among other things, the maintenance practices in the airline industry typically are more continuous than in the railroad industry. In addition, because the engines have fundamentally different designs (jet engine as compared to diesel engine), the overhaul of our aircraft engine is not comparable to the remanufacturing of a diesel locomotive. EPA is requesting comments on the inclusion of remanufactured locomotives in the definition of ''new'' for this rulemaking.

The Agency is proposing to define ''remanufacture'' of a locomotive engine as a process in which all of the power assemblies of an engine are replaced (with freshly manufactured (containing no previously used parts) or refurbished power assemblies) or inspected and qualified. Inspecting and qualifying previously used parts can be done in several ways, including such things as cleaning, measuring physical dimensions for proper size and tolerance, and running performance tests to assure that the parts are functioning properly and according to specifications. The refurbished power assemblies would include some combination of freshly manufactured parts, reconditioned parts from other previously used power assemblies, and reconditioned parts from the power assemblies that were replaced. In cases where all of the ower assemblies are not replaced at a single time, the engine would be considered to be ''remanufactured'' (and therefore ''new'') if all of the power assemblies from the previously new engine had been replaced within a five year period. EPA requests comment on this definition in general, and specifically whether it should include some different time limit for engines not remanufactured during a single event. Commenters are requested to address both the legal, economic, and environmental implications of considering an engine which does not have all of its power assemblies replaced in a single event to be ''new''.

EPA is proposing to include in its definition of ''remanufacture'' the conversion of a locomotive or locomotive engine to operate on a fuel other than the fuel it was originally designed and manufactured to operate on. Such conversions typically involve, at a minimum, the replacement or modification of the fuel delivery system, and often involve the replacement or modification of other emissions-critical components, as well as the recalibration of some engine operating parameters. For these reasons EPA is proposing to include alternative fuel conversions in its definition of remanufacture. Such conversions would thus be considered ''new'' and subject to today's proposed regulations.

EPA also requests comment on possible alternative definitions of these terms, including two suggested alternatives raised by the affected industries. Railroad operators and locomotive manufacturers have indicated to EPA that it should consider a definition of ''new'' that would include any locomotive or locomotive engine manufactured or remanufactured after the effective date of the 1990 amendments to the Clean Air Act

[10] Unless specified otherwise, all provisions discussed in this preamble applicable to remanufacturers shall also be considered to be applicable to upgraders.

(November 15, 1990). Under this alternative approach, EPA would define as ''new'' any locomotive or engine that is first manufactured after November 15, 1990, and any locomotive or engine, including those manufactured before November 15, 1990, that is remanufactured after that date. Since a locomotive would be new based solely on when it was manufactured or remanufactured, once it is new it would continue as new from then on. It would always be a new locomotive.

EPA also solicits comment on a second alternative definition of ''new'' for locomotives and locomotive engines, a variation of the first alternative. Locomotives and engines would be categorized as new from the time of first manufacture, or upon remanufacture, but only for the full extent of their useful life as defined by EPA regulations, and as long thereafter as they were shown to be in compliance with the applicable federal emissions standards and requirements.

EPA invites comment on these two alternatives, including the expected emissions impacts, the impacts on states, and whether the Agency would have the discretion under the Act to adopt such alternatives. On the last issue, EPA specifically invites comment on whether it has the authority and whether it would be appropriate to adopt a definition of new for locomotive and locomotive engine that differs so significantly from the definition of ''new'' adopted for all other nonroad vehicles and engines, and the Act's definition of new motor vehicle and new motor vehicle engine under section 216.

B. Emission Standards

As is described in the following sections, EPA is proposing three different sets of locomotive emissions standards, with the applicability of each dependent on the date a locomotive is first manufactured (i.e., 1973–1999, 2000–2004, or 2005 and later). Every locomotive covered by this proposal would be required to meet emission standards when operated over duty-cycles EPA believes are representative of average line-haul and switch operation. Also, any covered locomotive would be required to meet the standards over its full useful life, as defined by EPA regulations. The following sections discuss the proposed standards in detail, as well as presenting the other options EPA considered in their development.

B.1. Duty-Cycles

A duty-cycle describes a usage pattern for any class of equipment, using the percent of time at defined loads, speeds or other readily identifiable and measurable parameters. EPA's emission standards for mobile sources are typically numerical standards for emissions performance measured during a test procedure that embodies a specific duty-cycle for that kind of equipment. For example, the federal test procedure for passenger cars and light trucks is a procedure that specifies, second by second, the speed of the test vehicle, with simultaneous loading on the engine equivalent to loading which occurs on the road. Since the emissions of a particular type of equipment are dependent upon the way the equipment is operated, the duty-cycle used for emission testing directly affects the kind of design changes required to meet the standards. In this notice, the Agency is proposing a series of steady-state test modes, with the duty-cycles being used to weight the different test modes, resulting in an average emission rate for the duty-cycles. A brief overview of the duty-cycles EPA proposes to use for certification and compliance will be presented here, rather than in the test procedures section.

The Agency used a variety of available information to arrive at the proposed duty-cycles for locomotive testing, including several duty-cycles historically used by railroads and locomotive manufacturers to assess fuel and equipment usage. These duty-cycles were evaluated by EPA in light of actual in-use data on recent locomotive operations. Based on this analysis, EPA developed separate duty-cycles for line-haul, passenger and switch locomotives that account for the fundamentally different types of service these three categories of locomotives experience in use. These duty-cycles are presented in Table V–1. Since these duty-cycles merely represent the percent of time locomotives typically spend in each throttle notch and are not used during actual emissions testing, they are termed throttle notch weighting factors for the purposes of this proposal. A complete discussion of the historical cycles, in-use data, EPA's analysis of the relevant information, and development of these weighting factors is contained in the RSD.

TABLE V–1.—PROPOSED THROTTLE NOTCH WEIGHTING FACTORS FOR LOCOMOTIVES AND LOCOMOTIVE ENGINES

[Percent weighting per notch]

Throttle notch	Line-haul	Passenger	Switch
Idle	38.0	47.4	59.8
Dynamic Brake	12.5	6.2	0.0
1	6.5	7.0	12.4
2	6.5	5.1	12.3
3	5.2	5.7	5.8
4	4.4	4.7	3.6
5	3.8	4.0	3.6
6	3.9	2.9	1.5
7	3.0	1.4	0.2
8	16.2	15.6	0.8

B.2. Emission Standards

Tables V–2 through V–6 contain the emissions standards EPA is proposing to adopt for locomotives and locomotive engines. Standards are proposed for three categories of locomotives based on date of original manufacture (i.e., the Tier 0, Tier I and Tier II standards). The date of original manufacture is an appropriate factor to use in categorizing locomotives for emissions control purposes because it affects the emission reduction technologies that can either be retrofitted (for remanufacturing of existing locomotives) or are projected to be available in 2000 or 2005 for freshly manufactured locomotives.

EPA requests comments on the appropriateness of the levels of the standards, including the Tier II standards for NO_X and PM. The proposed Tier II standards would require more than a 60 percent reduction in NO_X and a 50 percent reduction on PM from uncontrolled levels. However, given the fact that locomotives contribute a substantial portion of the national NO_X inventory while their contribution to the PM inventory is much less substantial, EPA requests comment on whether it should set Tier II emissions standards that are more stringent for NO_X than the levels noted above and less stringent for PM. For example, EPA requests comment on Tier II standards which would achieve a 70 to 75 percent reduction in NO_X but smaller (*e.g.*, 30 percent, rather than the 50 percent reduction of the proposed Tier II PM standards) or even no reductions in PM compared to uncontrolled levels. EPA believes that, given the inherent tradeoff between NO_X and PM emissions control in diesel engines, such a tradeoff of NO_X and PM reductions in this option compared to the proposed Tier II standards may not change costs substantially compared to

the proposed Tier II standards, but may require a somewhat different technology mix. An analysis of the cost and technology implications of this option are contained in the public docket. EPA requests comment on all aspects of this option, including its technology and cost implications. EPA also requests comment on the cost and technology implications of requiring additional NO_X reductions, including the implications for control of PM. Finally, EPA requests comment on whether it should consider more stringent Tier II PM standards than those proposed, and what the implications of such standards might be for NO_X control, as well as their cost and technology implications.

Should the Agency consider tightening the particulate standards for Tier 0 and Tier I locomotives to ensure that particulate emissions do not exceed the current baseline level (0.34 g/bhp-hr for line-haul locomotives); and would more stringent particulate standards require relaxation of the NO_X standards? For example, EPA could set the particulate standard for Tier 0 locomotives at 0.40 g/bhp-hr to effectively prevent any Tier 0 locomotives from emitting above the current baseline; and set the particulate standard for Tier I locomotives at 0.3 g/bhp-hr to achieve a 25 percent reduction in emissions from the current baseline level. If the Agency were to adopt more stringent particulate standards for Tier 0 locomotives should they be phased-in to provide more leadtime to remanufacturers? The Agency requests comment on whether it should consider giving some form of credit for locomotives that are designed to shut down at idle, given that such locomotives would not be generating idle emissions in use, but would have idle emissions measured during emissions testing. Finally, the Agency requests comment on the stringency and form of the smoke standards.

Auxiliary engines used only to provide hotel power for the passenger cars of a train are currently subject to the applicable emissions standards previously adopted for nonroad compression ignition (CI) engines over 37 kW [11]. These standards, shown in Table V–6, will apply regardless of which of the duty-cycle options discussed is adopted.

In addition to proposing separate emissions standards for the three categories of locomotives based on date of original manufacture, the Agency considered three options for separate emissions standards for each of the three distinct types of locomotive operation described above (switch, passenger and line-haul). Of the three options considered, EPA is proposing the ''dual-cycle'' option, where all locomotives, regardless of their intended usage, would be required to meet both switch and line-haul duty-cycle standards. Details of this option, as well as the other two duty-cycle based options EPA considered (*i.e.*, the ''class-specific'' and the ''single-cycle'' options) are discussed in the following paragraphs.

The standards being proposed are designed to achieve very significant reductions in NO_X emissions from the beginning of the program, while significant reductions in the emissions of other pollutants would only be achieved under the Tier II standards, effective in 2005. This is because NO_X is the only pollutant for which locomotive emissions contribute more than one percent of the estimated national inventories (see Table IV–2). EPA believes that the Tier 0 and Tier I emission standards for NO_X might not be achievable if significant reductions in HC, CO, and PM were also required. Thus, the standards being proposed are intended to achieve the greatest environmental benefits as early as possible.

Class-Specific Option

Given the three distinct types of locomotive operation discussed above (*i.e.*, switch, passenger and line-haul), the first option the Agency considered was separate emission standards and duty-cycle weightings for each type (*i.e.*, the class specific option). Separate duty-cycle standards were intended to address the wide disparity in usage patterns for the different groups, and the effect of such use on emissions.

Although duty-cycles were developed for average locomotive operation, wide variations in actual operations do occur within the three basic types of operation (*i.e.*, switch, passenger and line-haul). To prevent substantial disparity between the in-use emissions rate and the emissions rate during the test cycle, EPA considered notch-by-notch emissions standards for all notches (*i.e.*, notch caps) for all pollutants. It should be noted that if a locomotive were operating at the levels of the notch caps for all notches, its duty-cycle-weighted emissions would be much higher than the duty-cycle standards. Thus, the proposed duty-cycle standards would prevent any locomotive from emitting at levels of the notch caps for all (or even most) notches. These notch-by-notch values were chosen to allow manufacturers and remanufacturers some degree of flexibility in meeting the duty-cycle standards, while at the same time insuring that differences in the utilization of locomotives which normally occur will not cause significant divergence from the duty-cycle emission standard. To provide additional flexibility to manufacturers and remanufacturers, EPA also considered a provision allowing a limited number of notch standards to be exceeded by a specified small amount provided there is compliance with the duty-cycle standards. The duty-cycle-weighted emissions standards and NO_X and PM notch caps considered under this option are shown in Tables V–2 through V–5 for line-haul, switch and passenger locomotives equipped with a single engine. Notch caps for HC and CO which are 25 percent above the applicable line-haul duty-cycle standards were also considered under this option.

Dual Cycle Option

The manufacturers indicated to EPA that it would be burdensome to comply with three sets of emission standards when essentially the same engine (differing only, for example, in the number of cylinders) could be used for all three types of locomotives (switch, passenger and line-haul). The manufacturers' concern is not based on testing burden since, as discussed in the test procedures section, the same test results on a notch-by-notch basis are simply weighted differently to determine compliance with the different standards. Rather, the issue is one of having to design three different versions of a single engine to meet three different sets of emission standards.

The Agency believes that the line-haul/switch dual cycle approach has some merit due to its ability to control idle emissions from switch locomotives as well as high notch emissions from line-haul and passenger locomotives. However, EPA is concerned that the lack of notch caps creates a situation where, with the use of electronic controls, the duty-cycle standards can be met during testing according to the proposed test procedure, but in-use emissions reductions are not fully realized. One way that this could happen would be if the average in-use duty-cycle changed to include greater percentages of time in notches which have disproportionately high emissions. Notch caps in individual modes would reduce this concern since it would require emissions control in all notches. A locomotive could also be designed such that the emissions during operation at notch eight (which are heavily weighted in the line-haul duty-

[11] 59 FR 31335, June 17, 1994, and 40 CFR part 89.

cycle) are low, while notch seven is calibrated for low fuel consumption (and possibly high emissions, due to the inherent tradeoffs between performance, fuel economy and emissions control) but at a power level near the notch eight power level. A locomotive operator could then use notch seven where notch eight would normally be employed, resulting in a savings in fuel consumed, and minimal impact in train schedules, at the expense of emissions performance. Notch caps on the higher power notches would be useful in preventing such situations. However, the manufacturers have indicated to EPA their concern that any notch caps would constrain their flexibility in meeting the emissions standards, especially at low power notches where emissions are more difficult to control than at the high power notches. EPA agrees that low power notch caps could be an unreasonable burden on manufacturers under this option, especially given the ability of the switch cycle to control those emissions. Thus, under this option, EPA is proposing notch caps only for notches four through eight. EPA requests comment on the need for notch caps under this option. The Agency recognizes that the compliance burden associated with such notch caps could be greater for remanufacturers of existing locomotives, and therefore requests comment on whether notch caps should be limited to Tier I and Tier II locomotives.

EPA believes that the dual cycle approach proposed in this notice provides the same emission reductions as the three duty-cycle approach previously discussed, but with a maximum of flexibility. Under the dual cycle approach, the line-haul duty-cycle standards will ensure control of emissions at high power notches, which account for the vast majority of in-service operations, while the switch duty-cycle standards will ensure control of emissions at the idle and low power notches characteristic of switch locomotive operations. Thus, the Agency is proposing to require all new locomotives and new engines used in locomotives to meet both the switch and line-haul duty-cycle standards. EPA is also proposing to require new locomotives equipped with hotel power to comply with both the switch and line-haul duty-cycle standards in both tractive power only and tractive plus hotel power mode in order to account for passenger locomotive emissions. EPA requests comment on whether it should require such locomotives to comply only with the line-haul duty-cycle standards when operating in tractive plus hotel power mode, rather than requiring compliance with both the switch and line-haul duty-cycle standards in this mode.

Single Cycle Option

The Agency considered a second approach suggested by the manufacturers under which a single duty-cycle would apply to all categories of locomotives, regardless of use. EPA is concerned about the ability of a single duty-cycle to effectively control emissions of all locomotives because of the emission effects of the differing uses. Switch locomotives tend to have very high percentages of idle time. Line-haul and passenger locomotives tend to spend less time at idle than switch locomotives, but more time in the high power notches. Using a single duty-cycle for all three classes would likely result in higher emissions in cases where the locomotive's operation does not resemble the duty cycle throttle notch weightings used for emissions testing. For this reason, the single cycle approach would not achieve emissions reductions equivalent to the proposed approach unless accompanied by very stringent individual notch caps, with no provisions for some small exceedance of the notch caps. EPA requests comment on the appropriateness of such a single duty-cycle and set of standards that would be based on the line-haul duty-cycle, but with stringent caps on idle and low power notch emissions in order to assure that switch locomotives certified to these standards achieve the same levels of emission reductions as switch locomotives certified to the switch locomotive standards described earlier.

EPA also requests comment on the proposed dual-cycle approach to applying the proposed standards, as well as the alternative options described in this notice, and other duty-cycle standard approaches. The Agency believes that all three options described could provide similar emission reductions. EPA requests comment on whether more than one option should be adopted, with the manufacturer given a choice of which option to comply with. In such a scenario, should a manufacturer be allowed to certify some engine families to the single or dual cycle and others to the class-specific cycle, or should a manufacturer be required to certify all of its production in compliance with only one of the options? The Agency also requests comment on how passenger locomotive hotel power should be handled under any of these approaches.

High Baseline Locomotives

EPA believes the proposed standards to be appropriate under section 213 of the Act. The proposed standards would achieve the greatest degree of reduction in emissions achievable through the use of technology that will be available, in light of cost, leadtime and other factors. However, in the course of this proposal's development the locomotive manufacturers expressed some concern about the ability of all 1973–1999 locomotives to meet the Tier 0 standards. This concern relates to some engine families produced during this period which, due to their design, have higher emissions than other locomotives produced during the same period, and for which the cost-effective technologies which are projected to be used to comply with the Tier 0 standards will not reduce emissions from these locomotives to the levels of the proposed Tier 0 standards. Additionally, the manufacturers believe that it would be difficult to certify these engines under the proposed averaging banking and trading program (ABT, discussed later in this notice), due to concerns about the availability of credits. They are concerned that independent remanufacturers would certify systems for those Tier 0 locomotive engine families that are easy to bring into compliance without putting in the extra effort that would allow them to generate emissions credits from those engine families. These remanufacturers may not develop emission control systems for those engine families that are more difficult to bring into compliance. This would leave the manufacturers to develop them, without the benefit of being able to use credits that could be generated from the engine families that are easy to bring into compliance. Thus, assuring that all Tier 0 engine families are certified under the ABT program would require much cooperation and coordination among railroads and the various entities certifying remanufactured locomotives.

Because of the reasons just discussed, the Agency is proposing, and requesting comment on, a provision by which manufacturers and remanufacturers can petition EPA to allow certification of Tier 0 locomotives based on a demonstration of a 33 percent NO_X reduction from pre-control levels for that specific engine family, rather than meeting the proposed Tier 0 NO_X standards. Under this option the Tier 0 standards for all pollutants other than NO_X would still apply. A 33 percent reduction for NO_X was chosen because this is the approximate average reduction the Tier 0 NO_X standards

would achieve from fleet average baseline levels (when factoring in the expected NO_X compliance margin of 5 percent). Such a petition would be granted based on the certifier's demonstration of infeasibility or excessive cost, as determined by the Administrator. The numerical NO_X emissions standard applicable to a given engine family certified under this option would be established by emissions testing five well-maintained locomotives in the engine family. The average of the results of these five tests would then be used as the baseline emissions level and the applicable NO_X standard would be set at a level 33 percent below baseline. Once the applicable NO_X standard is determined through this procedure, the certification process would be the same as for other Tier 0 locomotives, as discussed later in this notice. The Agency requests comment on the appropriateness of and need for this option, and whether Tier 0 locomotives and locomotive engines should be excluded from the ABT program if this certification option is adopted. EPA specifically requests comment on the need for this option in the event that the railroad-based Tier 0 certification provisions discussed in the engine family certification section of this notice are finalized. EPA believes that a railroad-based certification program would eliminate or reduce the concerns expressed about the ability of the ABT program to allow these locomotives to be certified because a railroad would have control over the locomotives it operated and could better plan for their remanufacture in a given year whereas a remanufacturer would have to estimate the engine family mix that it would remanufacture in a given year in order to plan its ABT strategy for that year. EPA requests comment on other alternative plans for addressing the issue of Tier 0 locomotives which have trouble meeting the Tier 0 standards (either for reasons of excessive cost or infeasibility), including such options as allowing Tier 0 locomotives under 2000 hp to certify to the switch duty-cycle standards (and applicable caps) only, and not requiring such locomotives to comply with the line-haul duty-cycle standards.

Other Nonroad Engines

A second issue raised by the manufacturers is the replacement of an existing tractive power locomotive engine (i.e., repowering) with an engine generally used in equipment other than locomotives. Such engines are subject to EPA's standards for nonroad engines over 37 kW, and only a small percentage of the total production of such engines would be used in locomotives. The smallest of these engines (under 1000 hp) are likely to be used in locomotives which are in captive use moving materials and equipment within industrial sites, rather than being used by railroads. Thus, their use is more likely to resemble that of industrial equipment than locomotives. Therefore, EPA is proposing that such vehicles not be defined as locomotives, and therefore would not be subject to today's proposed regulations. Engines in such vehicles must be certified as meeting the over 37 kW regulations.

Slightly larger engines (between 1000 and 2000 hp) used for repowering are more typically sold for use in locomotives for railroad switching operations. EPA is concerned that it might be overly burdensome to require such engines to be certified to two different sets of federal standards (i.e., the over 37 kW nonroad engine standards and the locomotive standards), especially given the small number used in locomotives. Further, the over 37 kW nonroad engine regulations provide emission reductions that are roughly comparable to the proposed Tier I standards for locomotives. Thus, the Agency is proposing to allow manufacturers to sell a limited number of these nonroad engines a year for use in locomotives without specifically certifying to the locomotive standards. Such engines must be certified as meeting the over 37 kW regulations.

In determining what an appropriate number of engines the Agency should allow to be sold for use in locomotives under this provision the Agency considered an exemption that is included in the aircraft regulations.[12] Aircraft, like locomotives, have an extremely low annual sales volume compared to other mobile source categories. In the aircraft regulations an exemption from the emissions standards is provided for engine families of 20 or fewer annual sales, in a market with total annual sales of approximately 1400. Using a similar ratio, the Agency considered a range for this locomotive provision from 10 per year (when compared to annual sales of freshly manufactured locomotives) to 40 per year (when compared to annual remanufactures). The Agency is thus proposing the midpoint of this range, or 25 a year, to be the number of engines (between 1000 and 2000 hp) certified to the over 37 kW regulations that can be sold for use in locomotives.

While EPA believes that the over 37 kW regulations provide similar environmental benefits as do the proposed Tier I locomotive regulations, based on the percent emissions reductions from uncontrolled baselines, the Agency is nonetheless concerned about the differences between the test procedures proposed for locomotives and those that currently apply to other nonroad engines (resulting from different duty-cycles) and the potential environmental impacts of those differences. Since the over 37 kW regulations do not apply to engines in the 1000 to 2000 hp range until 2000, EPA currently has no way of evaluating those impacts because there are no engines meeting the over 37 kW regulations which can be used to compare the results over the two test procedures. Thus, as a condition of being allowed to sell such engines for use in locomotives, the Agency would retain the authority to require that testing done for certification to the over 37 kW standards also include testing done at the locomotive power notch points. EPA will use this data to determine the validity of this provision (i.e., allowing engines certified to the over 37 kW standards to be used in locomotives) from an environmental perspective, and may choose through future rulemaking action to eliminate, limit or expand the availability of this provision on the basis of the data.

The Agency believes that the provisions for allowing some engines certified to the over 37 kW standards to be used in locomotives, as just described, are reasonable for several reasons. First, such engines are expected to have emissions levels similar to Tier I locomotive engines, but would most likely replace older locomotive engines which would otherwise remain uncontrolled (i.e., those in pre-1973 locomotives) or be remanufactured to the Tier 0 standards (i.e., 1973–1999 locomotives). Thus, an emissions benefit is expected from these engines relative to the engines they replace. Second, this provision is limited to engines under 2000 hp which, due to their lower power, tend to have lower mass emissions than higher powered line-haul locomotives (which make up the vast majority of both locomotives in service and locomotive emissions). Finally, these engines are not expected to have useful lives as long as other locomotive engines, nor are they expected to be remanufactured as many times throughout their service lives. These last two points would serve to minimize any unanticipated adverse effects of this provision.

The Agency requests comment on several aspects of this proposed provision for repowering. Should the

[12] See 40 CFR 87.7(b)(1).

Agency require, rather than just have the option of requiring, that these engines be tested at locomotive power notches, in addition to the testing required for the over 37 kW nonroad engine certification for all engines covered by these provisions? How should such engines be treated with respect to preemption? Should this allowance be limited to engines of less than 2000 hp, as proposed, or should there be separate restrictions for higher horsepower, or no restrictions at all on horsepower? Is 25 an appropriate number of engines to allow under this provision, or would a higher or lower number be more appropriate? Commenters on the proposed horsepower and sales restrictions are requested to provide economic and environmental data in support of their comments. Should this option be eliminated when the Tier II standards take effect, given that the current over 37 kW standards are not as stringent as the Tier II standards for locomotives? Commenters on this last point are requested to take into account the fact that EPA is currently in the process of developing a phase II regulation for nonroad engines over 37 kW. The Agency requests comment on whether it should consider a separate provision for engines used in repowers which are not certified according to the over 37 kW regulations which would allow manufacturers to pre-select from production those engines which will be used for in-use testing. Such a provision would make it easier for those engine manufacturers to keep track of their engines for the in-use test program. Finally, EPA developed this repower provision based on the current state of the locomotive market, where manufacturers of engines that are used in locomotives do not sell them to locomotive manufacturers to be used in locomotives with freshly manufactured chassis. EPA requests comment on whether it should extend this provision, or a similar one, to engine manufacturers for engines to be used in locomotives with freshly manufactured chassis.

As discussed later in the engine family certification section, EPA is proposing that certificates of conformity be issued for locomotives, not locomotive engines. However, EPA is proposing that engines used for repowering of existing locomotives that are not eligible to use the provisions just discussed, because they exceed either the sales or horsepower limits, be certified as locomotive engines, not locomotives. This is because such engines go into existing locomotives, which the engine manufacturer cannot control (in terms of their operating parameters such as percent of engine power in notches, engine cooling hardware, etc.). However, due to the logistical problems associated with pulling a locomotive engine from a locomotive to test it during in-use testing (discussed later), EPA is proposing that in-use testing for these engines be done on locomotives. The engine manufacturer could choose, in the event of a failure of locomotives containing its engines during the in-use testing program, to either accept the results of the locomotive tests, or to test the actual engines.

TABLE V–2.—TIER 0 EXHAUST EMISSION STANDARDS—LOCOMOTIVES AND LOCOMOTIVE ENGINES MANUFACTURED FROM 1973 THROUGH 1999

Duty-cycle or notch	Gaseous and particulate emissions (g/bhp-hr)				
	THC[1]	NMHC[2]	CO	NO_X	PM
Line-haul and passenger duty-cycle	1.0	1.0	5.0	9.5	0.60
Switch duty-cycle	2.1	2.1	8.0	14.0	0.72
Low and normal idle	.....	.....	.....	140.0	13.7
Hotel idle and notch 1	.....	.....	.....	20.5	1.7
Notches 2 and 3	.....	.....	.....	12.0	1.1
Notches 4 through 8	.....	.....	.....	11.9	0.75
Dynamic brake	.....	.....	.....	57.0	13.7

[1] Applicable to any fuel except natural gas (or any combination of fuels where natural gas is the primary fuel).
[2] Only applicable to natural gas, or any combination of fuels where natural gas is the primary fuel.

TABLE V–3.—TIER I EXHAUST EMISSION STANDARDS LOCOMOTIVES AND LOCOMOTIVE ENGINES MANUFACTURED 2000 AND LATER

Duty-cycle or notch	Gaseous and particulate emissions (g/bhp-hr)						
	THC[1]	NMHC[2]	THCE[3]	Aldhyd[3]	CO	NO_X	PM
Line-haul and Passenger Duty-cycle	0.55	0.55	0.55	0.035	2.2	7.4	0.45
Switch duty-cycle	1.2	1.2	1.2	0.076	2.5	11.0	0.54
Low and normal idle	.....	.....	.....	.....	.....	50.0	6.8
Hotel idle and notch 1	.....	.....	.....	.....	.....	10.8	0.75
Notches 2 and 3	.....	.....	.....	.....	.....	9.7	0.5
Notches 4 through 8	.....	.....	.....	.....	.....	9.3	0.57
Dynamic brake	.....	.....	.....	.....	.....	31.4	6.8

[1] Applicable to diesel, bio-diesel, or any combination of fuels with diesel as the primary fuel.
[2] Only applicable to natural gas, or any combination of fuels where natural gas is the primary fuel.
[3] Applicable to alcohol(s), or any combination of fuels where alcohol is the primary fuel.

TABLE V–4.—TIER II EXHAUST EMISSION STANDARDS LOCOMOTIVES AND LOCOMOTIVE ENGINES MANUFACTURED 2005 AND LATER

Duty-cycle or notch	Gaseous and particulate emissions (g/bhp-hr)						
	THC [1]	NMHC [2]	THCE [3]	Aldhyd [3]	CO	NO_X	PM
Line-haul and passenger duty-cycle	0.3	0.3	0.3	0.018	1.5	5.5	0.20
Switch duty-cycle	0.6	0.6	0.6	0.036	2.4	8.1	0.24
Low and normal idle	——	——	——	——	——	20.0	0.35
Hotel idle	——	——	——	——	——	10.8	0.25
Notches 1 through 8	——	——	——	——	——	6.9	0.25
Dynamic brake	——	——	——	——	——	15.0	0.35

[1] Applicable to diesel, bio-diesel, or any combination fuels where diesel is the primary fuel.
[2] Only applicable to natural gas, or any combination of fuels where natural gas is the primary fuel.
[3] Applicable to alcohol(s), or any combination of fuels where alcohol is the primary fuel.

TABLE V–5.—SMOKE (PERCENT OPACITY) STANDARDS [1]

Number of stacks	Exhaust diameter	Examined plume section	Steady-state	30-sec peak	3-sec peak
Single exhaust stack	12″ or less	Total	20	35	50
	More than 12″	Each 6″ Segment, or	10	15	20
		Total [2]	30	40	55
	12″ or less	Any one	20	35	50
		Sum of stacks	30	40	55
		Each 6″ segment, or	10	15	20
Multiple exhaust stacks	More than 12″	Total for any one	30	40	55
		Sum of stacks	40	50	60

[1] Measurement performed continuously during testing.
[2] Sum of each 6″ segment or the total, whichever is lower.

TABLE V–6.—EXHAUST EMISSION STANDARDS FOR NONROAD ENGINES ABOVE 37 kW[1]

Gaseous and particulate emissions (g/bhp-hr)				Smoke (Percent opacity)		
HC	CO	NO_X	PM	Accel	Lug	Peak
0.97	8.5	6.86	0.4	20	15	50

[1] 59 FR 31335, June 17, 1994, and 40 CFR 89.112–96 and 89.113–96.

Alternate Standards

EPA is proposing an alternate set of CO and particulate standards that are intended primarily to address locomotives which operate on alternative fuels such as natural gas. Such locomotives are expected to have higher (and more difficult to control) CO emissions than diesel-fueled locomotives, but lower PM emissions. These differences are due to the different molecular structure of alternative fuels compared to diesel fuel which result in the need to operate under different conditions (*e.g.*, different air/fuel ratios, spark ignition vs. compression ignition). The proposed alternate standards would allow higher CO emissions, but would also require lower particulate emissions. Although these alternate standards are primarily intended to address issues associated with alternative fuels, EPA is proposing that they be available for application to any locomotive. The Agency believes this is appropriate since the primary focus of today's proposal is NO_X and PM reductions, and the alternate standards would result in further PM reductions than the standards contained in Tables V–2 through V–4, with the same NO_X reductions. Manufacturers and remanufacturers could choose to comply with these alternate standards, shown in Table V–7, instead of the CO and particulate standards listed in Tables V–2 through V–4. They would not be allowed to mix the alternate CO standards with the primary particulate standards for a single engine family. Also, the particulate notch caps would apply in the same manner as under the primary option.

TABLE V–7.—ALTERNATE CO AND PM STANDARDS (G/BHP-HR)

	Line-haul cycle		Switch Cycle	
	CO	PM	CO	PM
Tier 0	10.0	0.30	12.0	0.36
Tier I	10.0	0.22	12.0	0.27
Tier II	5.0	0.10	6.0	0.12

B.3. Leadtime

The Agency is proposing an effective date of January 1, 2000 for the Tier 0 emission standards for existing locomotives (*i.e.*, locomotives manufactured from 1973 through 1999) upon remanufacture, and for the Tier I standards for freshly manufactured locomotives. The Tier II standards for freshly manufactured locomotives are proposed to take effect January 1, 2005. See Tables V–2 through V–4. EPA believes that these implementation dates allow sufficient leadtime for the development and application of the needed emission control technology. In the case of the Tier 0 and Tier I standards, discussions with the locomotive manufacturers have led the Agency to believe that the technology required is well understood as it is essentially technology currently used (or being developed for application in the 1998 model year) for on-highway diesel engines, and that the application of this technology is feasible in the timeframe proposed. EPA does not believe that it is feasible to begin the applicability of the Tier 0 and Tier I standards sooner than 2000 since this rulemaking is not expected to be completed until late 1997. While the technology required to meet these standards is currently well understood, EPA believes that the manufacturers will need two years leadtime to develop and finalize production plans for model year 2000 production. The 2005 implementation date proposed for the Tier II standards allows several additional years for the development and application of the technology needed in addition to that used to comply with the Tier I standards. The Agency believes that seven years total leadtime is appropriate for the Tier II standards since the locomotive industry is currently unregulated, and EPA believes that the industry needs some experience under the less stringent Tier 0 and Tier I standards before assuming liability for emissions performance under the more stringent Tier II standards. Finally, industry has known for some time the approximate levels that the Agency is proposing, and has already begun working toward compliance. The levels of the standards the Agency is proposing have been discussed in numerous meetings with the manufacturers, and were included in the development of a federal implementation plan (FIP) for ozone nonattainment areas in California.[13]

The Agency requests comment on whether the leadtime proposed is appropriate to allow compliance with the standards. Any comments suggesting that either more or less leadtime is required should include technical justification of the need as well as an estimate of the appropriate leadtime. Also, the Agency requests that comments favoring more leadtime address the impacts that a delay of the proposed implementation schedule would have on the ability of severe and extreme ozone nonattainment areas to attain the national ambient air quality standard for ozone by the applicable date (2005 or 2007 for severe areas, and 2010 for the South Coast nonattainment area in California, currently the only extreme ozone nonattainment area), and on the ability of attainment areas to maintain that status. Finally, EPA requests that comments favoring more leadtime address the possibility of other approaches to resolving the issue, such as a phase-in of the Tier 0 and/or Tier I standards, or less stringent standards for Tier I.

B.4. Useful Life

EPA proposes that a locomotive or locomotive engine covered by today's standards be required to comply with the standards throughout its useful life. The useful life would be defined using the typical period that a locomotive engine is expected to be properly functioning. A locomotive engine's emissions-critical components should be built to be at least as durable as the rest of the engine. That is to say, for the time period that the engine is expected to be functioning properly, with respect to reliability and power output, it must comply with the proposed emission standards. This time period is one that EPA sets based on general practice, not an engine by engine time period that ends if the locomotive engine is poorly manufactured and stops functioning properly earlier than expected. It should be noted that greatest practical significance of the useful life period is that it defines where in-use compliance testing will be conducted (*i.e.*, in-use testing is conducted at 75 percent of useful life), as is discussed later in this notice.

Given the above description, the Agency has decided to base its numerical definition of a locomotive engine family's useful life on the average period between remanufactures (or from remanufacture to scrappage) for that family. EPA believes that this period is most closely linked to the period during which a locomotive is designed to be properly functioning. However, because the average period between remanufactures varies from railroad to railroad for any given locomotive model, EPA has decided to propose minimum (or default) useful life numbers for each Tier of standards. EPA believes that the best indicator of the interval between remanufactures is work done (expressed as MW-hr), which is dependent on the horsepower (hp) of a locomotive. Thus, the proposed definition of useful life is based on MW-hr. However, mileage between remanufactures is also meaningful, and many existing locomotives are not equipped with MW-hr meters. Therefore, the proposed definition for minimum locomotive useful life for Tier 0 locomotives is expressed both as miles and MW-hr, with the MW-hr levels being a function of the rated power of a locomotive. Tier 0 locomotive useful life is proposed to be defined as mileage for locomotives not equipped with a MW-hr meter, and mileage or MW-hr, whichever occurs first, for Tier 0 locomotives equipped with MW-hr meters. The proposed values are shown in Table V–8. The Agency is not proposing that mileage values be included in the minimum useful life definitions for Tier I and Tier II locomotives, but is presenting them for comment in Table V–8. Similarly, EPA is not proposing that the number of years be included in the minimum useful life definitions, but has included year values in Table V–8 for comment. If EPA were to adopt more than one criteria for useful life in its definition (e.g., miles and MW-hr), the end of a locomotive's useful life would occur at the point when the first of those multiple criteria is met (e.g., useful life is defined as miles or MW-hr, whichever occurs first).

The Agency expects that locomotive manufacturers will continue work on developing locomotives which will operate longer between remanufactures than current locomotives. For this reason, EPA is proposing that locomotive and locomotive engine manufacturers be required to specify a longer useful life than the minimum if a longer period between remanufactures is intended for the locomotive than the minimum useful life interval. EPA would determine if a longer useful life is needed based on information such as a manufacturer's recommended time to remanufacture, or on in-use data showing that a locomotive engine family is consistently operating properly well past its useful life period. The Agency will also allow manufacturers to petition for shorter useful lives in unusual circumstances where an

[13] The California FIP, signed by the Administrator 2/14/95, is located in EPA Air Docket A–94–09, item number V-A–1. The FIP was vacated by an act of Congress before it became effective.

individual engine family does not achieve the minimum useful life in-use.

The remanufacture data provided by the railroad industry showed that average remanufacture intervals for different models of locomotives operated by different railroads varied from about 300,000 to 1,400,000 miles, or about 9,300 to 35,000 MW-hr. This variation made the task of establishing a minimum useful life period very difficult, especially for Tier 0 locomotives. The proposed minimum values fall in middle of these ranges, which means that some current locomotives are being remanufactured long before they reach the proposed minimum useful life values. However, EPA believes that the proposed values are appropriate for several reasons. First, future locomotives are expected to last longer between remanufactures than the existing fleet. The Tier 0 minimum useful life values will not only apply to locomotives remanufactured in 2000, but also to locomotives remanufactured well into the next century. Second, the proposed regulations include flexibility to allow manufacturers to request a shorter useful life for any engine family that is typically remanufactured before reaching the minimum useful life. Finally, EPA believes that there is a significant environmental risk associated with a useful life that is too short. It is possible that significant noncompliance could occur if most locomotives continue to operate significantly beyond the point at which they are tested for compliance in-use. A long useful life ensures that the period of operation after testing will be minimized.

The Agency requests comment on all aspects of the proposed useful life definition. Specifically, comment is requested on whether MW-hrs and miles are the most appropriate measure of a locomotive's useful life, or whether other measures (e.g., fuel usage, years) should be considered and, if so, how they should be measured. The Agency is also considering a separate useful life definition of 12 years for Tier 0 locomotives dedicated to switching operation. This is because it is often difficult to quantify mileage accumulation for switch locomotives. EPA requests comment on this possible approach to Tier 0 switch locomotive useful life definition, and whether periods higher or lower than 12 years would be more appropriate. The Agency also requests comment on whether it should consider allowing different useful lives within a given engine family for locomotives which will be used in substantially different applications than other locomotives in the same engine family. Finally, the Agency recognizes that the useful life definition just presented is based on a limited amount of remanufacture data, and encourages the inclusion of additional remanufacture data with comments. The Agency will fully consider any new data on the average period between remanufactures.

TABLE V–8.—MINIMUM USEFUL LIFE VALUES

	Miles	Years	Megawatt-hours	Megawatt-hours for 4000 HP Locomotive
Tier 0	750,000	10	7.5 X hp	30,000
Tier I	800,000	10	8.0 X hp	32,000
Tier II	900,000	10	9.0 X hp	36,000

B.5. Averaging, Banking and Trading

Consistent with the Act's requirement that EPA set emissions standards for new locomotives and new locomotive engines which achieve the greatest degree of emissions reductions achievable while considering cost and other factors, EPA is proposing a certification averaging, banking and trading (ABT) program for manufacturers and remanufacturers of locomotives and locomotive engines. Such a program would allow the manufacturers and remanufacturers the flexibility to meet overall emissions goals at the lowest cost, while allowing EPA to set emissions standards at levels more stringent than they would be if each and every engine family had to comply with the same numerical standards. This program would allow certification of one or more engine families within a given manufacturer's or remanufacturer's product line at levels above the emission standard, provided the increased emissions are offset by one or more families certified below the emission standard, such that the average of all considered emissions for a particular manufacturer's product line (weighted by horsepower, production volume and useful life) is at or below the level of the emission standard. Within the engine family, each engine must comply with the standard set for that family (the family emission limit, or FEL). The proposed banking program would also allow manufacturers and remanufacturers to generate emission ''credits'' and bank them for future use in averaging or trading. This proposed ABT program is modeled after similar programs already in place for on-highway and nonroad engines. While the practical effect of the proposed ABT program is that a manufacturer's or remanufacturer's production must, on average, meet the applicable emissions standards, compliance with the program is calculated on a total mass basis. This is to account for differences in the horsepower and useful life of different engine families (i.e., the credits for an engine family are weighted according to horsepower, production volume and useful life).

When a manufacturer or a remanufacturer uses ABT, it would be required to certify each participating engine family to a family emission limit (FEL) which is determined by the manufacturer or remanufacturer during certification testing. A discussion of the proposed engine family definition is contained in the section on compliance issues. A separate FEL would be determined for each pollutant which the manufacturer or remanufacturer is including in the ABT program. EPA is proposing an FEL ceiling of 1.25 times the applicable standard, so that no engine family could be certified at an emissions level higher than 1.25 times the applicable standard.

As was previously discussed, the Agency is proposing to require that all locomotives meet both the line-haul and switch duty-cycle standards, so that more than one standard (and accompanying duty cycle) applies to a single pollutant. This presents a unique situation for the proposed locomotive ABT program in comparison to other mobile source ABT programs where the participating vehicles or engines only have to meet one standard for a particular pollutant. The Agency is proposing separate switch and line-haul ABT programs in order to address the

issues that multiple standards for the same pollutant raise. Each engine family would be allowed to participate in both the switch and line-haul ABT programs. However, line-haul credits could not be used to meet the switch standards, and vice versa.

EPA is proposing that ABT credits be weighted according to a locomotive's useful life, if specified as work, or a combination of horsepower (hp) and useful life if the useful life is defined as miles. This is consistent with the Agency's ABT program for on-highway heavy-duty engines. EPA is considering restricting the exchange of credits between locomotives above 2000 hp and below 2000 hp to prevent credits generated by higher powered engine families from being used to allow lower powered switch locomotive engine families to remain essentially uncontrolled. Reducing emissions from switch locomotives is a significant concern given that switch locomotives are more likely to operate exclusively in urban areas, and EPA is concerned that allowing free exchange of credits between high and low powered locomotive engine families would not achieve such reductions. The Agency requests comment on whether it should prohibit or restrict credit exchange between locomotives above and below 2000 hp.

Consistent with the ABT program for on-highway heavy-duty engines, the locomotive ABT program is proposed to be limited to NO_X and PM emissions only. EPA does not believe that the proposed CO, HC and smoke standards are so stringent that they should be included in the ABT program. Also, The ABT program is proposed to be applicable to the duty-cycle emissions only. EPA believes that extending the ABT program to include the individual notch caps would result in a program that is too complex to be practical. Individual notch caps would be adjusted for locomotives which participate in the ABT program by prorating them on the basis of the ratio of the standard and the FEL. Averaging, banking and trading of credits would be limited to locomotive engines subject to the same set of standards (i.e., Tier 0, Tier I, Tier II). For example, credits generated on a Tier I locomotive could not be used towards a Tier II locomotive's compliance. The Agency requests comment on whether it should allow some degree of credit use across different sets of standards and, if so, for how long, and what effect if any this should have on the level of the standards. For example, should EPA allow Tier I credits to be used toward the first year (or more) of Tier II compliance?

EPA is also proposing to exclude from the ABT program Tier 0 locomotives certified pursuant to the 33 percent NO_X reduction option discussed in the above section on emission standards. As was discussed previously, the 33 percent NO_X reduction option is being proposed due to the potential difficulties of certifying certain Tier 0 engine families under the proposed ABT program. Additionally, the Agency is proposing that a remanufacturer who certifies a Tier 0 engine family under this option not be allowed to include any of its other Tier 0 engine families in the averaging, banking and trading program, and requests comment on this proposed prohibition.

As was previously discussed, the Agency is proposing that engine families which contain passenger locomotives equipped with a single engine for both traction power and hotel power be required to meet both the line-haul and switch duty-cycle standards both when providing traction power only, and when providing both traction power and hotel power. For the purposes of ABT, EPA is proposing that a single FEL for each pollutant be declared for such engine families based on the mode of operation of the higher emission rate. These FELs would cover the locomotive in both power modes.

The ABT program raises a unique issue for remanufactures of locomotives and locomotive engines. A manufacturer of freshly manufactured locomotives can plan its year's production in advance with the ABT program in mind. However, a remanufacturer is much less able to plan for the complexities of the program due to the greater number of engine families, the fact that more than one entity could remanufacture a given engine family, the larger number of customers for remanufacture kits than for freshly manufactured locomotives, the inability to predict how many engines will be remanufactured in a given year, and other factors. To account for this situation, EPA is proposing that a locomotive or locomotive engine subject to the Tier I or Tier II standards, when remanufactured, must meet the standards and/or FELs it was certified as meeting when it was originally manufactured (or, in the case of Tier 0 locomotives and locomotive engines, when it was first remanufactured following the effective date of these proposed standards). The Agency is requesting comment on several aspects of this provision. First, should EPA allow a remanufacturer to generate credits by certifying a remanufacture at a level below the locomotive's original FELs? Second, should the Agency consider simply ignoring the locomotive's original FELs, and institute an averaging, banking and trading program for remanufactured locomotives and locomotive engines under which credits would be generated on the basis of reductions beyond the remanufacture standards (as applicable), rather than on the basis of reductions beyond any FELs the locomotive or locomotive engine was previously certified as meeting? Finally, should the Agency place any restrictions on the exchange of credits between remanufactured and freshly manufactured locomotives?

As was previously mentioned, EPA is proposing to weight ABT credits according to useful life, and power (if useful life is expressed in miles). This raises a unique situation for the treatment of Tier 0 locomotives, whose useful lives can be expressed as either MW-hr (if equipped with a MW-hr meter) or miles (if not equipped with a MW-hr meter). These two definitions of useful life for Tier 0 locomotives result in a situation where credits based on one definition are not interchangeable with credits based on the other definition, and there is no reliable way to correlate between the two (*i.e.*, there is no standard relationship that would allow accurate conversion from one form to the other). The Agency is proposing that separate averaging sets be established for Tier 0 locomotives, one for those whose useful life is defined in MW-hr and one for those whose useful life is defined in miles, in order to deal with incompatible credit calculations. Credit use would be restricted to within each of the two sets. The Agency requests comment on this approach, as well as two other options it considered. The first alternative has a parallel in other mobile source ABT programs such as those for on-highway heavy-duty engines and nonroad compression ignition engines over 37 kW. In those programs, when a participating engine family has engines of more than one power (hp) rating, the manufacturer is required to generate credits based on the lowest hp rating in an engine family, but can only use credits based on the highest hp rating in an engine family. Using a similar approach for locomotives, an estimated range of conversion factors to equate MW-hr and mileage would be established. When generating or using credits, the endpoints of the range would be used in a conservative fashion to minimize credit generation and maximize credit usage. The second alternative EPA considered was simply

to require that all Tier 0 locomotives be equipped with MW-hr meters, thus resulting in a single useful life definition (MW-hrs) for Tier 0 locomotives, and a single category of credits for Tier 0 locomotives.

The leadtime the Agency is proposing for compliance with today's emissions standards is intended to allow all engine families to be able to comply. EPA recognizes that some engine families may be able to comply prior to the effective date of the proposed standards. However, EPA expects that these proposed regulations will be finalized in December of 1997, by which time the manufacturers are expected to have finalized their 1998 and 1999 production plans. Thus, the Agency does not believe it would be practical to require a phase-in of the proposed standards prior to 2000 across the entire industry, but would like to encourage the early introduction of cleaner locomotives. Thus, EPA is proposing to allow manufacturers and remanufacturers to begin banking credits for locomotives and locomotive engines as early as one year prior to the effective date of the standard, (*i.e.*, the 1999 model year). EPA is proposing that, for early banking, manufacturers and remanufacturers could receive NO_X and/or PM emission credits for engines certified to FELs below the NO_X and/or PM standards which take effect in 2000. The NO_X and PM credits would be calculated based on the difference between the FEL and the corresponding emission standard for the appropriate duty-cycle. The Agency requests comment on whether it should further encourage the early introduction of cleaner locomotives and locomotive engines by giving credits for early certification in excess of what would be generated relative to the applicable standards. For example, should a locomotive which is certified as meeting the Tier I standards in 1999 be given credit relative to the Tier 0 standards, given that it would otherwise not have to meet any standards initially, and only the Tier 0 standards at remanufacture? EPA recognizes that credits generated early could be used in later years and that there may be little net benefit in the long term from such an approach, but nonetheless sees a benefit in encouraging earlier emissions reductions.

Consistent with the current ABT program for nonroad engines over 37 kW, credits are proposed to have a three year lifetime with no annual discounting. The Agency requests comment on the proposed three year credit life, as well as an infinite credit life. The Agency also requests comment on the proposal that credits not be discounted with time, as well as annual discounting rates of up to 20 percent.

Participation in the proposed locomotive ABT program would be voluntary. For those manufacturers and remanufacturers who choose to utilize the program, compliance for participating engine families would be evaluated in two ways. First, compliance of individual engine families with their FELs would be determined and enforced in the same manner as compliance with the emission standards in the absence of an averaging, banking and trading program. Each engine family must certify to the FEL (or FELs, as applicable), and the FEL would be treated as the emission limit for certification, production-line and in-use testing for each engine in the family. Second, the final number of credits available to the manufacturer or remanufacturer at the end of a model year after considering the manufacturer's or remanufacturer's use of credits from averaging, banking and trading must be greater than or equal to zero.

When credits are generated and traded in the same model year, EPA proposes to make both buyers and sellers of credits potentially liable for any credit shortfalls, except in cases where fraud is involved. This provision is consistent with other mobile source ABT programs. The certificates of both parties issued for locomotives and locomotive engines involved in the violating trading transaction could be voided *ab initio* (i.e., back to date of issue) if the engine family or families exceed emission standards as a result of a credit shortfall.

The integrity of the proposed locomotive averaging, banking and trading program depends on accurate recordkeeping and reporting by manufacturers and remanufacturers, and effective tracking and auditing by EPA. Failure of a manufacturer or remanufacturer to maintain the required records would result in the certificates for the affected engine family or families being voided retroactively. Violations of reporting requirements could result in a manufacturer or remanufacturer being subject to civil penalties as authorized by sections 213 and 205 of the Clean Air Act.

EPA requests comment on all aspects of the proposed averaging, banking and trading program. Specific comment is requested as to whether the program should be limited to just NO_X and PM, as proposed, or whether the other regulated pollutants should be included. Also, the Agency requests comment on the various restrictions (averaging sets, etc.) proposed for this program.

C. Compliance Assurance

Section 213(d) of the Clean Air Act, which applies to EPA's proposed emissions standards for locomotives, provides that such standards ''shall be enforced in the same manner as standards prescribed under section (202)'' of the Act (applicable to new motor vehicles and new motor vehicle engines). This provision also grants EPA discretion to revise the regulations implementing certification, in-use testing and recall if appropriate for locomotives and other nonroad vehicles and engines. EPA uses several mechanisms to enforce its motor vehicle emissions standards, including certification, production line testing, in-use testing and recall. This section covers the various aspects of these proposed compliance programs for locomotives. A discussion of the proposed definition of locomotive engine family is presented first, followed by discussions of the three main compliance programs (certification, production line testing and in-use testing).

C.1. Engine Family Definition

EPA defines engine family for all other mobile sources as a group of engines expected to have similar emissions characteristics throughout their useful lives. The engine family concept facilitates more efficient certification of engines or vehicles by allowing those with similar emissions characteristics to be grouped together, thus reducing testing costs. In defining engine family for locomotives and locomotive engines, the Agency sought to balance the economic advantage of a broad definition that would minimize testing and certification costs, and the environmental advantage of a narrow definition that would better assure that the testing of an engine family would accurately represent all engines in that family. The Agency is proposing to define engine family for locomotives using many of the same parameters which are currently used to define on-highway and nonroad engine families. These parameters include aspects of both the physical design of the engine (e.g., combustion chamber configuration, cylinder bore and stroke) as well as operating characteristics (e.g., fuel injection pressure and rate, turbocharger and inlet air cooling characteristics). A complete list of the parameters is included in section 92.010 of the proposed regulations.

While the proposed locomotive engine family definition uses many of

the same parameters as engine family definitions adopted by EPA for other classes of mobile sources, the engine family definition proposed here for locomotives is somewhat more narrowly defined, especially for Tier I and Tier II. Characteristics such as fuel injection pressures and turbocharger and aftercooler performance are included in this definition.

EPA does not believe that the above outlined approach to defining engine family will result in an excessive number of engine families. For Tier I and Tier II the Agency expects that a manufacturer may only have a single engine family in a given model year. However, the Agency is requesting comment on whether it should allow for the combining of small Tier 0 engine families into a single engine family in order to reduce the testing burden imposed by the Tier 0 standards. Comments should address the size of the engine families which can participate, as well as the justification for allowing them to be classified as a single engine family and recommended criteria for separating families.

C.2. Engine Family Certification

Certification is the process whereby a manufacturer or remanufacturer obtains a certificate of conformity for a particular engine family of locomotives. A certificate of conformity must be obtained before a manufacturer or remanufacturer may lawfully offer for sale or otherwise introduce (or reintroduce) into commerce new locomotives and new locomotive engines. The CAA establishes an annual certification requirement for new vehicles and engines, including new locomotives and new locomotive engines.[14] Under the proposed regulations, a separate certificate must be obtained for each engine family. Applications must be submitted every year, even when the engine family does not change from the previous certificate, although representative test data could be reused in the succeeding year's application in order to minimize the testing burden.

As discussed in the following paragraphs, EPA is proposing that locomotives (rather than engines) be tested for demonstration of compliance with the applicable emissions standards. EPA is also proposing an exception to this requirement which would allow test data from a development engine to be used for certification, rather than requiring testing of a pre-production prototype locomotive. Nevertheless, it is the actual locomotive, not the engine, for which a certificate of conformity would be issued, and the Agency is proposing that locomotives, not engines, be tested during production line and in-use testing programs. These programs are discussed later in this notice. The only exception to the proposed requirement that a certificate of conformity be issued for locomotives, rather than engines, is in the case of engines which are sold for purposes of repowering existing locomotives, as previously discussed. This exception is not proposed to be extended to locomotive engines which are sold to locomotive manufacturers for use in freshly manufactured chassis. The Agency is also proposing to prohibit defeat devices which sense operation outside of the normal certification test conditions and reduce the ability of the engine to control emissions under non-test conditions. Finally, EPA is proposing that manufacturers and remanufacturers of locomotives be required to specify a range for adjustable parameters which can affect emissions such that the locomotives will comply with the applicable standards with the parameters set anywhere within their specified range. These provisions are discussed in the following paragraphs.

Under EPA's current motor vehicle program, the certification process includes an up-front showing of emissions durability. This is done through an emissions durability vehicle which is operated more or less continually to accumulate mileage representative of in-use operation. Thus, a motor vehicle's ability to meet the emission standards throughout its useful life is demonstrated as part of the initial certification process, although under somewhat artificial conditions. With locomotives, which are built to operate continually and have very long useful lives, this type of accelerated usage is not feasible. Such a demonstration would take several years to complete, compared to several months for on-highway passenger cars, and could require more than $1 million in fuel. Thus, including a durability showing in the initial certification process is not appropriate in light of the cost and time involved in making such a showing. The Agency is, therefore, proposing no durability demonstration be required for certification. However, a manufacturer or remanufacturer must still estimate in-use emissions deterioration as part of the certification process (through engineering evaluation or other means), but need not do so by operating a locomotive for its entire useful life. Compliance over the full useful life will be ensured by the production line and in-use testing programs (discussed in the following sections), which EPA considers extremely important aspects of the proposed program to control emissions from locomotives. The Agency is considering, and requests comment on, whether it should develop optional assigned deterioration factors based on the initial results of the in-use testing program (discussed later).

EPA believes that, in order to accurately measure locomotive emissions, the locomotive, not just the engine, should be tested. However, EPA recognizes that the locomotive manufacturing industry is unusual in the way it develops new products. Typically, a manufacturer will have a single engine mounted on a dynamometer which may remain there for years. This development engine serves as a test bed for changes in the engine's design. Given the relatively small volume of locomotives and locomotive engines manufactured, combined with their very high per-unit cost, the Agency is proposing that as an option to certification testing of a complete locomotive, test data from this development engine be allowed to be submitted for certification. This is in contrast to other EPA mobile source programs where a pre-production prototype engine or vehicle is used to generate emissions data. As a condition of certifying a locomotive using data from a locomotive engine rather than a complete locomotive, a manufacturer or remanufacturer must accept liability for a certificate suspension and/or recall action based on production line or in-use testing of locomotives. Additionally, for engine families which are certified using development engine data, one of the first five locomotives manufactured will be tested as part of the production line testing program, which is discussed later.

This development engine would be required to be tested at power points which correspond to the actual notches of the locomotive the engine will be used in. In general, the certification testing is the only time that EPA proposes that the engine, rather than the locomotive, could be tested. For production line and in-use testing (discussed next), EPA proposes that the actual locomotives be tested in order to assure that the locomotive engine is being operated at conditions that represent those in a locomotive (e.g., intake air and coolant temperatures,

[14] Section 206 of the Clean Air Act requires certification on a yearly basis. This has been interpreted to mean certification for each model year, as defined in section 202(b)(3)(A)(i) of the CAA. Section 206 applies to locomotives, pursuant to section 213(d) of the Act.

power at throttle notches). As is discussed in the section on production line testing, a waiver from the requirement that locomotives (not engines) be tested under the production line testing program will be available for those manufacturers and remanufacturers which only manufacture or remanufacture engines used to repower existing locomotives.

While EPA is proposing to allow data from a development engine to be used for certification testing, the Agency is aware that parts of this engine may have been in operation for some time when the engine is tested. Thus, the data used for certification may not accurately reflect the emissions performance of a freshly manufactured engine. The application for certification would include a demonstration, which could be based on good engineering judgement, that the locomotive or locomotive engine will meet the applicable emission standards throughout its useful life. Thus, the manufacturer or remanufacturer would be required to use engineering judgement or test data to develop a deterioration factor (df), subject to EPA approval, for the development engine which would account for any expected emissions deterioration. As part of the application for certification, EPA proposes to require the applicant to also provide a df, also subject to EPA approval and based on engineering judgement or test data, which could be applied to a freshly manufactured unit to give its emissions rate at the end of its useful life. This df might be different than the one generated for use with the development engine data, and it would be used for production line testing of new locomotives and locomotive engines.

When no significant changes to an engine family occur from one model year to the next, EPA proposes to allow manufacturers and remanufacturers the flexibility to submit emission test data used to certify the engine family in previous years in lieu of actual testing for current year certification. This can be done to certify an engine family which is the same as, or substantially similar to (as determined by the Administrator), the previously certified engine family, provided these data show that the test engine would comply with the applicable regulations. This allows manufacturers the ability to ''carry over'' test data from the same engine family from one model year to another.

The proposed remanufacture requirements for locomotives raise a unique question regarding who should be required (or allowed) to hold the certificate of conformity for a remanufactured locomotive engine family. Section 206 of the Act, which applies to locomotives pursuant to section 213(d), states that the Administrator shall test new vehicles and engines submitted by a manufacturer to determine compliance with applicable emissions standards and shall issue a certificate of conformity if the vehicle or engine conforms to EPA regulations. Section 203(a)(1) prohibits manufacturers from introducing into commerce new vehicles and engines that are not covered by a certificate of conformity issued by EPA. Because section 213(d) states that EPA's locomotive emissions standards shall be enforced in the same manner as the federal motor vehicle emissions standards, it is appropriate to apply the prohibition against introduction into commerce without a valid certificate to manufacturers of new locomotives and new engines used in locomotives. Since EPA proposes to define remanufactured locomotives as new, these provisions apply to both remanufactured and freshly manufactured locomotives. Section 216 defines ''manufacturer'' as any person engaged in the manufacturing or assembling of new nonroad vehicles or new nonroad engines. This definition envisions manufacturing of a new vehicle or engine, at least in some cases, as being something other than simply assembling the new vehicle or engine. EPA has considered the remanufacturing process for locomotives and engines to determine which entity or entities should be considered a manufacturer for purposes of compliance with emissions standards. For remanufactured locomotives and engines, several different entities may be ''engaged in the manufacturing or assembling'' of the new locomotive or engine, potentially resulting in multiple manufacturers of a remanufactured locomotive or engine. A railroad company may remanufacture its locomotives or engines itself. A railroad may otherwise play a significant role in the process of design, production, or installation of parts in the remanufacturing process. A third party may install the remanufacturing kit. Such kits, in turn, could be produced by a different entity. All of these parties are involved in the remanufacturing process to some extent, and can therefore be considered to be ''engaged in the manufacturing or assembling'' of the resulting new locomotive or engine. This is significantly different from the motor vehicle industry, in that no single entity conducts the entire process of manufacturing a new vehicle or engine.

The entity that makes the remanufacturing kit, containing parts used to remanufacture locomotives or engines, can be considered a manufacturer of the new locomotive or engine because such entity actually produces the components that will constitute the remanufactured locomotive or engine. The installer of the remanufacturing kit, who may or may not be a different entity, can be considered a manufacturer of the remanufactured locomotive or engine because such entity performs the installation of the remanufacturing kit to result in a new locomotive or engine. Finally, the railroad company that remanufactures its own engine, or is otherwise involved to any significant degree in the remanufacturing process, such as hire another entity to install a remanufacturing kit according to the railroad's specifications, can be considered a manufacturer of the resulting new locomotive or engine, because the railroad plays a significant role in determining the specific manner in which the locomotive or engine will be remanufactured. Because any of these entities could be considered the remanufacturer, the Agency is proposing that any of them could hold the certificate of conformity. The Agency requests comment on its legal authority to call a railroad a manufacturer in cases where the railroad is in no way involved in the remanufacturing of its locomotives.

It is possible that, given the number of entities that could be engaged in manufacturing or assembling a remanufactured locomotive engine family, there will be cases where the certificate holder will be an entity other than the installer (e.g., the entity which designs the system or manufactures the components). In such cases the certificate holder would be required, as a condition of the certificate of conformity under section 206(a) of the Act, to provide to the installer along with a remanufacture kit (which would include the necessary components or a component list including specifications for the components) instructions for the proper installation and calibration of those components, as well as any other instructions or calibrations required for that remanufactured engine family to meet the applicable emissions standards. Specific provisions for how remanufacture kits would be handled with respect to production line testing and liability are discussed later in this notice.

The Agency requests comment on whether it should require emission testing for remanufacturers certifying kits that are equivalent to kits

previously certified by other remanufacturers. Would there be any benefit to such emission testing, and if not, would it therefore be unreasonable to require it? EPA is concerned, however, that if it were to allow such certification, that it would be unfair to the original certificate holder that would have been required to perform the emission testing. One way to address this concern would involve not allowing such certification until several years after the original certificate holder had obtained the certificate; thereby giving the original certificate holder time to recover its investment. This also raises an issue of whether EPA would have authority under section 206(a) of the Act to refuse to issue a certificate based on this reason. EPA therefore requests comment on whether certification of equivalent kits without testing should only be allowed for kits that were originally certified at least five years previous.

As described above, the process of remanufacturing an existing locomotive or engine to result in a new locomotive or engine is unique to the locomotive industry, and is not common practice for other mobile sources. Pursuant to section 213(d), EPA has discretion to modify its regulations implementing sections 206 and 207 of the CAA as the Agency determines is appropriate for locomotives. EPA has analyzed the current industry practice of remanufacturing existing locomotives and engines, as well as the technical aspects of remanufacturing, and is considering an approach to certification of remanufactured locomotives and engines under which the entity that owns the locomotive or engine being remanufactured (generally a railroad company) would be primarily responsible for meeting the obligations of the manufacturer of such locomotive or engine to meet the Tier 0 standards.

As stated above, a railroad company that hires another entity to install a remanufacturing kit according to the railroad's specifications can be considered to be engaged in the manufacturing or assembling of the resulting new locomotive or engine, as can the entity hired to install the kit. In such a case, both the railroad and the installer would be subject to the obligations and prohibitions that apply to manufacturers of new vehicles and engines. To simplify the certification and enforcement process, EPA is considering specifying by regulation that the owner of the locomotive or engine being remanufactured shall be considered the primary manufacturer of the remanufactured locomotive or engine, and, as such, shall be the entity that EPA will look to for compliance with certification and enforcement requirements relating to its remanufactured locomotives and engines. EPA believes that it is appropriate to specify the owner of the remanufactured locomotive or engine as the primary manufacturer, rather than the installer of the kit, because the former entity has the greatest degree of control over the manner in which the existing locomotive or engine is remanufactured; the railroad provides the specifications that the remanufactured engine must meet and maintains ownership of the locomotive, or physical control in the case of a leased locomotive. The installer simply follows the directions provided by the owner; while installation of the remanufacturing kit renders the installer a manufacturer of a new locomotive or engine under the CAA definition, EPA would not expect to seek recourse against the installer as the manufacturer of the remanufactured locomotive or engine (nor against any other entities that meet the definition of a manufacturer) unless the owner of such engine failed to meet its obligations as a manufacturer. However, if the primary manufacturer failed to meet certain requirements, such as failing to obtain a certificate prior to introducing the remanufactured engine into commerce, then all parties who meet the definition of manufacturer, with regard to such engines would be considered to be in violation of section 203(a)(1) of the Act, not just the primary manufacturer.

EPA believes that such an approach could potentially have much less impact on the existing markets for parts and remanufacturing for these locomotives. EPA also believes that such an approach would ensure compliance with the proposed emission standards equivalent to that of the proposed remanufacturer based certification process previously discussed. EPA is concerned, however, that there could be unforeseen problems associated with attempting to establish a program that is fundamentally different from all other mobile source programs. The Agency does not believe that there is the same potential for negative market impacts for the remanufacture of locomotives originally built after the effective date of this rule due to the fact that those locomotives would slowly be introduced into the fleet, and thus the remanufacturing market for them would develop slowly as they aged. Nonetheless, EPA also requests comments on whether a railroad-based certification program should be established for the remanufacture of Tier I and Tier II locomotives.

Under the railroad-based certification program being considered, the certification requirements would be largely the same as those that are being proposed under the remanufacturer based certification approach. Locomotives and locomotive engines would still be grouped together in engine families, certification test data would still be required from a representative worst-case configuration, and small numbers of locomotives would still be audited on the production line and tested in-use. The main difference would be that the railroads would be primarily responsible for submitting an application for certification and conducting all of the production line auditing and in-use testing, and would be liable for the emissions performance.

Under this approach, railroads would be allowed to purchase kits from manufacturers, or any other suppliers, that could be applied to engines during remanufacture to achieve the necessary emissions reductions. Railroads would also be allowed to use emissions test data collected by a kit supplier for certification. Moreover, the railroads could even make commercial arrangements to hold the kit supplier liable for in-use emission problems. Thus, the railroads could choose to certify in a manner that would be practically very similar to the manner in which it would be handled under the remanufacturer-based approach that is being proposed. Also, the smallest railroads would still be able to be exempted from the proposed compliance requirements, as discussed later in the railroad requirements section.

EPA is also proposing to reduce the reporting burden associated with the application for certification. EPA believes that it is appropriate to require manufacturers and remanufacturers to collect and maintain certification application information, but that it should not be necessary for them to submit this information in all cases unless specifically requested. The authority, as proposed, to modify what information must actually be submitted versus maintained will allow EPA to exercise some flexibility in designing and implementing the certification process for locomotives and locomotive engines. When the Agency exercises its authority to modify the information submission requirements, it will provide manufacturers and remanufacturers with a guidance document, similar to the manufacturer guidance issued under the on-highway

program, that explains the modification(s). These modifications to the information submission requirements will in no way change the actual requirements of the regulations in terms of the emissions standards, test procedures, etc. Manufacturers and remanufacturers must retain records that comprise the certification application whether or not EPA requires that all such records be submitted to the Agency at the time of certification. The Administrator would retain the right to review records at any time and at any place she designates.

As is the case for other regulated nonroad and on-highway vehicles and engines, the proposed certification regulations make it illegal for any manufacturer, remanufacturer, or any other person to use a device on a locomotive or locomotive engine which senses operation outside normal emission test conditions and reduces the ability of the emission control system to control the engine's emissions through, for example, the optimization of fuel economy at the expense of emissions performance. Such ''defeat'' devices are specifically prohibited for motor vehicles under section 203 of the Act. Section 213(d) of the Act directs the Agency to enforce the locomotive standards in the same manner as it enforces motor vehicle standards. EPA considers the current motor vehicle programs' prohibition against the use of defeat devices to be an essential tool in ensuring in-use compliance with emissions standards. For this reason, lack of a comparable prohibition for locomotives could result in a real and significant risk that locomotives will not comply with applicable standards during actual operation.

Moreover, there is no indication in the Act that Congress intended to prohibit defeat devices for motor vehicles and engines, but to allow such practices for nonroad vehicles and engines. In fact, the overall structure of the nonroad vehicle and engine provisions of the Act, as well as the explicit reference to enforcement in section 213(d), support an approach to enforcement of the emissions standards for such vehicles and engines (including locomotives) comparable to the approach used for motor vehicle enforcement. Therefore, EPA is proposing in the certification regulations an explicit prohibition against defeat devices applicable to locomotives subject to the federal standards. Since the use of defeat devices effectively renders the specified test procedures for certification, production line, and in-use testing inadequate to predict in-use emissions, EPA would reserve the right to test a certification test locomotive or engine, or require the manufacturer or remanufacturer to perform such testing over a modified test procedure if EPA has reason to believe a defeat device is being used by a manufacturer or remanufacturer on a particular locomotive or locomotive engine. EPA solicits comments on this proposed provision.

EPA regulations applicable to on-highway vehicles contain provisions which allow for testing with any adjustable parameter set anywhere within its adjustable range. The purpose of these provisions is to ensure that variation in parameters which mechanics or vehicle operators can adjust using low cost tools, when set anywhere within the adjustable range, would not cause the vehicle to exceed emissions standards. Production tolerances on such large engines, as well as the need to grind smooth, plate, or otherwise process certain parts during remanufacture in such a way that their physical dimensions change, result in the need for locomotive adjustable parameters to have much wider ranges of adjustability than those of on-highway vehicles. An engine which is designed to be remanufactured numerous times throughout its service life needs to be manufactured such that some of its parameters have physically adjustable ranges which are much larger than their functional ranges when the engine is running in order to account for the change in dimension of parts which are processed in some way during remanufacture, as described above. Requiring that a locomotive be able to demonstrate compliance with applicable emissions standards with its parameters adjusted anywhere within their adjustable range is not reasonable. However, correct setting of adjustable parameters (e.g., injection timing) is critical for good emissions performance. EPA is proposing that manufacturers and remanufacturers specify a tolerance range for each adjustable parameter within which compliance with emissions standards will be achieved. Any locomotives which are inspected and found to have adjustable parameters set outside of the range specified by the manufacturer or remanufacturer will be considered to have been tampered with, and the owner/operator of such locomotives will be subject to tampering penalties, as discussed below in the tampering section.

EPA is authorized under section 217 of the Clean Air Act to establish fees to recover compliance program costs associated with sections 206 and 207 of the Act. Sections 206 and 207 apply to locomotives and locomotive engines pursuant to section 213(d) of the Act. Therefore, EPA has authority to establish fees for locomotive and locomotive engine testing pursuant to section 217. EPA proposes to establish fees for this locomotive compliance program at some future time after the program is in place and the associated costs to EPA can be determined.

C.3. Production Line Testing Program

EPA is proposing a production line testing (PLT) program pursuant to the Agency's authority to implement and enforce the locomotive emissions standards. Section 213(d) subjects the nonroad (including locomotive) standards to the provisions of section 206 of the Act, with such modifications that the Administrator deems appropriate to the regulations implementing section 206, and directs EPA to enforce the nonroad standards in the same manner as the Agency enforces motor vehicle standards.

Section 206(a) provides EPA authority to issue certificates of conformity with applicable emissions standards to vehicles that demonstrate compliance with such standards. Section 206(b) authorizes testing of new vehicles and engines being manufactured to determine whether such vehicles and engines actually comply with the certificate of conformity (i.e., testing of vehicles and engines as they come off the production line). If the results of such testing show that all or part of the relevant vehicles or engines do not comply with the certificate, EPA may suspend or revoke the certificate in whole or in part. Section 206(b)(1) provides that such testing may be conducted directly by the Agency, or by the manufacturer in accordance with conditions specified by the Agency.

Pursuant to its authority under section 206, as applied to locomotive emissions standards according to section 213(d), EPA is proposing that manufacturers and, in some cases, remanufacturers of locomotives perform production line testing of newly manufactured and remanufactured locomotives. The PLT program would be an emission compliance program in which manufacturers would be required to test locomotives as they leave the point where the manufacture is completed. The objective of the PLT program is to allow manufacturers, remanufacturers and EPA to determine, with reasonable certainty, whether certification designs have been translated into production locomotives that meet applicable standards and/or FELs from the beginning, and before excess emissions are generated in-use.

EPA believes that a PLT program is necessary to verify that new locomotives and new locomotive engines comply with applicable regulations. This program is especially important given that EPA is proposing to allow certification of freshly manufactured locomotives and locomotive engines based on data from a development engine, rather than a pre-production prototype locomotive. The Agency is concerned that testing conditions during engine testing (percent power at notches, air and coolant temperatures, etc.) may not accurately reflect actual operation in a locomotive, resulting in emissions which may not accurately reflect actual locomotive emissions. It is for this reason that EPA is proposing that one of the first five freshly manufactured locomotives produced be tested as part of the PLT program if development engine test data is used for certification. EPA is proposing different PLT programs for freshly manufactured and remanufactured locomotives and locomotive engines. As discussed in the following paragraphs, the Agency is proposing that the PLT program for freshly manufactured units be based on actual testing, while the PLT program for remanufactured units would be based on an audit of the remanufacture (e.g., assuring that the correct parts are used and they are installed properly), with EPA having the ability to require testing if in-use data indicates a possible problem with production.

Manufacturers of freshly manufactured locomotives would be required to demonstrate that locomotives randomly selected by them meet applicable emissions standards and requirements. All PLT emission results and quarterly production figures would be required to be reported electronically to EPA each quarter. EPA would review PLT data and the procedures used in acquiring the data to assess the validity and representativeness of each manufacturer's PLT program.

The proposed program for freshly manufactured locomotives assures that locomotives from each engine family will be tested periodically and that their compliance will be continuously monitored. The frequency of testing would depend on an engine family's production volume, with greatly reduced testing for small volume engine families, and a cap on the total number of tests in a given year for larger engine families. In general, testing will be performed on locomotives. However, manufacturers who only manufacture locomotive engines can perform PLT testing on engines provided those engines are only used to repower existing locomotives. If any engines produced by an engine manufacturer are used for locomotives with freshly manufactured chassis, the Agency can require that some PLT testing be done on a locomotive, rather than allowing all PLT testing to be done on engines.

EPA recognizes the need to develop a PLT scheme that does not impose an unreasonable burden on the manufacturers and remanufacturers. While EPA believes that it has developed a PLT program which takes into account the circumstances of this industry, it also understands that alternative plans may be developed that better account for the individual needs of a manufacturer or remanufacturer. Thus, provisions are proposed to allow a manufacturer or remanufacturer to submit an alternative plan for a PLT program, subject to approval of the Administrator. A manufacturer's petition to use an alternative plan should address the need for the alternative, and should include justifications for the number and representativeness of locomotives tested, as well as having specific provisions regarding what constitutes a PLT failure for an engine family.

Under the proposed PLT program, manufacturers would select locomotives from each engine family at a one percent sampling rate for emissions testing. EPA has the right to reject any locomotives selected by the manufacturers if it determines that such locomotives are not representative of actual production. Manufacturers and remanufacturers would be required to conduct testing in accordance with the applicable federal testing procedures for locomotives. Tests must be distributed evenly throughout the model year, to the extent possible.

The required sample size for an engine family would be the lesser of five tests per year or one percent of projected annual production. For engine families with production of less than 100, a minimum of one test per year per engine family would be required. These numbers were chosen to minimize the testing burden on the manufacturers but still allow an adequate testing sample to determine conformity with the applicable requirements. Manufacturers could elect to test additional locomotives. Manufacturers would be required to submit quarterly reports to EPA summarizing locomotive test results, test procedures, and events such as the date, time, and location of each test. Quarterly reporting will allow EPA to continually monitor the PLT data, and is consistent with current reporting requirements in the PLT program of the marine engine regulations and on the voluntary assembly line test program for on-highway vehicles and engines. If no testing is performed during a quarter, no report would be required.

Under this testing scheme, if a locomotive fails a production line test, the manufacturer would test two additional locomotives out of the next fifteen produced in that engine family in accordance with the applicable federal testing procedures for locomotives. When the average of the three test results, for any pollutant, are greater than the applicable duty-cycle, FEL, or notch standard for any pollutant, the manufacturer fails the PLT for that engine family. In all cases, individual locomotives which failed a test in the PLT program would be required to be brought into compliance.

This program is different than the approach that EPA has traditionally used for mobile sources, such as on-highway motor vehicles and nonroad marine engines. The more traditional approach used for assuring that the engines are produced as designed for other mobile sources is called Selective Enforcement Auditing (SEA). In the SEA program, EPA audits the emissions of new production engines by requiring manufacturers to test engines pulled off the production line on short notice. This spot checking approach relies largely on the deterrent effect: The premise is that manufacturers would design their engines and production processes and take other steps necessary to make sure their engines are produced as designed and thereby avoid the penalties associated with failing SEA tests, should EPA unexpectedly conduct an SEA.

In the marine engine SEA program, EPA employs a statistical procedure known as the Cumulative Sum (CumSum) Procedure that enables manufacturers to select engines at appropriate sampling rates for emission testing and will determine whether production line engines are complying on average with emission standards. For an engine family to experience a failure under this approach, the CumSum statistic, which is based on previous emissions test results, must reach an appropriate action limit. Under the proposed PLT program, for a locomotive engine family to experience a failure, the average of any pollutant for three consecutive tests must be greater than the applicable standard or FEL. The procedure used for marine engines is appropriate for the marine industry which has a much higher total annual production than the locomotive industry. This procedure could prove very burdensome for the locomotive industry, so EPA feels it is appropriate to design a production line testing

program that is more suitable for their annual production volumes.

EPA has taken a different approach in the locomotive production line testing program: This program implements a more flexibly organized testing regime that acts as a quality control method that manufacturers will utilize and monitor to assure compliance. Manufacturers will continue to take steps to produce engines within statistical tolerances and assure compliance aided by the quality control data generated by PLT which will identify poor quality in real time.

In the proposed PLT program, the Administrator could suspend or revoke the manufacturer's certificate of conformity in whole or in part fifteen days after an EPA noncompliance determination for an engine family that fails the PLT, or if the locomotive manufacturer's submittal reveals that the PLT tests were not performed in accordance with the applicable testing procedure. During the fifteen day period following a determination of noncompliance, EPA would coordinate with the manufacturer to facilitate the approval of the required production line remedy in order to eliminate the need to halt production, to the greatest extent possible. The manufacturer must then address (i.e., bring into compliance, remove from service, etc.) the locomotives produced prior to the suspension or revocation of the certificate of conformity. EPA could reinstate the certificate of conformity subsequent to a suspension, or reissue one subsequent to a revocation, after the manufacturer demonstrates (through its PLT program) that improvements, modifications, or replacement had brought the locomotive and/or engine family into compliance. The proposed regulations include hearing provisions which provide a mechanism to resolve disputes between EPA and manufacturers regarding a suspension or revocation decision based on noncompliance with the PLT. It is important to point out that the Agency would retain the legal authority to inspect and test locomotives and locomotive engines should such problems arise in the PLT program.

The Agency requests comment on all aspects of this proposed PLT program. Specifically, EPA requests comment on whether it should select the individual locomotives to be tested, or whether this should be done by the manufacturer, with the selection subject to EPA approval. Also, the Agency requests comment on whether manufacturers which only manufacture locomotive engines (rather than complete locomotives) and whose engines only go toward the repowering of existing locomotives should be allowed to do PLT testing on locomotive engines, as proposed, or whether such engines should be required to be installed in locomotives prior to PLT testing. Comments in support of requiring testing of a locomotive in this situation should address logistical issues such as how much mileage should be allowed in order to get the locomotive to a suitable testing site.

During the development of today's proposal, the locomotive and locomotive engine manufacturers developed an alternative PLT program. Citing cost and time concerns with running a PLT program based on the full federal test procedure (FTP), as just described, they proposed a program based on a short test. This short test would only test locomotives at notches five and eight, rather than at all notches as in the full FTP. It would also utilize less accurate measurement equipment, and would not require the same level of training for those running the test as the proposed FTP would. EPA solicits public comment on this approach, and particularly on the liability that would be associated with a failure of such a short test, and whether the Agency could take appropriate enforcement action based on failure of a production line test which is different than the test used for initial certification. The Agency also requests commenters to address whether a less rigorous PLT program would be appropriate in light of a strong in-use testing program.

The Agency is proposing a separate program for assuring the production quality of remanufactured locomotives. Under this proposed program, the certificate holder, as a condition of the certificate, would be required to audit its remanufacture of locomotives for the use of the proper parts, their proper installation, and all proper calibrations as a condition of the certificate of conformity. The certificate holder would be required to perform these audits on 5% of its annual production. For certificate holders which sell their kits for installation by others, the audits would be required to be spread out proportionally among every entity installing them. The Agency recognizes that it may be difficult for a remanufacturer to audit kit installations from a variety of installers located throughout the country. Thus, EPA is proposing to allow a remanufactured locomotive subject to an audit to operate up to 10,000 miles prior to the audit. This will allow for audits at sites other than where the installation occurs, as well as providing the flexibility in the timing of the audits (i.e., not having to audit a locomotive the moment it completes remanufacture). A case of uninstalled, misinstalled, misadjusted or incorrect parts would constitute a failure, and additional locomotives would be required to be audited. Actions in the event of an audit failure would be determined on a case-by-case basis, depending on whether the failure is considered tampering, causing of tampering, inappropriate parts in kit, etc. EPA would retain the right to order, on a case-by-case basis, a PLT testing program for remanufactured locomotives in the same manner as the PLT program for freshly manufactured locomotives if in-use testing or kit audits showed evidence of noncompliance. EPA requests comment on the impacts of this proposed audit program for remanufactured locomotives on small businesses, and whether it should consider an exemption from this requirement for small businesses.

C.4. In-Use Testing Program

A critical element in the success of the proposed locomotive program is ensuring that manufacturers, remanufacturers, and upgraders produce new locomotives that continue to meet emission standards beyond certification and production stages, during actual operation and use. EPA is proposing to adopt an in-use testing program pursuant to the Agency's authority to implement and enforce the locomotive emissions standards, and pursuant to its authority to collect information from entities subject to the Act's requirements.

EPA believes that the best way to ensure that the in-use emissions reductions expected to result from implementation of today's proposed standards are actually achieved is to perform in-use testing on a number of locomotives every year. This is especially important in the absence of an upfront durability showing. The Agency is proposing an in-use compliance program with two distinct components. EPA is first proposing a program to be performed by the manufacturers and remanufacturers aimed primarily at testing locomotives from all engine families under the full FTP. Second, the Agency is proposing to require that Class I railroads annually test 10 percent of their locomotives which have met or exceeded their useful lives using a modified version of the FTP, as discussed in the test procedures section. The purpose of this second component is to assure that locomotive useful life periods are appropriate and to assure states that locomotives are continuing to meet applicable emissions

standards for the time period during which certain state standards are preempted beyond useful life, as described later in this notice. Each of these two components of the proposed in-use testing program are discussed in more detail in the following paragraphs.

The first major component of the proposed in-use testing program includes requirements that apply to manufacturers and remanufacturers. EPA is proposing to require manufacturers and remanufacturers to test emissions from in-use locomotives pursuant to its authority under section 208 of the Act. This provision applies to the locomotive and locomotive engine emissions standards as provided in section 213(d). Section 208 requires manufacturers to submit information and conduct tests that EPA may reasonably require to determine whether such manufacturer is in compliance with Title II of the Act and its implementing regulations, or to otherwise carry out the provisions of Title II. The proposed testing program is designed to minimize the burden on industry, while providing a strong incentive for manufacturers and remanufacturers to build engines that meet standards beyond the certification and production stages, when in actual use.

Under the proposed in-use testing scheme, manufacturers and remanufacturers will be required to test in-use locomotives from one engine family per year, using the full FTP. The Agency is proposing one engine family per year in order to limit the testing burden on manufacturers and remanufacturers. EPA will specify the engine family to be tested each year, with selection based on criteria such as production quantity, past emission performance (including performance in the proposed railroad test program), and engine and emission control technology. All in-use testing is proposed to be performed on locomotives, with no allowances for engine testing (except for engines used for repowering, and then only after locomotive testing has been performed). In order to limit the testing burden for small engine families, the in-use testing requirement would not apply to engine families with production of less than ten locomotives per year, except where there is evidence of in-use failures. EPA will provide manufacturers and remanufacturers suitable advance notice about which engine families are to be tested in any given year. EPA would have the authority to waive this in-use testing requirement for a given manufacturer or remanufacturer based on evidence of consistent in-use compliance. This waiver would not be available for a manufacturer or remanufacturer that has not yet demonstrated the durability of each of its engine families (i.e., has one or more engine families that have not been tested in-use), or if there is evidence, from railroad or other testing, that one of its engine families may not be complying in-use. EPA expects that after this program has been in place for several years, the in-use testing burden will be much smaller, as long as in-use failures were very infrequent.

The Agency is proposing that all locomotives tested under the manufacturer and remanufacturer in-use testing program will have reached at least 75 percent of their useful lives. While testing of locomotives will be limited to between 75 and 100 percent of their useful lives, actual repair in the event of a determination of noncompliance under section 207(c) of the Act, however, would not be limited by useful life. For example, compliance testing of an engine family might be limited to 75 to 100 percent of its useful life; however, any resulting remedy repair would be required to be applied to all locomotives of that family, regardless of whether the locomotives had exceeded their useful lives. This is consistent with EPA's recall policy for on-highway vehicles and engines and large compression-ignition nonroad engines.[15] Further, EPA proposes that it may require that any remedy in the event of a nonconformity extend to locomotives of the same engine family, but different model years, that were certified using the proposed certification carry over provisions. Such an extension of the remedy to other model years is proposed to be limited to two model years before and one model year after the model year of the nonconforming engine family. Such a provision would thus limit the liability in the event of a nonconformity to four model years' production.

Under EPA's proposed testing program, a manufacturer or remanufacturer would be required to test in-use locomotives from an engine family specified by EPA when that family reached an appropriate age. The Agency is proposing that an appropriate age to begin in-use testing would be 75 percent of a locomotive's useful life. EPA has chosen 75 percent of useful life in order to balance the need to accurately assess in-use emissions performance, which argues for testing late in useful life, with the desire to maximize the benefits of any remedial action in the event of an in-use failure, which argues for testing earlier in useful life. The in-use test program is intended to assess in-use emissions deterioration, not production quality (which is assessed in the production line testing program). Thus, it is most appropriate to test later in a locomotive's useful life, rather than earlier, to ensure that test results reflect actual in-use deterioration, which tends to increase with age. However, testing too late may present two problems. First, the later in useful life the testing is done, the more difficult it may be to find well-maintained locomotives to test, since many may be remanufactured before the end of useful life. Second, testing extremely late in useful life would minimize the benefits achieved from any remedial action taken in the event an in-use nonconformity is identified. Thus, EPA believes that testing at 75 percent of useful life strikes a balance between these different issues. EPA requests comment on whether a lower age or range (e.g., 50 to 75 percent of useful life) would be more appropriate for such testing, including commenters' reasons for suggesting different ages.

To achieve the Agency's goal of establishing a strong enforcement program while minimizing the burden on manufacturers, EPA is proposing a sampling process for the selection of locomotives for in-use testing which is designed to provide adequate data for the Agency to use as a basis for compliance decisions, while expediting testing of engine families found to emit below the standard. This proposed selection process to achieve this goal is described in the following paragraphs.

The number of locomotives of a targeted family to be tested by a manufacturer or remanufacturer would be determined by the following method:

1. A minimum of two locomotives per year for the specified family after it reaches the minimum age specified, provided that no locomotive fails any standard. For each failing locomotive, two more locomotives would be tested up to a maximum of 10 locomotives tested.

2. If the following conditions are met, only one locomotive per family per year must be tested: (1) The engine family has been previously tested under step 1 above; (2) the engine family has not changed significantly from the previously tested family (i.e., has been certified using carryover emission data); and (3) EPA has not informed the manufacturer of an emission concern with that family. If that locomotive fails for any pollutant, testing must be conducted as outlined in step 1 above, up to a maximum of ten locomotives.

[15] See Center for Auto Safety v. EPA, 747 F.2d 1 [D.C. Cir. 1984].

A manufacturer or remanufacturer could test more locomotives than the minimum above or could concede that the engine family failed to comply with applicable standards before reaching locomotive number 10. EPA would consider failure rates, average emission levels, and the existence of any defects in tested locomotives, among other things in determining whether to pursue remedial action. EPA may order a recall before testing reaches the maximum number of locomotives.

In EPA's motor vehicle compliance program, EPA determines the schedule for testing engine families and conducts the testing itself. EPA recognizes that it would reduce the burden of testing to afford maximum flexibility in determining the test schedules for in-use testing programs to locomotive manufacturers and remanufacturers so that such programs could be coordinated with the schedules of the railroads whose locomotives are to be tested (e.g., schedules for maintenance and safety inspections). For this reason, EPA is proposing to allow manufacturers and remanufacturers to set their own schedule for in-use testing. However, EPA could require that in-use tests be distributed throughout the year in order to prevent all testing for the year from being performed at times when the weather is most favorable for low emissions results.

The Agency recognizes that locomotive manufacturers and remanufacturers may have difficulty procuring locomotives for in-use testing due to the fact that they are in revenue-generating service. Therefore, EPA is proposing to allow manufacturers and remanufacturers twelve months after the receipt of testing notification to complete the testing of an engine family. (Testing by the Agency of an engine family in the motor vehicle program is usually completed within a three-month period.) The Agency believes that providing manufacturers and remanufacturers with twelve months to complete this testing provides them significant flexibility in conducting their test programs and adequately addresses any difficulties which would arise during the locomotive procurement and testing, and requests comment on this provision. Furthermore, the Agency is willing to consider extensions to this requirement when the manufacturers or remanufacturers present circumstances which warrant such extensions.

Test locomotives would be required to be randomly selected and to have a maintenance and use history representative of a properly maintained and operated locomotive. To comply with this requirement a manufacturer or remanufacturer would question the end user regarding the accumulated usage, maintenance and operating conditions of the test locomotive. Manufacturers or remanufacturers could, with EPA approval, delete locomotives from their test sample and replace them with others if they could document abuse or malmaintenance that might significantly affect emissions durability. The manufacturer or remanufacturer would document reasons for deletion in its test report to EPA. The manufacturer or remanufacturer may perform minimal maintenance on a test locomotive. One valid emission test conducted under the federal test procedure established for locomotives would be required for each selected locomotive.

EPA is proposing to require locomotive manufacturers and remanufacturers to submit to the Administrator, within three months of completion of testing, all emission testing results generated from the in-use testing program. EPA envisions that manufacturers and remanufacturers will simply provide quarterly statements of all emission results obtained during the previous quarter, including a summary table of any engine family that has completed testing during that quarter. At the Administrator's request, a manufacturer or remanufacturer would be required to provide documents used in the locomotive procurement process, including criteria used in the procurement screening process and information from the end user(s) related to use and maintenance of the selected locomotives, and information about locomotives, if any, that were deleted from the program.

If an in-use nonconformity is found to occur in an engine family, EPA will work with the manufacturer or remanufacturer to implement a remedial action on a voluntary basis. If the manufacturer or remanufacturer does not implement a remedial action, the Administrator may order one pursuant to section 207(c) of the Act. Under this section, as applied to locomotives according to section 213(d), the Administrator has authority to require manufacturers or remanufacturers to submit a plan to remedy applicable locomotives or locomotive engines if EPA determines that a substantial number of a class or category of properly maintained and used locomotives or locomotive engines do not conform with the requirements prescribed under section 213 of the Act. Other requirements applicable in the event of a determination under section 207(c) of the Act include submittal of the manufacturer's remedial plan for EPA approval, procedures for notification of locomotive owners, submittal of quarterly reports on the progress of the recall campaign, and procedures to be followed in the event that the manufacturer requests a public hearing to contest the Administrator's finding of nonconformity. If a determination of nonconformity with the requirements of section 207(c) of the Act is made, the manufacturer or remanufacturer would not have the option of an alternate remedial action, and an actual recall would be required.

EPA requests comment regarding the circumstances under which alternatives to conventional recall should be considered as a voluntary action, prior to EPA making the formal determination of nonconformity. EPA contemplates that recall of locomotives will be the primary method for addressing in-use nonconformities. However, the Agency recognizes that in some cases, the actual recall and repair of locomotives could impose severe financial hardship on a manufacturer or remanufacturer if the necessary repair was extremely complex and expensive, and could also impact railroads when locomotives are required to be taken out of service for those repairs. In such cases, and assuming that the Administrator had not yet rendered a determination of nonconformity, alternatives to traditional recall would be strongly considered. These alternatives would be required to have the same or greater environmental benefit as conventional recall and to provide equivalent incentives to manufacturers and remanufacturers to produce locomotives which durably and reliably control emissions. EPA requests comment on how manufacturers or remanufacturers who have repeated nonconformities should be handled as compared to those who have only occasional nonconformities. The Agency invites comment on the factors the Agency should consider in evaluating proposed alternatives.

EPA recognizes the need to develop a testing program to provide assurance that in-use locomotives are meeting emissions standards while taking into account the burden of in-use testing on railroads and locomotive manufacturers and remanufacturers. EPA requests comments on its proposed in-use testing program as well as specific proposals for in-use locomotive test schemes that will address the concerns described above, and possible alternative designs for in-use testing programs (such as independent third party testing paid for by manufacturers and/or remanufacturers) or other effective enforcement mechanisms. However, any

alternatives must produce a compliance scheme that provides EPA with an enforceable program which provides substantial incentive to manufacturers and remanufacturers to produce clean, durable locomotives.

EPA envisions the second major component of the proposed in-use compliance program, the railroad in-use test program, as a screening program whereby relatively large numbers of locomotives would be tested. Section 114 of the Act provides EPA authority to collect information, require records to be kept, and inspect and monitor emissions. Pursuant to its authority under this provision, EPA proposes an in-use testing program that applies to certain owners and operators of locomotives covered by the proposed emissions standards. Section 114 states, in relevant part, that, for the purposes of ''carrying out any provisions of (the Act),'' EPA may require any person who owns or operates any emission source to establish and maintain records, sample emissions (according to specifications prescribed by the Administrator), and to provide ''such other information as the Administrator may reasonably require.'' [16]

The proposed in-use testing program is necessary to ensure that locomotives will remain in reasonable compliance with emissions standards during the period of preemption beyond their useful lives in order to ensure that their emissions do not significantly increase during such period of preemption, when certain state standards would be prohibited. Railroad operators are clearly owners or operators of an emissions source, and therefore, pursuant to section 114, EPA has authority to require railroad operators to sample the emissions from their locomotives, to report the results of such testing to EPA, and to provide other information that can be reasonably required. In addition to providing authority to require such in-use testing, section 114 explicitly authorizes EPA to require that such testing be performed according to ''such procedures or methods, at such locations, at such interval, during such periods and in such manner as the Administrator shall prescribe.'' EPA solicits public comment on its authority to require railroad operators to conduct in-use testing according to the requirements specified below.

[16] An exemption from Section 114 authority is provided for carrying out provisions of Title II of the CAA with respect to manufacturers of new motor vehicles and new motor vehicles engines. The proposed in-use testing program would not impose any testing requirements on such manufacturers.

This railroad operator in-use testing program would be intended to evaluate the emissions performance of locomotives which have reached or exceeded their useful lives, as defined by federal regulations. The proposed railroad in-use testing program would apply at the end of useful life, where the manufacturer/remanufacturer in-use testing program leaves off. The data will serve to indirectly evaluate emissions performance at the end of useful life as well as provide information about emissions during the time period for which many state standards or requirements would be preempted because of their expected effect on how manufacturers and remanufacturers design new locomotives and new locomotive engines. The tests would be carried out on 10 percent of Class I railroad locomotives which have reached the end of their full useful lives each year. The number of tests a given railroad would have to perform for a given year would be determined based on the number of locomotives that railroad has that have reached the end of their useful lives at the beginning of that year. However, the actual locomotives tested would be randomly selected throughout the year from any that have reached the end of their useful lives, not necessarily only from those that were counted at the beginning of the year to determine the number of tests required (*i.e.,* they could include locomotives which reached the end of their useful lives during that year). EPA proposes that it have the authority to lower the number of tests required if the testing costs are substantially higher than EPA estimates or if the testing shows that in-use locomotives have consistently good emissions performance beyond their useful lives. Testing is proposed to be limited to Class I railroads because they operate most of the locomotives, and the costs to smaller railroads of conducting in-use tests would be very high and would likely provide information that merely duplicates that received from Class I railroads.

The locomotives tested would be randomly selected by the railroads, and the tests could be performed in conjunction with a Federal Railroad Administration inspection in order to minimize downtime. Testing of any locomotive will not take place until it has reached the end of its useful life. This is because the manufacturer and remanufacturer in-use testing program would provide for testing in-use locomotives up to the end of useful life. The testing, to be performed at all notches, would be done using field quality measurement equipment. NO_X, CO, CO_2 and HC concentrations are proposed to be measured, as well as smoke opacity. These concentrations will be compared to the concentrations measured during certification testing. EPA recognizes that effective HC measurement of diesel engine exhaust requires a heated flame ionization detector (HFID) as opposed to a standard, or unheated FID. Such units are more expensive and more difficult to maintain than unheated FIDs, making them less suitable for use as field quality equipment. The Agency is requesting comment on whether the requirement to use an HFID is problematic, and whether the requirement for HC measurement should therefore be dropped. If so, would this compromise the effectiveness of the in-use short test?

The Agency proposes that the railroads be required to submit quarterly reports summarizing all emissions testing performed. If a particular engine family had consistent problems in all the railroads' fleets then it would likely be considered a problem with the design or manufacture of the locomotives. Since the engines tested under this proposed program would be past their useful lives, no direct enforcement action could be taken against the manufacturer or remanufacturer in the event of a failure. However, EPA could use this information to target engine families to be tested in the manufacturer/remanufacturer in-use testing program. If the failures were limited to one railroad's fleet then it would suggest the possibility of tampering or malmaintenance, which could be enforceable under the tampering prohibition, discussed later in this notice.

The Agency is considering, as an option, an alternative in-use test program proposed by the railroads. Under this option, the railroads would perform testing using the full FTP (with the exception of PM measurement) instead of the test procedure described above. However, tests would be performed at a much lower sampling rate (e.g., one percent) than the ten percent the Agency is proposing. EPA requests comment on this alternative in-use testing scheme. EPA also requests comment on a second alternative whereby a smoke test would be used with the number of locomotives tested being much greater than the ten percent in the proposed railroad in-use testing program. EPA specifically requests comment on a program in which the Agency would require that every locomotive covered by today's proposed standards be tested annually by its

owner/operator for smoke emissions. Such a requirement would apply throughout a locomotive's useful life, as well as beyond it, in contrast to the previously discussed railroad testing programs, which only require testing after a locomotive has reached the end of its useful life. Under such a program, the railroads would be required to maintain the test result records and make them available to EPA upon request. Finally, EPA requests comment on combinations of the previously discussed options, as well as other alternative in-use testing schemes.

The Agency specifically requests comments on the merits of replacing the proposed two-component (i.e., manufacturer and railroad) in-use testing program with a unified program that is conducted entirely by the railroads. Such a program could potentially be significantly more convenient for all parties involved, especially for certificate holders that do not have their own emission testing facilities. On the other hand, such a program could be unreasonably burdensome to the railroads. Furthermore, manufacturers have historically been very skeptical of the quality of emission testing performed by third parties, and thus might challenge any EPA finding of nonconformity based on such data. Finally, if the Agency does not finalize a unified in-use testing program, should it create provisions that would specifically allow it to be adopted voluntarily by the railroads?

D. Test Procedures

Due to the fundamental similarity between the emissions components of locomotive engines and on-highway heavy-duty diesel engines, the test procedures being proposed today are based on the test procedures previously established for on-highway heavy-duty diesel engines in 40 CFR part 86 subparts D and N. Specifically, the raw sampling procedures and many of the instrument calibration procedures are based on subpart D, and the dilute particulate sampling procedures and general test procedures are based on subpart N. The most significant aspects of the proposed test procedures are described below. Also, as with EPA's test procedures for other engines, the regulations would allow, with advance EPA approval, alternate test procedures demonstrated to yield equivalent or superior results.

D.1. Federal Test Procedure (FTP) for Locomotives

EPA proposes to use a steady-state test procedure to measure gaseous and particulate emissions from locomotives; that is, a procedure wherein measurements of gaseous and particulate emissions are performed with the engine at a series of steady-state speed and load conditions. Measurement of smoke would be performed during both steady-state operations and during periods of engine accelerations between notches. Specifically, the engine would be started, if not already running, and warmed up to normal operating temperature in accordance with warm-up procedures for in-service locomotives as specified by the manufacturer. For locomotive testing, the engine would remain in the locomotive chassis, and the power output would be dissipated as heat from resistive load banks (internal or external). The engine would be considered to be warmed up, and ready for emissions testing when coolant and lubricant temperatures are approximately at the mid-points of the normal in-service operating temperatures for these materials as specified by the manufacturer. After the engine has reached normal operating temperature, the engine would be operated at full power (i.e., highest power notch) for 5 minutes, then returned to idle, or low idle if so equipped. The 5-minute period at full power is intended to ensure that the engine is at a realistic operating temperature, and to improve test repeatability. Measurement of exhaust emissions, fuel consumption, inlet and cooling air temperature, power output, etc. would then begin, and would continue through each higher power operating mode to maximum power. In the event of test equipment failure during data acquisition, testing may be resumed by repeating the last test mode for which valid data was collected, provided the engine is at normal operating temperature. The minimum duration of the initial test point (idle or low idle), and each test point when power is being increased is 6 minutes, with the exception of the maximum power point, where the minimum duration of operation is 15 minutes.

Concentrations of gaseous exhaust pollutants are proposed to be measured by drawing samples of the raw exhaust to chemical analyzers; a chemiluminescence analyzer for NO_X, a heated flame ionization detector (HFID) for HC, and nondispersive infrared (NDIR) detector for CO and CO_2. Smoke would be measured with a smoke opacity meter, and particulates would be measured by drawing a diluted sample of the exhaust through a filter and weighing the mass of particulate collected. The Agency is not proposing to establish dilute sampling procedures for the total exhaust stream for gaseous and particulate emissions because it is not necessary to dilute the total exhaust stream prior to sampling for HC, CO_2, CO, NO_X, and particulate during steady state operations. In addition, the equipment that would be required for dilute sampling is very large and expensive. Not including such provisions would not preclude the use of dilute sampling as an alternative procedure. EPA requests comments regarding the need for dilute sampling procedures. In order to ensure good reliability of test results, EPA is also proposing calibration and verification requirements similar to those applicable to on-highway heavy-duty engines, and requests comments regarding the proposed methods and frequency of these requirements. It should also be noted that the Agency is in the process of making minor technical revisions to the particulate measurement procedures of 40 CFR 86, and that many of these technical amendments would be relevant to measurement of particulate emissions from locomotives. These amendments are expected to be finalized later this year. The Agency will incorporate these changes in the final rule for locomotives, as appropriate.

The Agency is proposing that the NMHC, alcohol and aldehyde measurement procedures that are currently applicable to on-highway natural gas- and methanol-fueled engines (40 CFR part 86) be used for natural gas- and alcohol-fueled locomotives. EPA recognizes, however, the possibility of unforeseen problems that could result during the use of such procedures with locomotive engines, especially with alcohol-fueled locomotives (which currently do not exist). Among the potential problems are the lack of information on whether the specifications for dilute alcohol and aldehyde sample temperatures and flow rates are appropriate for locomotives, as well as the complete lack of such specifications for raw exhaust. At this time, EPA believes that it is appropriate to specify the on-highway procedures in the absence of definitiveness of potential problems, but may reconsider alcohol and aldehyde sampling issues on a case-by-case basis, should alcohol-fueled locomotives come into use.

EPA's experience in testing engines is that it is difficult to accurately measure engine power at extremely low levels. Thus, EPA is considering, and requests comment on, assigning engine power levels for idle and dynamic brake

modes, expressed as a percent of the locomotive's rated power (*e.g.*, 0.2% at idle and 1.0% at dynamic brake), and not requiring that it be measured. These assigned levels, rather than measured levels, would be used in the emissions calculations. This approach would alleviate concerns expressed by industry about the ability to accurately measure engine power output during idle and dynamic brake operation. This would also provide a regulatory incentive to reduce fuel consumption in these two modes since the engine power used in the calculations for these modes would always be the same. This would in turn reduce total mass emissions. EPA requests comment on all aspects of this option, including what levels would be appropriate for the assigned power levels. The Agency also requests comments as to whether a similar approach should be used to provide an incentive for the development of an automatic shutdown mechanism that could shut off an engine automatically after some extended period of idling. One such approach would be to reduce the weighting factor for the idle *emission rate*, for engines equipped with automatic shutdown mechanisms, but use the higher *power* weighting factor that is specified in the proposed regulations. This approach would account for the emissions benefits of a shutdown mechanism whereas the proposed test procedures do not.

EPA is proposing that test conditions such as ambient test temperature and pressure be fully representative of in-use conditions. Specifically, the Agency is proposing that locomotives comply with emissions standards when tested at temperatures from 45° F to 105° F and at both sea level and high altitude conditions (*i.e.*, up to 7,000 feet above sea level). The Agency is not proposing that the test conditions include temperatures below 45° F because the Agency does not believe that there are significant benefits from such a requirement for diesel locomotives as compared to the benefits from controlling cold temperature emissions from gasoline-fueled vehicles (where EPA does currently have cold temperature requirements) since diesel engines are not associated with low temperature emissions problems.

The Agency is not proposing specific correction factors that would be used to account for the effects of ambient test conditions, such as temperature or humidity, on emission rates. In existing mobile source programs, EPA does require that NO_X emission rates be corrected to account for the effect of ambient humidity. (Water present in the intake air is known to lead to lower NO_X emissions, as it absorbs energy from the combustion process and decreases peak combustion temperatures.) EPA considered using the NO_X-humidity correction factor that is currently being used for highway and general nonroad diesel engines (40 CFR parts 86 and 89), but concluded that the data upon which that correction factor was based is not adequate for this rulemaking. In particular, EPA has concerns about the applicability of data from older pre-control highway engines to current and future locomotives that incorporate NO_X-reduction technologies. More importantly, however, the data is inappropriate as a basis for such correction factors for locomotives because the range of test conditions being proposed for locomotives is much broader than was used in the collection of that data. EPA is in the process of developing revised correction factors for inclusion in the final rule and will place any relevant information in the docket as soon as it is available. These would be used to correct emission rates to typical ambient summer conditions of 86 °F and 60 grains of water per pound of dry air. EPA requests comments on the need for any correction factors, especially a NO_X correction factor, and whether proposed the conditions to which emissions would be corrected are appropriate. Commenters supporting the use of correction factors are encouraged to include test data that could be used to develop meaningful correction factors for future locomotives.

The Agency is proposing test fuel specifications for compliance testing (certification, PLT and manufacturer/remanufacturer in-use testing) which are consistent with test fuel specifications for on-highway heavy-duty engine certification testing, with the exception of the sulfur specification. In the case of the sulfur specification, EPA is proposing a lower limit of 0.3 weight percent,[17] and is proposing that there be no upper bound for the sulfur level. This lower limit is intended to approximate worst case in-use conditions; in those cases where in-use locomotives are operated on low sulfur on-highway fuel, particulate emissions entering the atmosphere can be expected to be lower than levels measured when using the certification test fuel. EPA is taking this approach because there is no reason to believe that in-use locomotives will use only low sulfur on-highway fuel, especially given the potential price differences between low and high sulfur diesel fuels, and potential availability problems in some areas of the country.

Since the proposed test for the railroad in-use testing program is not the proposed FTP, and railroad in-use testing carries no liability with it, there is less of a need to use the fuel specified for certification for this railroad in-use testing. Given the cost and inconvenience of using a specific fuel for in-use testing, EPA is not proposing any fuel specifications for in-use railroad testing, and will allow the railroad testing to be done whatever fuel is in the locomotive's tank at the time of testing.

The Agency recognizes that the potential exists for future locomotives to include additional power notches, or even continuously variable throttles, and is proposing alternate testing requirements for such locomotives. Using the proposed FTP for such locomotives would result in an emissions measurement that does not accurately reflect their in-use emissions performance because it would not be a reasonable representation of their in-use operation. Thus, locomotives having additional notches would be tested at each notch, and the mass emission rates for the additional notches would be averaged with the nearest ''standard'' notch. Locomotives having continuously variable throttles would be tested at idle, dynamic brake, and 15 power levels assigned by the Administrator (including full power), with average emission rates for two power levels (excluding full power) assigned to the nearest ''standard'' notch. The 15 power levels proposed represent one level for full power and two, to be averaged, for each of the seven intermediate power levels used on current locomotives. The Administrator would retain the authority to prescribe other procedures for alternate throttle/power configurations.

D.2. FTP for Engines

The proposed test procedures are intended primarily for the testing of locomotives, rather than locomotive engines. However, EPA does recognize that engine testing will be reasonable in some cases, such as data collection from a development engine. For these cases, the engine would be mounted on a stand, with its crankshaft attached to an electric dynamometer. Because the Agency believes that it is critical that engine testing be as representative of actual locomotive operation as can practically be achieved, it is proposing that important operating conditions such as engine speed, engine load, and the temperature of the charge air

[17] Typical untreated (high sulfur) nonroad diesel fuel contains about 0.2–0.5 weight percent sulfur.

entering the cylinder be the same as in a locomotive in use (within a reasonable tolerance limit).

D.3. Short Test for Locomotives

The Agency is also proposing a short test to be used by the railroads for in-use testing. This test procedure would be similar to the FTP test, but would not require measurement of the fuel flow rate and engine power output (which require mechanical work on the locomotive), or particulate emissions (which requires a fairly expensive sampling system). Also, less precise analytical equipment would be allowed. These allowances are all included to minimize testing time and cost. This test would not allow direct calculation of the mass emission rates, but rather, would be limited to measurement of concentrations which would be compared to concentration measurements made during certification testing. If the fuel flow rate and power output of the engine are both assumed to be the same as measured at certification, however, approximate mass emission rates could be determined.

E. Railroad Requirements

Historically, EPA has not adopted specific federal requirements for end users of regulated mobile source engines and vehicles. However, there are some factors unique to the railroad industry and to the proposed regulation of locomotives that require the railroads to take a more active role in assuring compliance with today's proposed standards. These characteristics include the proposed broad preemption of state regulation, the industry practice of periodically remanufacturing locomotives and the proposed definition of such locomotives as new, and the unique relationship between the locomotive manufacturers and the railroads.

As discussed in the section on compliance, EPA is proposing two in-use testing programs for locomotives: one conducted by manufacturers and remanufacturers, and another conducted by railroads. For the first program, manufacturers and remanufacturers would need to obtain test locomotives from the railroads. EPA expects that the railroads will cooperate with the manufacturers in order to provide locomotives for this testing. The Agency recognizes that the railroads have a strong financial interest in keeping their locomotives in revenue service and minimizing scheduling disruptions, and that this could make it difficult for manufacturers to procure locomotives for in-use testing. Thus, as was mentioned in the in-use testing program discussion, EPA is proposing a relatively long period of time in which the in-use testing can be done, as well as a fairly small number of locomotives required to be tested, in order to minimize such disruptions. EPA expects the railroads to provide reasonable assistance to the manufacturers and remanufacturers in support of the in-use testing program. However, if a manufacturer or remanufacturer is unable to obtain a sufficient number of locomotives for testing, the Agency may require that the railroads do the testing themselves, under the authority of section 114 of the Act. In the second program, the railroads will be required to conduct their own in-use testing, as discussed above in the section on in-use testing programs.

EPA is proposing additional provisions to avoid unnecessary burdens on smaller railroads. First, the in-use testing requirement would apply only to Class I railroads. The potential benefits of obtaining extensive in-use test data from non-Class I railroads do not justify the costs that would be incurred if each railroad was required to maintain an emissions testing facility, especially in light of the fact that the information provided by the non-Class I railroads would be duplicative of that provided by the Class I railroads. EPA is also proposing to exempt the smallest railroads (as defined later in the paragraph) from compliance with the Tier 0 standards for locomotives that have never been brought into compliance. More specifically, these railroads would be allowed to rebuild their existing locomotives and locomotives that they purchased after the effective date of the Tier 0 standards according to their current practice, provided such locomotives were not originally manufactured or previously remanufactured to comply with federal emission standards. This exemption would allow these railroads to avoid the costs of converting a pre-existing, noncomplying locomotive into one which complies with the Tier 0 standards. All locomotives already certified to the Tier 0 standards, either by that railroad or a previous owner, would be required to remain in compliance with EPA regulations each subsequent time that they are remanufactured, since this would be much less expensive than converting a noncomplying locomotive into one which complies with the Tier 0 standards. As is discussed in the RSD, the cost of remanufacturing a locomotive so that it complies with the Tier 0 standards is much greater the first time it is brought into compliance as compared to subsequent remanufactures due to the one-time costs associated with the installation of such things as charge air cooling systems. The Agency believes that such an exemption is appropriate since the emissions impact of such an exemption would be minimal. As discussed in the RSD, such an exemption would likely amount to less than one percent of emissions initially, and would decrease and eventually disappear as the fleet turns over to Tier I and Tier II locomotives. EPA is proposing that this exemption would be limited to railroads that have 500 or fewer employees and are not owned by companies that the Small Business Administration would not classify as small businesses, and requests comments as to whether this criteria is appropriate, and whether some other criterion, such as annual revenue, should be used. The Agency requests comment on how it should treat holding companies which own small railroads with respect to this exemption. All railroads taking advantage of this exemption would also be exempted from the reporting requirements listed above. The Agency requests comment on how such exempted locomotives should be treated with respect to the preemption of certain state standards or requirements, as discussed later in the preemption section.

EPA is proposing that any locomotive operator that knowingly fails to properly maintain (as defined by EPA at the time of certification) a locomotive subject to this regulation would be subject to civil penalties for tampering. EPA is proposing that locomotive operators should be required to perform a minimum amount of maintenance specified by manufacturers and remanufacturers for components that critically affect emissions performance. EPA is proposing to limit the frequency and type of maintenance that could be required by manufacturers and remanufacturers, and to make such requirements subject to the Administrator's approval. Examples of the type of maintenance that could be required are replacement of fuel injectors and air filters, and cleaning of turbochargers. The Agency believes that this requirement is appropriate given the high standards of maintenance and repair observed in the railroad industry, the reasonable expectation by locomotive manufacturers and remanufacturers that this maintenance will be done, and the importance of such maintenance for ensuring proper emissions performance.

The Agency recognizes that, while many railroads own the locomotives that they operate, there is also a substantial amount of leasing of locomotives within the railroad industry. The Agency is proposing that the railroad requirements described in this section apply to the railroads (i.e., the locomotive operators), but requests comment on whether these requirements would more appropriately be applied to the locomotive owners in cases where the owner an operator are not the same entity.

F. Miscellaneous

F.1. Liability for Remanufactured Locomotives and Locomotive Engines

As was previously discussed in the engine family certification section, EPA expects that in some cases locomotives and locomotive engines may be remanufactured using a remanufacture kit that was developed and manufactured by one entity but installed by another. In these cases, it is most likely that the kit manufacturer will be the certificate holder.[18] For example, one of the primary locomotive manufacturers could sell a remanufacture kit (to possibly include a collection of replacement parts or parts specifications, along with installation and maintenance instructions) to a railroad that would use it to remanufacture one of its locomotive engines. EPA believes it is critical to clearly define which entity would then be liable for the emissions performance of that remanufactured locomotive engine. As a starting point, the Agency considered how it handles the installation of aftermarket alternative fuel conversion systems for on-highway vehicles.[19] With such conversions, EPA holds the certificate holder liable for the in-use performance of the vehicles. EPA is proposing a similar presumptive liability approach for locomotive remanufacturing. Specifically, EPA is proposing that the primary liability for the in-use emissions performance of a remanufactured locomotive or locomotive engine would be with the certificate holder. In cases where the certificate holder and installer are separate entities, the certificate holder would be required to provide adequate installation instructions with the kit. Since the primary liability would be presumed to apply to the certificate holder, the certificate holder would also have an incentive to ensure that the kits were being properly installed. Ultimately, the installer would be liable for improper installation under the proposed tampering prohibitions. It should be noted that such an installer would still be considered to be a remanufacturer, and thus would also be potentially liable under other provisions of this part and of the Act. The Agency requests comment on this proposed liability scheme for remanufactured locomotives and locomotive engines.

F.2. Defect Reporting

EPA is proposing that a manufacturer or remanufacturer of locomotives or locomotive engines be required to file a defect information report whenever the manufacturer or remanufacturer identifies the existence of a specific emission-related defect in a locomotive, or locomotive engine. These proposed reporting requirements are similar in structure to the requirements found in the on-highway and nonroad over 37 kW programs for compression ignition engines,[20] except that EPA proposes that a report be filed when a single locomotive, rather than 25 (as in the on-highway and over 37 kW programs) is found to be defective. During the rulemaking in which the defect reporting requirements (including the threshold of 25) were adopted for on-highway vehicles and engines (42 FR 28123), the Agency considered a lower threshold, but decided that it would be too burdensome. However, there are three reasons why a lower threshold would be appropriate for locomotives. First, since reliability is a very critical concern for locomotive purchasers, locomotives and locomotive engines tend to be very carefully manufactured. As such, the number of emission-related defects that would actually occur is expected to be small. Second, the number of locomotives produced under a single certificate will be much smaller for locomotives than for most on-highway or nonroad engine families. While 25 would be a very small fraction of a light-duty engine family of 100,000 vehicles, it could be one-quarter or more of the annual production volume of a locomotive engine family. Finally, given the size of locomotive engines (30 to 40 times the horsepower of a typical light-duty vehicle), and their long service lives (up to one million miles between rebuilds), the environmental impact of even a single defective engine could easily be much more significant than 25 defective light-duty vehicles.

F.3. Importation of Nonconforming Locomotives

EPA is proposing to prohibit the importation of locomotives and locomotive engines that are originally manufactured after the effective date of this rule, but are not covered by a certificate of conformity, except as provided below. The proposed prohibition is similar to existing regulations for the importation of nonconforming motor vehicles, motor vehicle engines (on-highway program), large (over 37 kW) compression-ignition nonroad engines and other regulated mobile sources.

Under EPA's current motor vehicle regulations, Independent Commercial Importers (ICIs) are allowed to import uncertified vehicles and engines into the U.S. but are required to comply with the same requirements that are applicable to motor vehicle manufacturers (*e.g.*, certification, testing, labeling, warranty, recall, maintaining records). EPA provides for an ICI program for motor vehicles and motor vehicle engines because significant importation of such vehicles and engines occurs. EPA does not anticipate, however, any importation of nonconforming locomotives and locomotive engines. Therefore, an ICI program is not necessary for locomotives or locomotive engines, and EPA is not proposing such a program.

This proposal includes certain exemptions to the prohibition on importing nonconforming locomotives and locomotive engines under the authority of section 203(b) of the Act. These include temporary importation exemptions for repairs and alterations, testing, precertification, display, national security, and certain locomotives and locomotive engines shown to be identical, in all material respects, to their corresponding United States certified versions. In previous rulemakings, EPA has provided for an exemption for motor vehicles and engines greater than 20 original production years old. However, EPA is not proposing a similar exemption for locomotives and locomotive engines. Since it is normal industry practice for locomotives to be in service for more than 40 years, these older locomotives constitute a large fraction of the in-use fleet, much larger than do motor vehicles over 20 years old. The Agency is proposing emission standards that will apply to all locomotives originally manufactured on or after January 1, 1973 when those locomotives and locomotive engines are remanufactured, including those more than 20 original production years old. It would be

[18] For the purposes of this discussion, EPA is proposing that the certificate holder for a remanufacture kit be termed the remanufacturer. The entity which installs the remanufacture kit would be termed the installer. The remanufacturer can also be the installer.

[19] 59 FR 48472, Sept. 21, 1994 and 59 FR 50042, Sept. 30, 1994.

[20] 40 CFR part 89, subpart T.

inappropriate for EPA to allow the importation of nonconforming locomotives simply because they are more than 20 years old. EPA requests comment on the absence of such an exemption.

Importation regulations are issued by both EPA and the United States Department of the Treasury (Customs Service). The citation for United States Customs Service, Department of Treasury regulations governing import requirements is reserved. The citation will be inserted upon promulgation by the United States Customs Service of the applicable regulations.

F.4. Tampering

EPA is proposing provisions that would prohibit any person from tampering with any locomotive or locomotive engine emission-related component or system installed on or in a locomotive or locomotive engine in accordance with EPA regulations. These provisions would help ensure that in-use locomotive engines remain in certified configurations and continue to comply with the applicable emission standards. All persons would be prohibited from removing or rendering inoperative any emission-related device or element of design installed on or in a locomotive or locomotive engine. These provisions would include a prohibition on the adjustment of engine parameters such as injection timing outside of the specified ranges. Knowingly failing to maintain emissions-critical components would also be considered tampering. The manufacturing, sale, and installation of a component intended for use with a locomotive or locomotive engine, where a principal effect of the component is to bypass, defeat, or render inoperative an emission-related device or element of design of the locomotive or locomotive engine would also be prohibited.

EPA expects that the implementation of these provisions would be generally similar to the implementation of existing on-highway tampering provisions.[21] The prohibition of tampering would extend beyond a locomotive's useful life, until the locomotive or engine is scrapped. The prohibition on tampering would begin once a locomotive becomes subject to today's proposed regulations, either by being freshly manufactured or by being remanufactured. Thus, any replacement of parts (including complete rebuilds) which cause a locomotive to exceed applicable standards or FELS, or any adjustments to the engine outside of the range specified in the application for certification (such as changing injection timing) would be considered tampering even if performed beyond the locomotive's useful life.

F.5. Nonconformance Penalties

Pursuant to section 206(g)(1) of the CAA, the on-highway heavy-duty engine emission compliance program provides that, in certain cases, engine manufacturers whose engines cannot meet emission standards may receive a certificate of conformity and continue to sell their engines provided they pay a nonconformance penalty (NCP). EPA has concluded that the use of NCPs is not warranted for locomotives and locomotive engines. NCPs are designed to provide relief for engine manufacturers who are technology developing laggards in the emission control technology needed to meet technology forcing standards.[22] Based on the levels of the standards proposed in this NPRM, EPA has concluded that there will be no locomotive or locomotive engine manufacturers or remanufacturers that are unable to develop the necessary emission control technology to bring their locomotives and locomotive engines into emission compliance. Thus, the Agency is not proposing any NCPs. EPA requests comment on the possibility of there being a manufacturer or remanufacturer that would be unable to comply with the proposed standards.

F.6. Emission Warranty

EPA is proposing an emission warranty period for all locomotive and locomotive engine emission-related parts equivalent to the full useful life of the locomotive or locomotive engine. Specifically, the manufacturer or remanufacturer must warrant that the locomotive, locomotive engine, or remanufacture kit is designed, built and equipped to conform, at the time of sale or time of return to service following remanufacture, with all applicable regulations, and that it is free from defects that would cause nonconformity in use. The warranty is not required, however, to cover normal maintenance such as cleaning or replacing fuel injectors. EPA requests comment on how to treat the unscheduled maintenance of other components, such as power assemblies or turbochargers, that are often replaced during the useful life of a locomotive. These warranty provisions are authorized by section 207(a) of the Act, which applies to the locomotive standards pursuant to section 213(d). EPA is not proposing any regulations at this time under section 207(b) of the Act, which directs EPA to establish special test procedures for on-highway vehicles and engine, if certain conditions are met, to ascertain whether vehicles and engines comply with applicable federal emissions standards for their useful life. If the Agency were to establish test procedures under this provisions, manufacturers would be required to warrant that their vehicles and engines would pass such tests. Furthermore, EPA believes that states would not be preempted from establishing an in-use emissions testing program for locomotives based on the performance warranty provisions of section 207, provided that it used federally-specified test procedures and pass/fail criteria. In such a situation, compliance with the performance warranty based on state testing would in effect be a federal requirement.

While a shorter warranty period may be adequate to ensure gross failures to performance systems and components do not occur, longer warranty periods are necessary to guard against emission control system failures. The warranty period must be of sufficient length to give the manufacturer or remanufacturer proper incentive to provide durable emission control equipment. EPA requests comments on the appropriateness of the length of the warranty period. The proposed warranty periods ensure the locomotive or locomotive engine manufacturer or remanufacturer has sufficient incentive to build emission-related systems that work and last. Further, it gives the locomotive or locomotive engine owner/operator the incentive to get emission-related system failures repaired, since failures to the emission control system might not always affect the ability of a locomotive or locomotive engine to continue to work. Should the warranty period be too short, a large number of noncomplying locomotives and locomotive engines could continue to produce excess emissions. EPA requests comment on how it should integrate these warranty provisions with the proposed required maintenance provisions.

An advisory parts list issued by EPA on July 15, 1991 gives manufacturers notice of EPA's current view concerning the emission-related parts that are covered by warranty under section 207(a). Given the similarity between the basic design of locomotive engines with that of other diesel engines, EPA intends to apply an updated version of this list to locomotives and locomotive engines.

[21] Office of Enforcement and General Counsel; Mobile Source Enforcement Memorandum No. 1A, June 25, 1974.

[22] See 40 CFR 86.1103–87.

A copy of this list is in the docket for this rulemaking.

F.7. Locomotives From Canada and Mexico

This proposal applies to new locomotives and locomotive engines which are sold or introduced into commerce in the United States. The Agency is concerned about the possibility of nonconforming locomotives from Canada and/or Mexico operating extensively within the U.S., under the ownership of either a U.S. or foreign railroad. EPA requests comment on EPA's legal authority to limit such activity. Comments should address whether EPA should limit export exemptions of nonconforming locomotives, since locomotives used in Canada and Mexico are often produced in the U.S, and whether the Agency would have the authority to do so. EPA is also seeking to address this issue with the North American Automotive Standards Council by exploring the potential for Canada and Mexico to adopt the same emissions standards for locomotives that EPA ultimately adopts. The Agency believes that the most effective solution to this potential problem would be for the Canadian and Mexican governments to adopt comparable (or identical) standards and other requirements for locomotives.

F.8. Aftermarket Parts

As is the case for on-highway vehicles and engines, there is currently an aftermarket parts market for locomotive parts. For on-highway vehicles and engines, the Agency currently has a two-fold approach to assuring that aftermarket parts do not degrade the emissions performance of a certified vehicle or engine configuration. First, there is a voluntary aftermarket parts certification procedure contained in 40 CFR part 85, subpart V, which allows aftermarket parts manufacturers to certify the emissions performance of their parts. Second, for those parts which are not certified under this voluntary program the Agency applies the principles of EPA Mobile Source Enforcement Memorandum No. 1A, which outlines the Agency's position on tampering with respect to the use of replacement components on certified vehicles and engines.[23] EPA is proposing that this approach to aftermarket parts be extended to locomotive parts as well, and requests comment on whether this approach is sufficient to assure the proper emissions performance of locomotives which utilize aftermarket parts.

The Agency is also requesting comments on whether it should establish provisions that would allow suppliers of aftermarket parts and parts remanufacturers to sell some emission-related parts for locomotive remanufacturing without being part of a certified remanufacture kit. Such provisions could create an exemption which would allow Class II and Class III railroads to have their locomotives remanufactured without a certificate of compliance, provided that the remanufacture resulted in the locomotive being returned to a previously certified configuration. If EPA were to establish such an allowance, should it limit it based on the size of the railroad, the size of the supplier or remanufacturer, or the number of such remanufactures performed annually? What, if any, reporting and recordkeeping requirements would be necessary to ensure compliance with the provisions? Finally, what would be the economic and environmental impacts of such provisions? EPA also requests comment on a streamlined certification program for modified kits. Such a program would allow an entity to apply for a modified certificate which would allow the use of parts other than those included in a certified kit. Such a certificate would only be granted with the permission of the original certificate holder, and the holder of the modified certificate would then assume all liability for locomotives remanufactured under the modified certificate. EPA requests comment on this and any other options for the streamlined certification of remanufactured locomotives.

F.9. Onboard Diagnostics

EPA has recently established regulations[24] that require light-duty vehicles to be equipped with onboard diagnostic (OBD) systems that indicate to the operator any occurrence of specific emission control failures. While EPA has not included any such provisions in the regulations being proposed today, it is requesting comment on the potential and need for such diagnostics for locomotives. EPA believes that it would be inappropriate to require that such systems be retrofitted to existing locomotives due to the cost, but that it may be appropriate to require them on freshly manufactured locomotives (Tier I and Tier II), which are expected to have advanced onboard computer displays for other purposes. Commenters are encourage to address the following issues, as well as any other relevant issues: (1) The extent to which easily measured parameters such as engine exhaust temperature or pressure drop across an air filter correlate with emissions performance; (2) the feasibility of monitoring injection timing; (3) how such OBD systems should be considered with respect to required maintenance; and (4) the extent to which advanced OBD systems affect the appropriate frequency of in-use testing.

G. Preemption

EPA is proposing to define through regulation those state or local standards or requirements that are preempted pursuant to section 209(e)(1)(B) of the Clean Air Act. Section 209(e) directs EPA to promulgate regulations to implement that subsection. To implement section 209(e), and specifically section 209(e)(1)(B), it is appropriate for EPA to interpret these provisions in light of other provisions in the statute as well as relevant case law and circumstances specific to locomotives. EPA believes that establishing regulations to define the scope of preemption under section 209(e)(1)(B) and providing EPA's interpretation of the statute and implementing regulation would provide clear guidelines to states,[25] and certainty to industry. EPA believes that because of the interstate nature of locomotive travel and the fact that regulation of locomotives is generally national in scope, it is especially important to provide clarity and certainty to the industry and states regarding preemption of state and local emission control regulation of locomotives.

Under the regulations proposed today, states would be preempted from adopting and enforcing standards or other requirements relating to the control of emissions from new locomotives and new engines used in locomotives. The proposed regulation defines the period of time following the manufacture or remanufacture of a locomotive or engine during which certain state controls would be explicitly preempted under this criteria. This preemption period would be defined as the useful life plus 25 percent. EPA's rationale for choosing this preemption period is described later in this section.

EPA believes that section 209(e)(1)(B) and the regulations proposed today would preempt states from adopting in-use regulations relating to the control of emissions that would be expected to

[23] June 25, 1974. Available in the public docket for this rulemaking.

[24] 40 CFR 86.094–17

[25] The term ''states'' when used in this section includes both state and local governments.

affect how a manufacturer designs a new locomotive or new locomotive engine (including both freshly manufactured and remanufactured units).[26] Such state regulation would be considered as ''relating to the control of emissions from (new locomotives or locomotive engines)'' and would be preempted. This interpretation appropriately implements Congressional intent, in the unique circumstances applicable to locomotives. It is also consistent with the case law interpreting a similar provision that applies to state motor vehicle controls.

In *Allway Taxi* v. *City of New York* [27], the court discussed the scope of federal preemption under section 209(a), which prohibits state or local standards relating to the control of emissions from new motor vehicles, and noted that the definition of ''new motor vehicle'' in section 216 of the Clean Air Act ''reveals a clear Congressional intent to preclude states and localities from setting their own exhaust emission control standards only with respect to the manufacture and distribution of new automobiles.'' [28] The court concluded that while Congress did not preempt states from regulating the use or movement of motor vehicles after they are no longer new, a state or locality is not free to impose its own emission control standards on motor vehicles that are no longer new where that would circumvent the Congressional purpose of preventing obstruction to interstate commerce.

In an earlier rulemaking action, EPA discussed the application of the *Allway Taxi* case to non-road vehicles and engines other than locomotives, and stated that the Agency expected the principles of *Allway Taxi* to apply to state adoption of emission controls on non-road vehicles and engines after they are no longer new. See 59 FR 36969, 36973 (July 20, 1994). In that notice, EPA stated that the Agency expected the same reasoning and policy would also apply to locomotives, although the implementation of that policy would depend on the ultimate definition of ''new locomotive.'' EPA today proposes to apply the same principles to state regulation of emissions from locomotives; however, because of compelling factual and policy considerations relating to regulation of locomotives as compared to regulation of motor vehicles and other nonroad vehicles and engines, the implementation of these principles would be expected to differ to a significant degree.

In the context of motor vehicle regulation, the *Allway Taxi* court noted that a state's imposition of its own emission control requirements immediately after a new motor vehicle is purchased by an ultimate consumer and registered would be ''an obvious circumvention of the Clean Air Act and would defeat the Congressional purpose (in preempting states from regulating emissions from new motor vehicles) of preventing obstruction to interstate commerce.'' [29] However, states may impose emission control standards after some period of time following the sale of a motor vehicle, provided that those standards would not require a vehicle manufacturer to redesign a new motor vehicle. The court stated that such requirements, such as standards directed primarily at intrastate activities where the burden of compliance does not effectively impact manufacturers and distributors, cause only minimal interference with interstate commerce. [30]

Applying this analysis to state regulation of locomotives, section 209(e)(1)(B) and the regulations proposed today would preempt states from adopting in-use regulations relating to the control of emissions that would be expected to affect how a manufacturer designs a new locomotive or new locomotive engine (including both freshly manufactured and remanufactured engines). Such a state standard would be considered as ''relating to the control of emissions from [new locomotives or locomotive engines]'' and would be preempted. The practical effect of applying the principles of *Allway Taxi* to locomotives is different than for other mobile sources because of the nature of the relationship between locomotive manufacturers and their customers (railroad operators). Emission related requirements imposed on railroads can reasonably be expected to have a very significant effect on locomotive manufacturers and remanufacturers. This is especially true of the Class I railroads which purchase nearly all of the freshly manufactured locomotives. With so few primary customers, manufacturers and remanufacturers must be very responsive to changes in design requested by these railroads. Although there are significantly more non-Class I railroads than there are Class I railroads, their number is still fairly small. Therefore, state requirements on railroads are much more likely to effect changes in how manufacturers and remanufacturers design new locomotives and new locomotive engines than would similar requirements on end users of other mobile sources, such as automobile owners. The fact that locomotive engines become new again when they are remanufactured will also have an effect on how the principles of *Allway Taxi* are applied. EPA solicits comment on this interpretation of *Allway Taxi* as applied to locomotive regulation.

In addition to the unique factual circumstances surrounding locomotives, there are compelling policy reasons that support uniform, national regulation of locomotive emissions. The legislative history of section 209(e) indicates that Congress intended a broad preemption of any state regulation of emissions from new locomotives or new locomotive engines, in large part because of the significant interstate commerce concerns raised by state-by-state regulation of locomotives. The House bill would have preempted states from regulating emissions from all new nonroad engines and vehicles.[31] By contrast, the Senate bill contained no preemption of state regulation of nonroad engines.[32] In conference, the House and Senate agreed to limit the House bill's broad preemption, and prohibited state standards and other requirements for only two categories of nonroad vehicles and engines: new farm and construction equipment of 175 hp or less, and new locomotives.[33] The following statement made by Rep. Dingell during the House debate on the Senate bill indicates Congress' concern that state regulation of locomotives in particular could result in a disruption of interstate commerce:

> With regard to (new locomotives and new engines used in locomotives), we balanced the need to control emissions from new locomotives against our belief that State efforts to regulate locomotive emissions or operations would impose an unconstitutional burden on interstate commerce.[34]

The legislative history of section 209(e) does not contain a similar statement regarding any other category of nonroad vehicles, indicating

[26] The proposed approach is intended to address real and concrete effects, whether or not large; however, it is not intended to address speculative or trivial effects.

[27] *Allway Taxi, Inc.* v. *City of New York*, 340 F.Supp. 1120 (S.D.N.Y.), aff'd, 468 F.2d. 624 (2d. Cir. 1972).

[28] 340 F.Supp. at 1124.

[29] *Id.*

[30] *Id.*

[31] 2 *A Legislative History of the 1990 Clean Air Act Amendments of 1990* at 3092 (1993).

[32] 3 *A Legislative History of the Clean Air Act Amendments of 1990* at 4370 (1993).

[33] California was permitted to promulgate and enforce state standards and other requirements for other nonroad engines, if it received authorization from EPA. Other states could then promulgate standards identical to California's for these other engines.

[34] 1 *Legislative History of Clean Air Act Amendments of 1990* at 1126 (1993).

Congress' specific concern with the interstate commerce burden that could result from state regulation of new locomotives. Therefore, EPA believes that it is appropriate and reasonable to interpret section 209(e)(1)(B) as preempting states from adopting any regulation that affects how a manufacturer designs (or produces) new locomotives or new locomotive engines (including remanufactured engines). This will implement the Congressional intent that interstate operation of locomotives not be burdened by such state emissions regulations.[35] EPA is proposing a regulatory provision that codifies this approach in today's notice, and solicits comment on this issue.

EPA recognizes that certainty with respect to when state controls would be preempted would be advantageous to states and localities, as well as to industry; therefore, EPA is proposing to define the time period of preemption under section 209(e)(1)(B) more explicitly than in previous rules, for purposes of locomotives and locomotive engines. During this time, given the relationship between manufacturers and railroads, a broad range of potential in-use controls would be expected to affect how a manufacturer designs or produces new engines, and would be preempted during this time period. Those controls are discussed later in this section.

EPA believes that a period of preemption similar to but slightly longer than the useful life of the locomotive is appropriate (where useful life is approximately the average life of a locomotive between rebuilds and is also the period that locomotives would be required to remain in compliance with federal emissions standards). This approach would effectively provide the railroads with some flexibility with respect to scheduling when each locomotive is to be remanufactured, and it is consistent with the criteria for preemption, as discussed in the following paragraphs. To balance the need for such flexibility with EPA's concerns about emissions reductions the Agency is proposing that the period of preemption be 25 percent longer than the applicable useful life of a locomotive. For example, for a locomotive with a useful life of 30,000 MW-hr which reached the end of its useful life after 50 months of service, this period would be 7,500 MW-hr or about 12.5 months of additional service (assuming the same rate of use). Based on an analysis of current remanufacturing practices (see RSD), EPA believes that this approach would allow industry to largely continue its current remanufacturing practices. The Agency also requests comment on an alternative approach to the period of preemption whereby a single period of preemption (defined in years, miles, or work done) would apply to all locomotives, irrespective of their useful lives.

It is important to note that the Agency expects that emission performance will not suddenly degrade at the end of a locomotive's useful life, but rather that any deterioration which does occur would generally be gradual. In fact, given the rigorous compliance program which is being proposed, EPA expects that most locomotives will be designed and built such that those that are operated within this 25 percent window would generally remain in compliance with the applicable emissions standards. Moreover, as was discussed previously, the Agency specifications for useful life are based on average time between remanufacturing events. If a majority of locomotives were being operated significantly longer than their useful lives, the proposed regulations would require that manufacturers and remanufacturers begin to specify longer useful lives.

EPA believes that certain categories of potential state requirements would be preempted under the proposed approach, including numerical emissions standards for new locomotives, fleet average standards, certification requirements (such as testing), aftermarket (retrofit) equipment requirements, and in-use testing. Numerical emissions standards and certification testing requirements for new locomotives and new locomotive engines are clearly standards or other requirements that are explicitly preempted by section 209(e)(1). EPA believes that a state fleet average standard would also be preempted since EPA expects that requiring compliance with any such standard would in effect ban the sale or production of certain new locomotives or new locomotive engines (including remanufactured locomotives that are new) for use in a state. Given the logistical challenges of operating an interstate locomotive fleet, the only practical way in which a railroad could comply would be to remanufacture all of its locomotives to comply with the fleet standard. This would effectively establish a state emissions standard for new locomotives in violation of section 209(e)(1).

Because of the unique factual circumstances surrounding locomotives, a state retrofit requirement that applied during the time period between each remanufacture (or between an engine's original manufacture and first remanufacture) would be preempted because such a requirement would affect the design, manufacture and/or remanufacture of new locomotives. Most retrofit requirements would affect engine performance, and thus lead to design changes. For example, the installation of a catalyst-type add-on system would require the original manufacturer or remanufacturer to design the locomotive and/or engine differently to account for the resulting increase in exhaust back pressure. Moreover, aftermarket devices (such as engine heaters, selective reduction catalysts, particulate traps, and exhaust gas recirculation (EGR)) would take up a significant amount of space in a locomotive; therefore, a state aftermarket equipment requirement on locomotives would be expected to cause the original manufacturer or remanufacturer to redesign the locomotive differently at the time it is first manufactured, or during remanufacturing, to account for the later addition of the aftermarket equipment. It is important to note that space is a critical issue for locomotive manufacturers and remanufacturers because rail systems operate with very tight specifications for width, height, and length. The width and height of a locomotive must be small enough to pass through tunnels and other such restrictions, while the length must be short enough to allow the locomotive to negotiate curves in existing tracks. EPA believes that retrofit equipment that states could require on non-new locomotives would also be preempted under the criteria described above. This is especially true given the unique circumstances associated with locomotives and locomotive engines. A retrofit requirement that would have little or no effect on the original manufacture of a locomotive or locomotive engine could have a significant effect on the remanufacture of that locomotive or engine. Given that the definition of new locomotive and new locomotive engine includes remanufactured locomotives and engines, retrofit requirements on locomotives and locomotive engines are more likely to have an effect on new locomotives and locomotive engines than would similar requirements on motor vehicles and other nonroad engines.

As with retrofit requirements, EPA believes that states would be preempted from adopting or enforcing non-federal in-use emissions testing programs.

[35] The Commerce Clause of the U.S. Constitution is, of course, an additional limitation on state authority that is independent of federal preemption under the Clean Air Act. The regulations proposed today are based on section 209 of the Act.

Given the unique circumstances of this industry, especially the extent to which railroads can influence locomotive design, EPA expects that manufacturers of new locomotives would be compelled by their customers to design and produce their locomotives to comply with any state in-use emissions standards, amounting to a control on emissions from new locomotives. In making this determination, the Agency considered potential state in-use testing programs in three groups: (1) Those which would hold locomotives to standards other than the federal standards; (2) those which would hold locomotives to the same numerical standards, but used different test procedures; and (3) those which would replicate the federal in-use testing program.

Under the proposed approach, states would be preempted from adopting any emissions standards for in-use locomotives. Since there is little that a locomotive operator can do to reduce emissions from in-use locomotive engines, the action needed to comply with an in-use emission standard would in effect need to be taken by the manufacturer or remanufacturer of the engine. Any meaningful attempt by a state to achieve emission reductions through in-use emission standards would be expected to require some actions to comply. As described above, this would necessarily affect the manufacturers and/or remanufacturers. This would apply to all state test programs designed to enforce any nonfederal standards, and would also hold true for state test programs using nonfederal test procedures, since both would have the practical effect of impacting locomotive design.

However, EPA is not sure whether states are preempted from adopting an in-use test program to enforce the federal standards. A duplicative state program would increase the total number of in-use locomotive emission tests conducted each year; the greater the number of states that adopt such a program, the greater the number of in-use tests. Given the relatively small number of new engines produced each year, and the small total number of in-use locomotives, the proliferation of such duplicative programs could effectively require manufacturers to include larger compliance margins in the design of their engines to deal with this unknown risk. This is because manufacturers recognize that, given manufacturing, facility, product and test variability, measured emissions will vary from locomotive to locomotive and there will always be a nonzero probability of in-use failure. However, the more testing that is conducted, the greater likelihood that at least one failure would be identified. In response to this probability and the customers' desire that no failures occur in use, manufacturers might feel compelled to design their locomotives such that the average emissions rate is far enough below the level of the standard that the risk of their locomotives failing an in-use test program approaches zero. This could affect the original locomotive engine design because achieving lower average levels means that lower emission targets are necessary. Nevertheless, EPA is not sure that these arguments justify a categorical preemption of state testing of locomotives in-use using the federal test procedure. EPA requests comment on this position.

Based on the limited ability of operators to reduce emissions, the relationship between operators and new locomotive manufacturers or remanufacturers, the expectation that states would only adopt in-use emission standards that would require additional reductions, and the potential impact of in-use testing on interstate commerce, EPA believes that nonfederal state in-use testing programs should be preempted as they would amount to emission standards for the manufacturer or remanufacturer of new locomotive engines. This combination of factors appears unique to this industry, and EPA would not expect the same preemption result to apply under other circumstances. The Agency continues to believe that state in-use testing programs for motor vehicles and other nonroad engines, including inspection and maintenance (I/M) programs, are not preempted under the Act.

This discussion of state controls that would be preempted under the regulation proposed today is not intended to be exclusive. Any state control that would affect how a manufacturer designs or produces new (including remanufactured) locomotives or locomotive engines would be preempted. EPA believes that section 209(e)(1)(B) and the regulations proposed today should be interpreted broadly in this context, in recognition of the unique circumstances affecting this industry as described above, including the impact on interstate commerce of state emissions controls on locomotives. EPA believes this is consistent with the text of section 209(e)(1)(B), the legislative history, and the applicable case law. The Agency believes that any state control within the specific categories described above would act as an emission standard or requirement for new locomotives or engines and should be preempted. EPA invites comment on this view, including whether regulatory provisions should be included to allow states to show that a specific control does not affect how a manufacturer or remanufacturer designs a new locomotive or engine, and would therefore not be preempted.

It is important to note that certain categories of potential state requirements would also be prohibited under the proposed regulations because they would require operators to make adjustments to a locomotive that would constitute tampering under the Act and the proposed regulations. Under section 203(a)(3) of the Act, tampering includes actions that can reasonably be expected to contribute to an increase in emissions of a regulated pollutant. For example, a state requirement to alter the fuel injection system or air intake system of a locomotive to achieve NO_X reductions is likely to cause increased PM and smoke emissions. Therefore, it is highly likely that a railroad operator could not comply with the state requirement without making an adjustment to its locomotive that can reasonably be expected to result in an increase in emissions of a regulated pollutant, and would therefore be violating the federal prohibition against tampering. In such cases where it would be impossible to comply with the state requirement without violating a federal prohibition, the federal law would preempt the state law. For this reason, such state requirements would be prohibited under the proposed national rule.

VI. Emission Reduction Technology

This rulemaking will be the first time locomotives and locomotive engines have been subject to EPA regulation for the pollutants of HC, CO, NO_X, PM and smoke. Much of this discussion of the emission reduction technologies is based on EPA's experience regulating similar but smaller diesel engines used in highway trucks since the 1970's. While many of the emission control technologies for highway trucks are applicable to locomotives and locomotive engines, the design and operation of locomotives and locomotive engines may preclude the effective use of some of these technologies. The following paragraphs discuss the emission control strategies that EPA believes are likely to be available to comply with today's proposed standards. These emission control strategies are considered separately for the three levels of proposed standards (*i.e.*, Tier 0, Tier I and Tier II standards).

Technologies EPA believes could be used to comply with the proposed

emission standards are listed in Table VI–1. As is discussed below, EPA has estimated which of these technologies are most likely to be employed by manufacturers and remanufacturers to meet today's proposed standards. These estimates are for purposes of calculating cost-effectiveness and appropriate levels of control only; they are not mandated control strategies. EPA developed these estimates based on its past experience with on-highway diesel engines, as well as numerous discussions with manufacturers and railroads. An extended discussion of these technologies and their potential to reduce emissions from locomotives is included in the RSD.

TABLE VI 1.—EMISSION REDUCTION TECHNOLOGIES

NO_X Reduction Strategies	
Air Handling	Turbocharging.
	Air to liquid charge air cooling.
	Air to air charge air cooling.
	Turbo compounding.
	Exhaust Gas Recirculation (EGR).
	Compression Ratio, Closed crankcase.
Fuel Delivery Systems	Injection pressure and Nozzle Design.
	Reoptimized injection timing.
	Increased injection rate.
	Injection rate shaping.
Electronic Control Systems	Electronic controls.
Combustion chamber design	Geometry, swirl.
Aftertreatment	Reduction catalyst.
	Chemical Addition.
PM and Smoke Reduction Strategies [1]	
Combustion chamber design	Increased swirl.
	Reduced crevice volume.
	Ceramic materials.
Fuel delivery Systems	Increased injection pressure.
	Limit sac volume.
Aftertreatment	Trap or catalytic oxidizer.
Smoke Control	Limiter on rate of increase of fueling.
Lubricants	Synthetic oils.
	Reduction in engine oil consumption.

[1] Most technologies that reduce particulate emissions will also reduce HC, CO and smoke to some extent.

A. Tier 0 Standards

EPA expects that locomotives currently equipped with turbocharged engines will most likely employ improved fuel injection, enhanced charge air cooling, and to some extent retarding of injection timing to reduce NO_X emissions to below the level of the proposed standards. (Note: the proposed Tier 0 standards would not require emission reductions in HC, CO, or PM compared to current, uncontrolled levels. The Tier 0 standards for HC, CO and PM are essentially caps to prevent large increases in those emissions compared to current levels.) Where practical and cost-effective, some of the pre-2000 locomotives may be equipped with electronic controls as a means of avoiding a loss in fuel efficiency resulting from injection timing retard. Improved fuel injection is expected to include injection rate changes, modifications to the spray patterns, and a reduction in injector sac volume. There may also be some small modifications to the piston design. Additionally, some models may require enhanced smoke controls to limit smoke during increases in engine power. In the case of naturally aspirated engines, modified/improved fuel injection and some retarding of injection timing are expected to be the control strategies of choice. The addition of electronic controls may also be employed.

B. Tier I Standards

The proposed Tier I emission standards will require an approximately 48 percent reduction in NO_X emissions from current levels, and may require some small reductions in HC, CO, and PM emissions (actual reductions will depend upon the size of the compliance margins that manufacturers choose to include in their designs). These locomotives can be expected to incorporate the technologies as outlined above for the Tier 0 standards, in conjunction with or superseded by the following additional technologies. Engine combustion temperatures will need to be reduced further; additional improvements in charge air cooling can therefore be expected. This could require a charge air cooling system using a separate coolant as the cooling medium. To achieve additional reductions, engine manufacturers are expected to employ a comprehensive emission management system consisting of optimized engine fuel injection strategies through electronic controls. Changes in the configuration of the combustion chamber and piston ring location may begin to appear in engines complying with the Tier I standards.

C. Tier II Standards

The proposed Tier II emission standards will require more than a 60 percent reduction in NO_X emissions and 50 percent reduction in PM and HC emissions from current levels, with smaller, but significant, reductions in CO emissions. EPA's current estimate of the technologies that will be used to comply with these emission standards includes continued improvement in charge air cooling, fuel management (including the introduction of ''rate shaping''), and combustion chamber configuration, in conjunction with an optimized electronic control system. It is uncertain, at this time, whether some form of exhaust gas recirculation (EGR) or reduced oil consumption will also be necessary.

EPA requests comment on its viewpoints and expectations expressed in this section. Commenters are encouraged to direct their comments toward a description of the technologies they believe would be necessary to meet the standards discussed above. Commenters should address issues of feasibility, durability and costs of the technologies they believe will be required.

VII. Benefits

This section contains a brief summary of the emission benefits expected from the proposed national locomotive and locomotive engine rulemaking. The complete analysis of the expected benefits is contained in the RSD. The primary focus of this rulemaking is on reducing NO_X and PM emissions. There are also reductions in HC and CO.

The benefits analysis was performed in three steps. First, the baseline locomotive fleet composition, emissions rates and total inventory were determined. Second, future fleet composition was projected, from which percentage emissions reductions for the fleet were calculated for NO_X and PM. Finally, those percent reductions were applied to the baseline fleet emissions inventories to arrive at mass emissions reductions for the fleet. Table VII–1 contains a summary of both the fleet percentage and mass reductions for both NO_X and PM. In addition to the NO_X and PM benefits shown in Table VII–1, today's proposed regulations provide reductions in HC and CO. EPA estimated those reductions by calculating the ratios of the proposed HC and CO emissions standard percent reductions to the PM standard reductions, and applying those ratios to the PM benefits previously calculated. EPA estimated that by 2040 the proposed regulations will result in total reductions of 274924 metric tons of HC and 240075 metric tons of CO. These total HC and CO reductions amount to average annual reductions of 6705 metric tons of HC and 5855 metric tons of CO per year. EPA requests comment on all aspects of this benefits analysis.

TABLE VII–1.—NATIONWIDE EMISSION REDUCTIONS OF NO_X and PM Compared to 1990 BASELINE LEVELS

[Metric tons per year]

Year	NO_X		PM	
	Percent reduction	Mass reduction	Percent reduction	Mass reduction
2000	6.7	65,538	0.0	0
2005	35.7	348,022	1.2	291
2010	39.2	382,361	7.3	1,747
2020	46.2	451,038	19.3	4,657
2040	59.7	581,934	42.4	10,224

VIII. Costs

This section contains a summary of EPA's estimate of costs associated with the proposed national locomotive rulemaking. In general, the Agency used a conservative approach to estimating costs by using the higher end of any cost ranges that were developed for specific cost components. Costs are presented for Tier 0, Tier I and Tier II locomotives on a per locomotive basis. Cost components consist of initial equipment costs, which include the one-time hardware costs associated with meeting the standards (i.e., hardware, such as aftercoolers, which are required to meet the standards initially, but are not typically replaced during remanufacture), as well as research and development costs; remanufacturing costs; fuel economy costs; [36] and certification, production line and in-use testing costs. These per locomotive costs are presented in Tables VIII–1 through VIII–3. Overall program costs and average annual program costs calculated from the per locomotive costs and projections of future locomotive fleet composition, and based on a forty-one year time period, are presented in Table VIII–4. Where applicable, costs are presented in actual and discounted format. A complete discussion of the methodology EPA used in calculating these costs is contained in the RSD. EPA requests comment on all aspects of this costs analysis, and especially encourages information and estimates from manufacturers and remanufacturers regarding the potential costs of compliance with the proposed regulations.

TABLE VIII–1.—COST PER LOCOMOTIVE—TIER 0 STANDARDS

Cost component	Cost	Comments
Initial Equipment	$75,000	Occurs in year 1.
Remanufacture	3,000	$1000 per remanufacture (average of 3 over lifetime).
Fuel	0	Total lifetime cost.
Testing:		
Cert	125	Occurs in year 1.
Prod Line	20	Occurs in year 1.
In-use	10 FTP	Occurs in years 1–40.
	115 Short Test	(Average of 17).
Total Cost	80,270	xl

TABLE VIII–2.—COST PER LOCOMOTIVE—TIER I STANDARDS

Cost component	Cost	Comments
Initial Equipment	$100,000	Occurs in year 1.

[36] The fuel economy estimates used in this analysis are worst case. Based on EPA's experience in regulating on-highway diesel engines, compliance with emission standards often improves fuel economy, especially in cases where electronic control systems are utilized.

TABLE VIII–2.—COST PER LOCOMOTIVE—TIER I STANDARDS—Continued

Cost component	Cost	Comments
Remanufacture	12,000	$2000 in Years 6, 12, 18, 24, 36.
Fuel	0	Total lifetime cost.
Testing:		
Cert	378	Occurs in year 1.
Prod Line	238	Occurs in year 1.
In-use	10 Full FTP	Occurs in years 1–40.
	115 Short Test	
Total Cost	117,616	

TABLE VIII–3.—COST PER LOCOMOTIVE—TIER II STANDARDS

Cost component	Cost	Comments
Initial Equipment	$200,000 [1]	Occurs in year 1.
Remanufacture	18,000	$3000 in Years 6,12,18,24,30,36.
Fuel	42,500	Total lifetime cost.
Testing:		
Cert	703 [1]	Occurs in year 1.
Prod Line	281	Occurs in year 1.
In-use	10 Full FTP	Occurs in years 1–40.
	115 Short Test	
Total Cost	266,484 [1]	

[1] For first five years of production, assuming the research, development and certification costs are recovered in five years. Total costs would drop to $85,781 per locomotive after five years.

TABLE VIII–4.—SUMMARY OF 41 YEAR TOTAL LOCOMOTIVE PROGRAM COSTS

[millions]

	Actual	NPV[1]
Tier 0	$1,526	$1,193
Tier I	286	211
Tier II	1,301	428
Average Annual	76	45
Total	3,113	1,831

[1] The NPV costs are based on a seven percent discount rate. A three percent rate would yield an average annual cost of $58 million and a total cost of $2,360 million.

IX. Cost-Effectiveness

The costs for NO_X or PM reductions are difficult to assign to a single pollutant due to the relationship between NO_X and PM emission generation. EPA computed cost-effectiveness for this rulemaking using only the NO_X reductions, and using the combined NO_X and PM reductions. Costs presented below are for all reductions. It should be remembered that there would also be some emission reductions in HC and CO that would be achieved from the same technology that is used for NO_X and PM control, enhancing the benefits of the program without significantly impacting the cost.

The following table (Table IX–1) summarizes the costs and emission benefits of the national locomotive rulemaking. Costs and emission benefits were computed over a 41 year program run.[37] In computing costs, EPA has generally used conservative estimates which are fairly consistent with the manufacturers' own cost estimates. EPA therefore believes this analysis to be a worst-case scenario in terms of cost to industry.

TABLE IX–1.—COST EFFECTIVENESS

	NO_X	NO_X + PM
Total Emission Reductions (millions metric tons)	17.83	18.02
Total Costs (million $)	3,113	3,113
Annual Emission Reductions (millions metric tons)	0.43	0.44
Annual Costs (millions $)	76	76
Cost Effectiveness($/ton)	175	173

X. Public Participation

A. Comments and the Public Docket

EPA desires full public participation in arriving at final rulemaking decisions. EPA solicits comments on all aspects of today's proposal from all interested parties. Wherever applicable, full supporting data and detailed analyses should also be submitted to allow EPA to make maximum use of the comments. Commenters are especially encouraged to provide specific suggestions for changes to any aspects of the proposal that they believe need to be modified or improved. All comments should be directed to the EPA Air Docket Section, Docket No. A–94–31 (see **ADDRESSES**).

Commenters desiring to submit proprietary information for consideration should clearly distinguish such information from other comments to the greatest extent possible and label it ''Confidential Business Information.'' Submissions containing such

[37] EPA used a 41-year program run to more accurately reflect lifetime costs associated with locomotives and locomotive engines, which have long lives (40 years or more).

proprietary information should be sent directly to the contact person listed above, and not to the public docket, to insure that proprietary information is not inadvertently placed in the docket. If a commenter wants EPA to base the final rule in part on a submission labeled as confidential business information, then a nonconfidential version of the document which summarizes the key data or information should be sent to the docket.

Information covered by a claim of confidentiality will be disclosed by EPA only to the extent allowed and by the procedures set forth in 40 CFR part 2. If no claim of confidentiality accompanies the submission when it is received by EPA, it may be made available to the public without further notice to the commenter.

B. Public Hearing

Any person desiring to present testimony regarding this proposal at the public hearing (see **DATES**) should, if possible, notify the contact person listed above of such intent at least seven days prior to the day of the hearing to allow for orderly scheduling of the testimony. The contact person should also be provided an estimate of the time required for the presentation of the testimony and notification of any need for audio/visual equipment.

It is suggested that sufficient copies of the statement or material to be presented be brought to the hearing for distribution to the audience. In addition, it will be helpful for EPA to receive an advance copy of any statement or material to be presented at the hearing prior to the scheduled hearing date, in order for EPA staff to give such material full consideration. Such advance copies should be submitted to the contact person listed above.

The official record of the hearing will be kept open for 30 days following the hearing to allow submission of rebuttal and supplementary testimony. All such submittals should be directed to the EPA Air Docket Section, Docket No. A–94–31 (see **ADDRESSES**)

XI. Administrative Designation and Regulatory Assessment Requirements

A. Executive Order 12866

Under Executive Order 12866 (58 FR 51735, October 4, 1993) the Agency must determine whether the regulatory action is ''significant'' and therefore subject to OMB review and the requirements of the Executive Order. The Order defines ''significant regulatory action'' as one that is likely to result in a rule that may: (1) Have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal government or communities; (2) create a serious inconsistency or otherwise interfere with action taken or planned by another agency; (3) materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

Pursuant to the terms of Executive Order 12866, EPA has determined that this is a ''significant regulatory action'' within the meaning of the Executive Order. EPA has submitted this action to OMB for review. Changes made in response to OMB suggestions or recommendations will be documented in the public record.

B. Regulatory Flexibility

The Regulatory Flexibility Act (RFA)[38] generally requires an agency to conduct a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small not-for-profit enterprises, and small governmental jurisdictions. This proposal would not have a significant impact on a substantial number of small entities. The Agency has identified two types of small entities which could potentially be impacted by this proposal: Small businesses involved in locomotive remanufacturing and small short line railroads. EPA believes that, while today's proposal could potentially affect both of these groups, the impacts would be minimal or nonexistent for the following reasons.

In the case of small remanufacturing businesses, the proposed rules governing remanufacturing of locomotives or locomotive engines require that any remanufacture of post-1972 locomotives or engines (except those exempted from the remanufacture requirements, as discussed in the next paragraph) be done such that the resultant locomotive or locomotive engine is in a configuration certified as meeting applicable emissions standards. The certification of a remanufactured locomotive or engine configuration has two cost components associated with it. The first is the cost of developing and manufacturing the requisite emission control technology. The second is the cost of emission testing associated with compliance. Small remanufacturing businesses often do not do their own research and development for the technology they use, but instead purchase the hardware from larger firms. It is expected that today's proposed requirements will not change this practice, and that these small firms will enter into contractual agreements with larger firms. Under such an arrangement the larger firms will continue to do the development work and will be the certificate holder for a particular engine family and, as the certificate holder, would be responsible for providing an emissions warranty and conducting the PLT and in-use testing programs, as required by the proposed regulations. This type of arrangement is expected to resolve the issue of technology development and manufacturing costs for small remanufacturing businesses. The Agency requests comments regarding whether additional provisions should be established to minimize market shifts that could adversely affect small businesses that either manufacture or remanufacture parts for locomotive remanufacturing.

In the case of the small railroads, the Agency believes that the amount of leadtime provided in today's proposal should allow for sufficient advance planning to minimize the impacts. First, these small railroads do not tend to purchase freshly manufactured locomotives, but instead purchase used locomotives from the Class I railroads. For this reason the costs associated with the compliance of freshly manufactured locomotives would not be borne by the small railroads. Additionally, these small railroads will likely have several years following the effective date of today's proposed standards before any used locomotives they purchase will be remanufactured, and thus required to comply with these standards. Furthermore, the Agency proposes to allow an exemption for railroads with 500 employees or less from the Tier 0 standards, as discussed earlier in this notice. Finally, the Agency is proposing that the railroad in-use test program only apply to Class I railroads, thus exempting all small railroads from this testing requirement. In developing this proposed regulation, EPA has tailored the requirements so as to minimize or eliminate the effects on small entities. Therefore, I certify that this action will not have a significant economic impact

[38] 5 U.S.C. 605(b).

on a substantial number of small entities.

C. Paperwork Reduction Act

The information collection requirements in this proposed rule will be submitted for approval to the Office of Management and Budget (OMB) under the Paperwork Reduction Act, 44 U.S.C 3501 *et seq.* An Information Collection Request has been prepared by EPA (ICR No. 1800.01) and a copy may be obtained from Sandy Farmer, OPPE Regulatory Information Division, U.S. Environmental Protection Agency (2137), 401 M St., SW., Washington, DC 20460 or by calling (202) 260–2740.

The information being collected is to be used by EPA to certify new locomotives and new locomotive engines in compliance with applicable emissions standards, and to assure that locomotives and locomotive engines comply with applicable emissions standards when produced and in-use.

The annual public reporting and recordkeeping burden for this collection of information is estimated to average 494 hours per response, with collection required quarterly or annually (depending on what portion of the program the collection is in response to). The estimated number of respondents is 20 and the estimated number of responses is 126. The total annualized capital/startup cost is $1.8 million. Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjusting the existing ways to comply with any previously applicable instructions and requirements; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

An agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations are displayed in 40 CFR part 9 and 48 CFR Chapter 15.

Comments are requested on the Agency's need for this information, the accuracy of the provided burden estimates, and any suggested methods for minimizing respondent burden, including through the use of automated collection techniques. Send comments on the ICR to the Director, OPPE Regulatory Information Division, U.S. Environmental Protection Agency (2137), 401 M St., SW, Washington, DC 20460, and to the Office of Information and Regulatory Affairs, Office of Management and Budget, 725 17th St., NW, Washington, DC 20503, marked ''Attention: Desk Officer for EPA.'' Include the ICR number in any correspondence. Since OMB is required to make a decision concerning the ICR between 30 and 60 days after February 11, 1997, a comment to OMB is best assured of having its full effect if OMB receives it by March 13, 1997. The final rule will respond to any OMB or public comments on the information collection requirements contained in this proposal.

D. Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Pub. L. 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. Under section 202 of the UMRA, EPA generally must prepare a written statement, including a cost-benefit analysis, for proposed and final rules with ''Federal mandates'' that may result in expenditures to State, local, and tribal governments, in the aggregate, or to the private sector, of $100 million or more in any one year. Before promulgating an EPA rule for which a written statement is needed, section 205 of the UMRA generally requires EPA to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, most cost-effective or least burdensome alternative that achieves the objectives of the rule. The provisions of section 205 do not apply when they are inconsistent with applicable law. Moreover, section 205 allows EPA to adopt an alternative other than the least costly, most cost-effective or least burdensome alternative if the Administrator publishes with the final rule an explanation why that alternative was not adopted. Before EPA establishes any regulatory requirements that may significantly or uniquely affect small governments, including tribal governments, it must have developed under section 203 of the UMRA a small government agency plan. The plan must provide for notifying potentially affected small governments, enabling officials of affected small governments to have meaningful and timely input in the development of EPA regulatory proposals with significant Federal intergovernmental mandates, and informing, educating, and advising small governments on compliance with the regulatory requirements.

Today's rule contains no Federal mandates (under the regulatory provisions of Title II of the UMRA) for State, local, or tribal governments because the rule imposes no enforceable duty on any State, local or tribal governments. Nothing in the proposed program would significantly or uniquely affect small governments. EPA has determined that this rule contains federal mandates that may result in expenditures of $100 millon or more in any one year for the private sector. EPA believes that the proposed program represents the least costly, most cost effective approach to achieving the air quality goals of the proposed rule. EPA has performed the required analyses under Executive Order 12866 which contains identical analytical requirements.

XII. Copies of Rulemaking Documents

The preamble, draft regulatory language and draft Regulatory Support Document (RSD) are available in the public docket as described under ''ADDRESSES'' above and are also available electronically on the Technology Transfer Network (TTN), which is an electronic bulletin board system (BBS) operated by EPA's Office of Air Quality Planning and Standards and via the internet. The service is free of charge, except for the cost of the phone call.

A. Technology Transfer Network (TTN)

Users are able to access and download TTN files on their first call using a personal computer and modem per the following information.

TTN BBS: 919–541–5742 (1200–14400 bps, no parity, 8 data bits, 1 stop bit)
Voice Helpline: 919–541–5384
Also accessible via Internet: TELNET ttnbbs.rtpnc.epa.gov Off-line: Mondays from 8:00 AM to 12:00 Noon ET

A user who has not called TTN previously will first be required to answer some basic informational questions for registration purposes. After completing the registration process, proceed through the following menu choices from the Top Menu to access information on this rulemaking.

<T> GATEWAY TO TTN TECHNICAL AREAS (Bulletin Boards)
<M> OMS—Mobile Sources Information
<K> Rulemaking & Reporting
<6> Non-Road
<3> File area #3 * * * Locomotive Emission Standards

At this point, the system will list all available files in the chosen category in

reverse chronological order with brief descriptions. To download a file, select a transfer protocol that is supported by the terminal software on your own computer, then set your own software to receive the file using that same protocol.

If unfamiliar with handling compressed (i.e. ZIP'ed) files, go to the TTN top menu, System Utilities (Command: 1) for information and the necessary program to download in order to unZIP the files of interest after downloading to your computer. After getting the files you want onto your computer, you can quit the TTN BBS with the <G>oodbye command.

Please note that due to differences between the software used to develop the document and the software into which the document may be downloaded, changes in format, page length, etc. may occur.

B. Internet

Rulemaking documents may be found on the internet as follows:

World Wide Web
http://www.epa.gov/omswww

FTP
ftp://ftp.epa.gov Then CD to the/pub/gopher/OMS/directory

Gopher
gopher://gopher.epa.gov:70/11/Offices/Air/OMS
Alternatively, go to the main EPA gopher, and follow the menus:
gopher.epa.gov
EPA Offices and Regions
Office of Air and Radiation
Office of Mobile Sources

List of Subjects

40 CFR Part 85

Environmental protection, Air pollution control, Railroads.

40 CFR Part 89

Environmental protection, Administrative practice and procedure, Air pollution control, Nonroad source pollution.

40 CFR Part 92

Environmental protection, Administrative practice and procedure, Air pollution control, Railroads, Reporting and recordkeeping requirements.

Dated: January 31, 1997.

Carol M. Browner,

Administrator.

[FR Doc. 97–3223 Filed 2–10–97; 8:45 am]

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Federal Register

Tuesday
February 11, 1997

Part IV

Social Security Administration

20 CFR Parts 404 and 416

Supplemental Security Income; Determining Disability for a Child Under Age 18; Interim Final Rules With Request for Comments

SOCIAL SECURITY ADMINISTRATION

20 CFR Parts 404 and 416

[Regulations Nos. 4 and 16]

RIN 0960-AE57

Supplemental Security Income; Determining Disability for a Child Under Age 18; Interim Final Rules With Request for Comments

AGENCY: Social Security Administration.

ACTION: Interim final rules with request for comments.

SUMMARY: These rules implement the childhood disability provisions of sections 211 and 212 of Public Law 104–193, the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 that provide a new definition of disability for children (i.e., individuals under age 18), mandate changes to the evaluation process for children's disability claims and continuing disability reviews (CDRs), and require that disability redeterminations be performed for 18-year-olds eligible as children in the month before they attain age 18.

DATES: These rules are effective beginning April 14, 1997. To be sure that your comments are considered, we must receive them no later than April 14, 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.

FOR FURTHER INFORMATION CONTACT: Daniel T. Bridgewater, Legal Assistant, Division of Regulations and Rulings, Social Security Administration, 6401 Security Boulevard, Baltimore, MD 21235, (410) 965–3298 for information about these rules. For information on eligibility or claiming benefits, call our national toll-free number, 1–800–772–1213.

SUPPLEMENTARY INFORMATION:

History

Prior to the enactment of Public Law 104–193 on August 22, 1996, the Act defined childhood disability in relation to the definition of disability for adults. The definition of disability for adults in section 1614(a)(3) of the Act is an inability ''to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than twelve months.'' Prior to August 22, 1996, the definition of disability for children (i.e., individuals under the age of 18) was contained in a parenthetical statement at the end of section 1614(a)(3)(A): A child was considered disabled for purposes of eligibility for SSI if he or she ''* * * suffer[ed] from any medically determinable physical or mental impairment of comparable severity'' to an impairment(s) that would make an adult disabled.

Social Security Administration (SSA) regulations at 20 CFR 416.920 set out a five-step sequential evaluation process for determining the disability of adults:

1. Whether the adult is engaging in substantial gainful activity;

2. Whether, in the absence of substantial gainful activity, the individual's medically determinable impairment or combination of impairments is ''severe;''

3. Whether, if the impairment(s) is severe, it meets or medically equals the severity of a listing in the Listing of Impairments in appendix 1 of subpart P of 20 CFR part 404 (the Listing);

4. Whether, if the impairment(s) is severe but does not meet or equal the severity of a listing, the individual retains the capacity to do his or her past relevant work, considering his or her residual functional capacity; and

5. Whether, if past relevant work is precluded, the individual retains the capacity to do any other kind of work which exists in significant numbers in the national economy, considering the individual's residual functional capacity and the vocational factors of age, education and work experience.

Until 1990, if a child was not engaging in substantial gainful activity and his or her impairment(s) met the statutory duration requirement, a child's claim for SSI benefits based on disability was decided based on whether or not the child's impairment(s) met or equaled the severity of a listing, as in the third step of the process for adults. We did not provide additional evaluation steps for children as we did for adults because it was inappropriate to apply the vocational rules we used for adults whose impairments do not meet or equal the severity of a listed impairment to childhood claims.

Sullivan v. Zebley

On February 20, 1990, in the case of *Sullivan* v. *Zebley*, 493 U.S. 521 (1990), the Supreme Court decided that the ''listings-only'' approach SSA had used to deny claims for SSI benefits based on childhood disability did not carry out the ''comparable severity'' standard in title XVI of the Act. This was because the listings did not provide for an assessment of a child's overall functional impairment. The Court held that, under the comparable severity standard, children claiming SSI benefits based on disability were entitled to an assessment as part of the disability determination process, comparable to adults who have impairments that do not meet or equal the severity of a listing and who receive such an individualized assessment. The Court found that, whereas adults who are not found to be disabled under the Listing still have the opportunity to show that they are disabled at the last step of the sequential evaluation process, no similar opportunity existed for children. The Court concluded that, although the vocational analysis we use in claims filed by adults is inapplicable to claims for SSI benefits based on disability filed by children, this does not mean that a functional analysis could not be applied to children's claims.

The Court also addressed various aspects of the way in which we employed the Listing in evaluating childhood disability claims. The Court stated that the policies for establishing whether a child's impairment(s) was equivalent in severity to a listed impairment ''exclude[d] claimants who have unlisted impairments or combinations of impairments that do not fulfill all the criteria for any one listed impairment.'' The Court was also concerned that all claimants be given an opportunity for an assessment of their functional limitations, including the effects of their symptoms, in establishing medical equivalence.

The Childhood Rules That Resulted From Zebley

As a result of the *Zebley* decision, we revised the rules we used to evaluate childhood disability claims under SSI. The rules were first published in the Federal Register on February 11, 1991 (56 FR 5534) as a final rule with a request for comments. Following consideration of public comments, we published a final rule in the Federal Register on September 9, 1993 (58 FR 47532).

In § 416.924(a) of the prior rules, we defined the term ''comparable severity'' in terms of the impact of an impairment

or a combination of impairments on a child's ability to function independently, appropriately, and effectively in an age-appropriate manner. The rules also provided that each child whose impairment(s) did not meet or medically or functionally equal the requirements for any listing would have an ''individualized functional assessment'' (IFA), an evaluation of the impact of the child's impairment(s) on his or her overall ability to function independently, appropriately, and effectively in an age-appropriate manner.

In fact, the rules provided three steps at which we would consider a child's functioning. At each of these steps, we considered the impact of all of the child's medically determinable impairments on his or her functioning and considered all relevant evidence, including the effects of the individual's symptoms and the side effects of medication. We considered the nature of the impairment(s), the child's age, the child's ability to be tested given his or her age, the child's ability to perform age-appropriate daily activities, and other relevant factors.

First, we added a ''severe impairment'' step for children to parallel step 2 of the adult sequential evaluation process. At this step, the threshold for further evaluation was whether a child had more than a slight abnormality or a combination of slight abnormalities that caused more than minimal limitation in a child's ability to function independently, appropriately, and effectively in an age-appropriate manner.

Second, at step 3 of the sequential evaluation process, we expanded the rules for determining equivalence to the Listing. The new ''functional equivalence'' rule was intended, among other things, to address the Supreme Court's concerns about our use of the Listing in childhood cases. Functional equivalence provided that, if a child's impairment(s) did not meet or medically equal the severity of any listed impairment, we would assess the child's functional limitations and compare those limitations with the disabling functional consequences of any listed impairment, without regard to whether the listed impairment chosen for comparison was medically ''related'' to the child's impairment(s); for example, functional equivalence permits comparison of the functional limitations caused by a physical impairment with the functional limitations establishing disability in the mental disorders listings.

Last, for those children whose impairments were not of listing-level severity, the rules resulting from the *Zebley* decision included an entirely new fourth step in the sequential evaluation process for children. At this step, we used the IFA to assess whether a child's severe impairment(s), while not of listing-level severity, was nonetheless of ''comparable severity'' to an impairment(s) that would disable an adult.

The IFA addressed the functional impact of a child's impairment(s) in broad areas of functioning, which we called domains and behaviors, such as cognition, communication, and motor abilities. These domains and behaviors were intended to encompass and reflect all the things that a child may do at any particular age, and were, therefore, intended to include all of a child's functioning.

If an IFA showed that a child's impairment(s) substantially reduced his or her ability to function independently, appropriately, and effectively in an age-appropriate manner, and the impairment(s) met the duration requirement, we found the impairment(s) to be of comparable severity to an impairment that would result in disability in an adult, and the child would, therefore, be considered disabled. If the impairment(s) did not substantially reduce the child's ability to function independently, appropriately, and effectively in an age-appropriate manner, or if it did not meet the duration requirement, we found the child was not disabled. For most children, the rules provided examples of how ''marked'' and ''moderate'' limitations in the domains and behaviors would indicate whether there was a substantial reduction in functioning; for example, ''moderate'' limitations in three domains would generally, though not invariably, result in a finding of disability.

Summary of the Childhood Disability Provisions of Public Law 104–193

Public Law 104–193 provides a new statutory definition of disability for children claiming SSI benefits and directs us to make significant changes in the way we evaluate childhood disability claims. Under the new law, a child's impairment or combination of impairments must cause more serious impairment-related limitations than the old law and our prior regulations required.

Section 211(a) of Public Law 104–193 amended section 1614(a)(3) of the Act to provide a definition of disability for children separate from that for adults. The ''comparable severity'' criterion in the Act was repealed and replaced with the following definition:

> (C)(i) An individual under the age of 18 shall be considered disabled for the purposes of this title if that individual has a medically determinable physical or mental impairment, which results in marked and severe functional limitations, and which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months.
>
> (ii) Notwithstanding clause (i), no individual under the age of 18 who engages in substantial gainful activity (determined in accordance with regulations prescribed pursuant to subparagraph (E)) may be considered to be disabled.

The conference report that accompanied Public Law 104–193 further explained:

> The conferees intend that only needy children with severe disabilities be eligible for SSI, and the Listing of Impairments and other current disability determination regulations as modified by these provisions properly reflect the severity of disability contemplated by the new statutory definition. In those areas of the Listing that involve domains of functioning, the conferees expect no less than two marked limitations as the standard for qualification. The conferees are also aware that SSA uses the term ''severe'' to often mean ''other than minor'' in an initial screening procedure for disability determination and in other places. The conferees, however, use the term ''severe'' in its common sense meaning.

H.R. Conf. Rep. No. 725, 104th Cong., 2d Sess. 328 (1996), *reprinted in* 1996 U.S. Code, Cong. and Ad. News 2649, 2716. The House report contains similar language. See H.R. Rep. No. 651, 104th Cong., 2d Sess. 1385 (1996), *reprinted in* 1996 U.S. Code, Cong. and Ad. News 2183, 2444.

Further provisions concerning childhood disability adjudication are summarized below with references to the relevant sections of Public Law 104–193.

- The Commissioner was directed to remove references to maladaptive behavior in the personal/behavioral domain from listings 112.00C2 and 112.02B2c(2) of the childhood mental disorders listings (Section 211(b) (1)).
- The Commissioner was directed to discontinue the IFA for children in 20 CFR 416.924d and 416.924e (Section 211(b) (2)).
- Within 1 year after the date of enactment, we must redetermine the eligibility of individuals under the age of 18 who were eligible for SSI based on disability as of August 22, 1996, and whose eligibility may terminate by reason of the new law. The cases are to be redetermined using the eligibility criteria for new applicants. The medical improvement review standard in section 1614(a) (4) of the Act and 20 CFR 416.994a, used in CDRs, shall not apply

to these redeterminations (Section 211(d) (2)).

- The medical improvement review standard for determining continuing eligibility for children was revised to conform to the new definition of disability for children (Section 211(c)).
- Not less frequently than once every 3 years, we must conduct a CDR for any childhood disability recipient eligible by reason of an impairment(s) which is likely to improve. At the option of the Commissioner, we may also perform a CDR with respect to those individuals under age 18 whose impairments are unlikely to improve (Section 212(a)).
- We must redetermine the eligibility of individuals who were eligible for SSI based on disability in the month before the month in which they attained age 18 using the rules for determining initial eligibility for adults. We will do the redetermination during the 1-year period beginning on the individual's 18th birthday. The medical improvement review standard used in CDRs does not apply to these redeterminations (Section 212(b)).
- We must conduct a CDR not later than 12 months after the birth of the child for any child whose low birth weight is a contributing factor material to our determination that the child was disabled (Section 212(c)).
- At the time of a CDR, a child's representative payee shall present evidence that the child is and has been receiving treatment to the extent considered medically necessary and available for the disabling impairment. If a payee refuses without good cause to provide such evidence, we may select another representative payee, or pay benefits directly to the child, if we determine that it is appropriate and in the best interests of the child (Section 212(a)).

These rules implement all of the provisions of sections 211 and 212 of Public Law 104–193, with the exception of section 211(d)(2). Because Public Law 104–193 repealed the ''comparable severity'' disability standard for children, and eliminated use of the IFA, step 4 of our prior sequential evaluation process (the comparable severity step) has been removed. To be found disabled under these rules, an individual under age 18 must have ''marked and severe functional limitations,'' which means that his or her impairment or combination of impairments must meet, or medically equal or functionally equal, the severity of a listed impairment.

Summary of Specific Revisions

These interim final rules revise our prior rules for deciding initial eligibility and continuing eligibility for children claiming SSI benefits based on disability. They also provide rules for redetermining the eligibility of individuals who attain age 18 and who were eligible for SSI based on disability in the month before the month in which they attained age 18.

The major changes to the rules are explained below. In addition, we have added, removed, and revised language throughout subpart I of 20 CFR part 416 to remove references to the ''comparable severity'' standard and our prior regulatory definition of disability interpreting that standard. Since these are only conforming changes to comply with the new law, we have not summarized each of them in this summary.

These rules do not address every aspect of the evaluation of disability of children and of individuals who have attained age 18. They implement primarily those changes required by Public Law 104–193. Therefore, they must be read in the context of all our other relevant rules for determining disability.

Appendix 1 to Subpart P of Part 404—Listings 112.00C and 112.02B2

Public Law 104–193 mandates removal of references to ''maladaptive behaviors'' in listings 112.00C2 and 112.02B2c(2) in the childhood mental disorders section of the Listing of Impairments. Listing 112.00C explains the severity criteria we use to evaluate a mental impairment in most of our childhood mental disorder listings. These severity criteria are often referred to as the ''paragraph B'' criteria because they are found in paragraph B of most of the listings to which they apply. Listing 112.02B2c(2) was a particular paragraph B criterion for persistent, serious maladaptive behaviors in children aged 3 to 18. Pursuant to Public Law 104–193, we have removed all references to ''maladaptive behaviors'' in listing 112.00C and deleted all of prior listing 112.02B2c(2); we have also redesignated the ''personal/behavioral'' area as the area of ''personal function.'' For this reason, we also removed the reference to ''activities of daily living'' from former listing 112.02B2c(1), which we now designate as listing 112.02B2c because it is the only paragraph remaining.

The area of personal function now pertains only to self-care; that is, the ability to help oneself and to cooperate with others in taking care of personal needs, health, and safety (e.g., feeding, dressing, toileting, bathing, following medication regimes, and following safety precautions). Further, we have clarified the description of the social area of functioning to make it clearer that many impairment-related behavioral problems (including those previously considered in the prior personal/behavioral area) are likely to have their most significant effects on a child's social functioning.

In addition, we revised the fourth area of function from ''concentration, persistence, and pace'' to ''concentration, persistence, or pace.'' This is a technical correction to conform the language of this section to the rules in listings 112.00C3 and 112.02B2d, which have always read ''deficiencies of concentration, persistence, or pace.'' We made a corresponding change in listing 112.00C4, which also used the word ''and.'' We also made several clarifications in listing 112.00C2b. The changes are not substantive and are only intended to parallel the adult mental listing 12.00C2 with appropriate language for children.

Section 416.635 Responsibilities of a Representative Payee.

We revised this section to provide that, in cases in which the beneficiary is an individual under age 18 (including cases in which the beneficiary is an individual whose low birth weight is a contributing factor material to our determination that the individual is disabled), the representative payee is responsible for ensuring that the beneficiary is and has been receiving treatment to the extent considered medically necessary and available for the condition that was the basis for providing benefits.

Section 416.902 General Definitions and Terms for This Subpart

We have added four new definitions. First, we explain that a *disability redetermination* (see § 416.987) is a redetermination of eligibility based on disability using the rules for new applicants appropriate to the individual's age, except the rules pertaining to performance of substantial gainful activity. Second, we explain that the term *impairment(s)* means ''a medically determinable physical or mental impairment or a combination of medically determinable physical or mental impairments.''

Third, we explain that the term *marked and severe functional limitations,* when used as a phrase, means the standard of disability in the Act for children claiming SSI benefits, and is a level of severity that meets or medically or functionally equals the requirements of a listing. We explain that the separate words *Marked* and *severe* are also terms used throughout

this subpart, but the meanings of these words in the phrase *marked and severe functional limitations* is not the same as their meanings when used separately. The meaning of the phrase *marked and severe functional limitations* derives directly from the legislative history of Public Law 104–193, quoted in the ''Summary of the Childhood Disability Provisions of Public Law 104–193,'' above. Since the meanings of the separate terms *marked* and *severe* predate enactment of Public Law 104–193, they are touched on in this section to minimize any confusion from the new law's use of the same words, used in combination with a different meaning. Finally, we define *Commissioner* to mean the Commissioner of Social Security.

Section 416.906 Basic Definition of Disability for Children

We have revised this section to replace the prior ''comparable severity'' standard with the new ''marked and severe functional limitations'' standard for childhood disability. We also added the statutory provision that an individual under age 18 who files a new claim and who is engaging in substantial gainful activity will not be considered disabled. For clarity, we added language specifying our longstanding policy that we consider the effects of combined impairments in assessing whether a child is disabled.

Section 416.911 Definition of Disabling Impairment

Under the Act and our regulations, individuals who file new applications for benefits based on disability and who are engaging in substantial gainful activity are found not disabled. However, after a disabled individual is eligible for SSI, the Act and our regulations permit some individuals to try to work without losing eligibility. A recipient of SSI benefits who begins or returns to work despite a ''disabling impairment'' may be found eligible for special SSI cash benefits and for special SSI eligibility status under §§ 416.260 ff. of our regulations.

Section 416.911 provides the definition of the term ''disabling impairment'' for such cases. We have redesignated all but the last sentence of prior § 416.911, which was applicable only to adults, as paragraph (a)(1), and added a paragraph (b)(1) to define ''disabling impairment'' for children. Final paragraph (a)(2) takes account of the new rules in § 416.987 for the disability redeterminations required by section 212(b) of Public Law 104–193. Consistent with this section of the new law, the rules explain that, for disability redetermination cases of individuals who are age 18, and who were eligible for SSI benefits based on a disability for the month before the month in which they attained age 18, a disabling impairment is one that meets the criteria for initial eligibility set forth in §§ 416.920(c) through (f) for adults. This is because the new law specifies that these disability redeterminations shall apply the eligibility criteria for new applicants, and not the medical improvement review standard provisions of section 1614(a)(4) of the Act applicable to CDRs. However, step 1 of the sequential evaluation process for new claims (the substantial gainful activity step) will not apply. For individuals affected by this provision who have a disabling impairment, and who are working, we will apply the rules in §§ 416.260 ff. We redesignated as paragraph (c) the last sentence of prior § 416.911, which provides that earnings are not considered in deeming whether a recipient has a disabling impairment(s), because it applies to both adults and children.

Section 416.919n Informing the Examining Physician or Psychologist of Examination Scheduling, Report Content, and Signature Requirements

We have amended § 416.919n(c)(6), which concerns the opinion of a consulting physician or psychologist about an individual's ability to function despite his or her impairment(s), to add a discussion specific to childhood cases to make it clear that the provision applies to both adults and children.

Section 416.924 How We Determine Disability for Children

We have extensively revised this section, which provides the sequential evaluation process for childhood disability claims, to conform to the provisions of Public law 104–193.

We have deleted former paragraphs (a) and (f). Prior paragraph (a) defined *comparable severity* and prior paragraph (f) discussed the IFA. We redesignated prior paragraphs (b) through (e) as (a) through (d), and revised them as explained below. We added a new paragraph (e) to explain what we will do when children become adults (i.e., they attain age 18) after they file their applications for SSI benefits based on disability but before we make a determination or decision. We redesignated prior paragraph (g) as paragraph (f), but it is otherwise unchanged. Also, we added a new paragraph (g).

In final § 416.924, the new sequential evaluation process for determining initial eligibility is:

1. Whether the child is engaging in substantial gainful activity;

2. If not, whether the child has a medically determinable impairment or combination of impairments that is severe; and

3. If the child's impairment(s) is severe, whether it meets or medically equals the requirements of a listing, or whether the functional limitations caused by the impairment(s) are the same as the disabling functional limitations of any listing and, therefore, functionally equivalent to such listing.

As in the prior sequential evaluation process, we will follow the steps in order. If a determination or decision can be made at a step, we will stop; if not, we will proceed to the next step.

New § 416.924(a), ''Steps in evaluating disability,'' retains basic guidance from prior § 416.924(b) that is unaffected by the new law. It continues to provide that we will consider all relevant evidence in a child's case record, that we will consider all impairments for which we have evidence and their combined effects, and that we will evaluate any limitations in a child's functioning that result from a child's symptoms, including pain. We have removed the reference to the prior IFA step and made minor revisions to reflect the new statutory standard and the new sequence of evaluation. Because meeting or equaling the severity of a listing is now the last step of the sequence, we have emphasized the importance of the step by specifying that a child will be disabled if his or her impairment(s) meets, medically equals, or functionally equals the severity of any listing. We also changed references to the ''ability to function'' to ''functioning'' in order to conform to the new statutory definition of disability, which is now expressed in terms of ''marked and severe functional limitations.''

Final paragraphs (b) through (d) provide more detail on the sequential evaluation steps outlined in paragraph (a). Final paragraph (b), ''If you are working,'' is the same as prior paragraph (c). A child who files a new application, and who is engaging in substantial gainful activity, will be found not disabled as required by the statute. Final paragraph (c), ''You must have a severe impairment(s),'' is substantively the same as prior paragraph (d), but revised to reflect the new law. At step two of the sequential process, we will continue to evaluate whether a child has a ''severe'' impairment or combination of impairments. We now provide that if a child has a slight abnormality or a combination of slight abnormalities that

causes no more than minimal functional limitations, we will find that the child does not have a severe impairment and, therefore, is not disabled. The phrase ''minimal functional limitations'' replaces the phrase from our prior rules ''minimal limitation in your ability to function, independently, appropriately, and effectively in an age-appropriate manner,'' which, as noted above, was derived from the prior statutory definition of disability.

Final paragraph (d) ''Your impairment(s) must meet, medically equal, or functionally equal in severity a listed impairment in appendix 1,'' explains that an impairment(s) causes marked and severe functional limitations if it meets, medically equals or functionally equals the severity of a listed impairment. Thus, if a child's impairment(s) meets, medically equals, or functionally equals in severity a listing (and meets the duration requirement), we will find the child disabled. If a child's impairment(s) does not meet or medically equal or functionally equal in severity any listing, or does not meet the duration requirement, we will find the child not disabled. We have removed the language from prior paragraph (e) that said a child's claim would not be denied because his or her impairment(s) was not of listing-level severity.

We added a new paragraph (e), ''If you attain age 18 after you file your disability application but before we make a determination or decision,'' to explain what we will do in such cases. We will use the rules for determining disability in adults when an individual whom we found disabled prior to attaining age 18 attains age 18. (We have always used the adult disability rules beginning at age 18 when we find that an individual was *not* disabled prior to attaining age 18 to see if the individual became disabled at a later date.) Therefore, final paragraph (e) explains that, for the period during which the individual is under age 18, we will use the disability rules in § 416.924, but for the period starting with the day the individual attains age 18, we will use the disability rules for adults filing new claims in § 416.920.

Except for redesignating prior paragraph (g) as final paragraph (f), ''Basic considerations,'' has not been changed. We will continue to consider all relevant medical and nonmedical evidence in a child's case record.

Finally, we have added a new paragraph (g) to explain that, when we make an initial or reconsidered determination whether you are disabled or when we make an initial determination about whether your disability continues under section 416.994a, we will complete a standard form, Form SSA–538, Childhood Disability Evaluation Form. The new form is designed to guide our adjudicators through the new sequential evaluation process and emphasizes the requirements for establishing functional equivalence. In new paragraph (g), we also explain that disability hearing officers, administrative law judges, and the administrative appeals judges on the Appeals Council (when the Appeals Council makes a decision) will not complete the form. This is because these adjudicators issue decisions with detailed rationales and findings that will already reflect the steps of the new sequential evaluation process.

Section 416.924a Age as a Factor of Evaluation in Childhood Disability

Most of the guidance in our prior rules on consideration of age in childhood disability cases has not been changed by Public Law 104–193. We have revised this section to conform to the ''marked and severe functional limitations'' disability standard. As under our prior rules, we will consider the child's age in determining whether he or she has a severe impairment(s). When evaluating whether the impairment(s) meets, medically equals, or functionally equals the severity of a listing, we will consider the child's age if the listing we consider uses age categories. We have deleted prior paragraphs (a)(4) and (b), which addressed issues related to the IFA.

We redesignated prior paragraph (c), ''Correcting chronological age of premature infants,'' and prior paragraph (d), ''Age and the impact of severe impairments on younger children and older adolescents,'' as final paragraphs (b) and (c) and made changes to conform to the new definition of disability; we deleted prior paragraph (d)(4)(ii) because it was based on the prior ''comparable severity'' standard.

Section 416.924b Functioning in Children

This section discusses some of the terms we use to describe or evaluate functioning in children, including age-appropriate activities, developmental milestones, activities of daily living, and work-related activities. We retained the discussions of these terms with appropriate conforming changes. We also clarified the explanations of the last three terms, which were described in our prior rules as ''*the* most important indicators of functional limitations'' in, respectively, infants up to attainment of age 3, children aged 3 to attainment of age 16, and older adolescents aged 16 to attainment of age 18. In the interim final rules, we describe these functions as being ''most important as indicators of functional limitations,'' because the emphasis should be on whatever age groups for which these indicators of functional limitations are most appropriate.

Although we deleted prior paragraph (b)(5) because it described the domains and behaviors used in performing an IFA under our prior rules, consideration of functional limitations remains an integral part of the childhood disability evaluation process. For example, final § 416.926a describes areas of functioning we will consider when we evaluate whether a child's impairment(s) is functionally equivalent in severity to a listing.

Section 416.924c Other Factors We Will Consider

As under our prior rules, when we evaluate whether a child's impairment(s) is disabling, we will consider all relevant factors, such as the effects of medications, the setting in which the child lives, the child's need for assistive devices, and the child's functioning in school. However, as throughout these interim final rules, we have revised this section to conform to the statutory ''marked and severe functional limitations'' standard.

Section 416.924d Individualized Functional Assessment for Children

Section 416.924e Guidelines for Determining Disability Using the Individualized Functional Assessment

We deleted both of these sections as required by section 211(b)(2) of Public Law 104–193.

Section 416.925 Listing of Impairments in Appendix 1 of Subpart P of Part 404 of This Chapter

We have revised paragraph (a) of this section, ''Purpose of the Listing of Impairments,'' to explain that, for children, the Listing of Impairments describes impairments that are considered severe enough to result in marked and severe functional limitations. We revised paragraph (b)(2), which explains the purpose of the childhood listings in part B of the Listing, to explain that the level of severity of the impairments listed in part B is intended to be the same as that expressed in the functional severity criteria of the childhood mental disorders listings (see 112.01 ff.). Therefore, in general, a child's impairment(s) is of ''listing-level severity'' if it results in marked limitations in two broad areas of functioning, or extreme limitations in

one such area. However, we also explain that when we decide whether a child's impairment(s) meets the requirements for any listed impairment, we will decide that the impairment is of ''listing-level severity'' even if it does not result in marked limitations in two broad areas of functioning, or extreme limitations in one such area, if the listing that we apply does not require such limitations to establish that an impairment(s) is disabling. We also explain that we define the terms ''marked'' and ''extreme'' as they apply to children in § 416.926a.

Section 416.926 Medical Equivalence for Adults and Children

In these interim final rules, we moved the rules for deciding whether a child's impairment(s) is medically equivalent in severity to any listing into the same section as the rules for deciding medical equivalence of impairments in adults, reserving § 416.926a for functional equivalence. To make this clear, we revised the heading of final § 416.926 to reflect the inclusion of children. We also revised final paragraph (a), ''How medical equivalence is determined,'' by replacing the explanation of how we determine medical equivalence with provisions from prior § 416.926a. We also incorporated and revised the last sentence of prior § 416.926a(a), explaining that we consider all relevant evidence in the case record when we decide the issue of medical equivalence because it remains applicable to both adults and children.

We decided to use the provisions of former § 416.926a(b) to explain our rules for determining medical equivalence for both adults and children. This is not a substantive change, but a clearer statement of our longstanding policy on medical equivalence than was previously included in prior § 416.926(a), as it was clarified for children in prior § 416.926a(b). This merely allows us to address only once in our regulations the policy of medical equivalence, which is and always has been the same for adults and children. (Although some of the text of § 416.929(a) will differ from the text of § 404.1526(a), both sections, which are in chapter III of title 20 of the Code of Federal Regulations, will continue to provide the same substantive rules.)

We have also added a new paragraph (d), ''Responsibility for determining medical equivalence,'' to address our longstanding policy of who is responsible for determining medical equivalence for adults and children.

Section 416.926a Functional Equivalence for Children

Although Public Law 104–193 discontinued the use of the IFA, the legislation nevertheless emphasized that we were still to continue evaluating the functioning of children in our disability assessments, as shown by the news statutory definition of disability, ''marked and severe functional limitations.''

Moreover, in the legislative history, the conferees stated:

* * * Where appropriate, the conferees remind SSA of the importance of the use of functional equivalence disability determination procedures.

* * * [T]he conferees do not intend to suggest by this definition of childhood disability that every child need be especially evaluated for functional limitations, or that this definition creates a supposition for any such examination. * * * Nonetheless, the conferees do not intend to limit the use of functional information, if reflecting sufficient severity and is otherwise appropriate.

H.R. Conf. Rep. No. 725, 104th Cong, 2d Sess. 328 (1996), *reprinted in* 1996 U.S. Code, Cong. and Ad. News 2649, 2716. The House Report also contained similar language about the importance of functional information. See H.R. Rep. No. 651, 104th Cong., 2d Sess. 1385–1386 (1996), *reprinted in* 1996 U.S. Code, Cong. and Ad. News 2183, 2444–2445.

Thus, even though it eliminated the IFA, Congress directed us to continue to evaluate a child's functional limitations where appropriate, albeit using a higher level of severity than under the former IFA. Congress also explicitly endorsed our functional equivalence policy as a means for evaluating impairments that would not meet or medically equal any of our listings and without which some needy children with severe disabilities would not be eligible.

Therefore, we are retaining our prior policies on determining functional equivalence. Because the changes made by Public Law 104–193 make the functional equivalence provision that last point of adjudication in a child's claim and, therefore, critical to the outcome of many cases, we are also clarifying these rules.

When we published the prior rules in the Federal Register on September 9, 1993, we chose not to adopt a number of public comments about our policy of ''functional equivalence.'' Some commenters on the 1993 rules thought that, because the functional equivalence policy was unfamiliar, it was important that we provide as much detail as possible in the regulations so that all adjudicators would understand and apply the new rules in the same way. Several commenters also said that § 416.926a should explain the ''thought processes'' an adjudicator could employ to make a finding of functional equivalence; otherwise, the policy of functional equivalence might be under-utilized. One suggestion was that we incorporate into the rules the more detailed instructions in our operating manuals and training guides. One commenter suggested that we provide separate headings for medical equivalence and functional equivalence to highlight their differences and the novelty of the functional equivalence policy.

Although we did not adopt the comments in 1993, we have made changes in these rules that respond to some of the earlier concerns of 1993 to reflect the increased importance of the functional equivalence policy under the new law.

First, as noted in the explanation of § 416.926, we have separated the discussion of medical equivalence for children from the discussion of functional equivalence for children. We have also incorporated some of the more detailed explanations from our operating manuals regarding the application of functional equivalence.

Final paragraph (a), ''General,'' and final paragraph (b), ''How we determine functional equivalence,'' now include, in reorganized form, the rules for functional equivalence previously in § 416.926a(a) and (b)(3). As already indicated, we moved prior (b)(1) and (b)(2), which explained medical equivalence, to § 416.926. Because of the reorganization, we deleted the second sentence from prior paragraph (b)(3) (''If you have more than one impairment, we will consider the combined effects of all your impairments on your overall functioning.'') because it would have been redundant.

In final paragraph (b), we also included some of the more detailed guidelines concerning functional equivalence that commenters on the 1993 childhood disability rules requested that we include in the regulations, and that we believe are necessitated by the new definition of disability. This paragraph explains that there are several methods for determining functional equivalence, and that we may use any one of them to determine whether an impairment is functionally equivalent in severity to a listing. Subparagraphs then explain the various methods that we may employ to determine functional equivalence. We explain that there is no set order in which we must apply these methods and that, when we find that an

impairment(s) is functionally equivalent to a listed impairment, we will use any method that is appropriate to, or best describes, a child's impairment(s) and functional limitations. However, we explain that will consider all of the methods before we decide that an impairment(s) is not functionally equivalent in severity to any listed impairment and refer to final § 416.924(g), which explains how we will use the new Childhood Disability Evaluation Form, Form SSA–538, at the initial and reconsideration levels.

In (b)(1), we explain the first method we may use. An impairment(s) may be functionally equivalent in severity to a listed impairment because of extreme limitations in one specific function, such as walking or talking, or based on a combination or more than one, but less medically severe, specific functional limitations, such as walking and talking. In (b)(2), we explain that an impairment(s) may be functionally equivalent to a listed impairment if it causes functional limitations in broad areas of development or functioning (e.g., in motor or social functioning) that are equivalent in severity to the disabling functional limitations in listing 112.12 or listing 112.02. (The areas of functioning in which an impairment(s) may be evaluate are discussed in paragraph (c), described below.) In (b)(3), we explain that an impairment(s) may be functionally equivalent to a listed impairment if it is chronic and characterized by frequent episodes of illness or attacks, or by exacerbations and remissions. In such cases, we may compare a child's functional limitations to those in any listing for a chronic impairment with similar episodic criteria. In (b)(4), we explain that an impairment(s) may be functionally equivalent to a listed impairment if it requires treatment over a long period of time (at least a year) and the treatment itself (e.g., multiple surgeries) causes marked and severe functional limitations, or if the combined effects of limitations caused by ongoing treatment and limitations caused by the impairment(s) result in marked and severe functional limitations.

In final paragraph (c), ''Board areas of development or functioning,'' we explain that listing 112.12, for infants (especially infants who are too young to test) and listing 112.02 are the listings we will use for comparison when we use this method of functional equivalence. However, when we determine functional equivalence based on broad functional limitations, we will evaluate the functional effects of an impairment(s) in several areas of development or functioning specified in this paragraph of § 416.926a instead of referring to the listings themselves. We also explain that we describe the areas of functioning in general terms in (c)(4) and in more detail for specific age groups in (c)(5). If we find ''marked limitations'' in two areas of development or functioning, or ''extreme limitations'' in one area, we will find that an impairment(s) is functionally equivalent to listing 112.12 or listing 112.02. Even though the listings we use for reference are mental disorder listings, this evaluation may be done for a physical impairment(s) or for a combination of physical and mental impairments. We define the terms ''marked limitations'' and ''extreme limitations'' in (c)(3).

In (c)(1), we explain how we use the areas of development or functioning: We consider the extent of functional limitations in the areas affected by an impairment(s) and how limitations in one area affect development or functioning in other areas. Thus, when a physical impairment(s) produces global limitations (i.e., limitations in the motor area and at least one other area), those limitations must be evaluated in all relevant areas. We also make reference to new areas of motor development and functioning we have added to ensure appropriate consideration of physical impairments.

In (c)(2), ''Other considerations,'' we explain that we will consider all information in the case record that will help us determine the effect of an impairment(s) on a child's physical and mental functioning. We will consider the nature of the impairment(s), the child's age, the child's ability to be tested given his or her age, the child's need for help from others (and whether such need is age-appropriate), and other relevant factors.

In (c)(3), we define the terms ''marked'' and ''extreme'' limitations. The definitions are not new, but are based on longstanding policy in the regulations and interpretations we have used in our internal instructions and training. In (c)(4) and (c)(5), we describe the areas of development or functioning that may be addressed in a determination of functional equivalence, including the new areas of motor development and motor functioning and the revised ''personal'' area of functioning. The descriptions are based on our prior descriptions and changes mandated by Public Law 104–193, and contain several clarifications based on our experience evaluating functional equivalence in children since 1991.

Final paragraph (d), ''Examples of impairments that are functionally equivalent in severity to a listed impairment,'' is substantively the same as prior paragraph (d), ''Examples of impairments of children that are functionally equivalent to the listings.'' We made minor editorial changes for clarity and, as throughout the rules, to conform the language to the changes in the law. We also updated examples (1) and (11) to remove examples of cardiovascular impairments that are now listed impairments and, therefore, no longer examples of equivalence. We changed example (4) to delete reference to a ''marked inability to stand and walk'' because the limitation described is actually ''extreme.'' We changed example (5) to show how the area of motor functioning may be used. We also clarified the primary purpose of example (10), which is primarily for children who are too young to test and for whom a diagnosis and other medical findings may be difficult to specify.

Section 416.927 Evaluating Medical Opinions About Your Impairment(s) or Disability

We have added a description of the ''marked and severe functional limitations'' standard for children to paragraph (a), ''General,'' which already included a description of the disability standard for adults.

Section 416.929 How We Evaluate Symptoms, Including Pain

Throughout this section, we have replaced references to a child's ability to ''function independently, appropriately, and effectively in an age-appropriate manner'' with references to the child's ''functioning.'' The rules for evaluating a child's symptoms are otherwise unchanged by the new law.

Section 416.930 Need To Follow Prescribed Treatment

This section explains that, in order to receive benefits, an individual must follow treatment prescribed by his or her physician if the treatment can restore his or her ability to work; i.e., if the treatment could end the individual's disability. We have added parallel language explaining that a child must follow prescribed treatment if the treatment can reduce his or her functional limitations so that they are no longer ''marked and severe.''

Section 416.987 Disability Redeterminations for Individuals Who Attain Age 18

This section is new. It provides rules for disability redeterminations

mandated by section 212(b) of Public Law 104–193.

In paragraphs (a)(1) and (a)(2), we explain that Public Law 104–193 requires these redeterminations and that, when we do these disability redeterminations, we generally will use the rules for adults filing new claims, not the rules we use for CDRs.

In paragraph (a)(3) we explain that we will notify individuals before we begin a disability redetermination. In paragraph (a)(4) we explain that we will notify the individual in writing of the results of the redetermination and explain the individual's rights in connection with our notice of disability redetermination.

Paragraph (b) concerns a group of recipients who are subject to disability redeterminations under section 212(b) of the new law: individuals who became eligible by reason of disability prior to attaining age 18, and who were eligible for SSI benefits based on disability for the month before the month in which they attained age 18. Paragraphs (b)(1) through (b)(7) of this section provide that, during the 1-year period beginning on the individual's eighteenth birthday, we will redetermine the eligibility of these individuals using the rules in §§ 416.920 (c) through (f), and not the rules in § 416.920(b) or § 416.994; i.e., we will decide whether an individual is disabled using the rules for adults filing new claims, except the rule that says an individual engaging in substantial gainful activity will be found not disabled. If an individual age 18 or older has a ''disabling impairment'' as defined in § 416.911 and is working, we will apply the rules for special SSI eligibility in §§ 416.920ff. We also provide that eligibility will end if we find that the individual is not disabled and describe the month in which we may find an individual not disabled. Finally, we explain that, if we find an individual is not disabled, the last month for which benefits can be paid is the second month after the month in which the individual was determined not to be disabled.

Section 416.990 When and How Often We Will Conduct a Continuing Disability Review

In paragraph (b), ''When we will conduct a continuing disability review,'' we have added a new paragraph (b)(11), mandated by Public Law 104–193. The new paragraph provides that we will do a CDR by a child's first birthday if the child's low birth weight is a contributing factor material to the determination that the child is disabled; i.e., whether we would have found the child disabled if we had not considered the child's low birth weight.

In paragraph (c), ''Definitions,'' we have revised the definition of a *permanent impairment, medical improvement not expected,* to explain that for a child, such an impairment is one that is unlikely to improve to the point that the child's functional limitations will no longer be marked and severe.

Section 416.994a How We Will Determine Whether Your Disability Continues or Ends, and Whether You Are and Have Been Receiving Treatment That Is Medically Necessary and Available, Disabled Children

We revised this section extensively to comport with provisions in Public Law 104–193 in two ways:

- To revise the medical improvement review standard (MIRS) used in conducting a CDR, and
- To add rules that, at the time of a CDR, a child's representative payee must show evidence that the child is and has been receiving treatment that is medically necessary and available for the condition that was the basis for providing SSI benefits.

The new evaluation sequence for applying the medical improvement review standard in a CDR is:

1. Has there been medical improvement in the impairment(s) on which eligibility was based? If there has been no medical improvement, we will find that the child is still disabled, unless certain exceptions apply.

2. If there has been medical improvement, does the impairment(s) the child had at the time of our most recent favorable medical determination or decision still meet, medically equal, or functionally equal the severity of the listing that it met or equalled at the time of the prior determination or decision? If that impairment(s) still meets or equals the severity of that listed impairment as it was written at that time, we will find the child still disabled, unless certain exceptions apply.

3. If that impairment(s) does not still meet or equal the severity of that listed impairment as it was written at that time, is the child now disabled, taking into consideration all current impairments.

Because the childhood disability standard is no longer linked to the adult standard of inability to work, there is no longer a step to assess whether any medical improvement is ''related to the ability to work.''

In paragraph (a)(1), we changed the outline of the sequential evaluation process for CDRs in childhood disability cases to reflect the new sequence of evaluation. The sequence outlined in paragraph (a)(1) and discussed in more detail in paragraphs (b)(1) through (b)(3) differs significantly from the sequence under our prior rules. In our prior rules, the first step of the CDR evaluation process for children required consideration of whether the child's impairment(s) met, or was equivalent in severity to, a listing. However, the new statutory definition of disability for children—''marked and severe functional limitations''—means a level of severity that meets or is medically or functionally equivalent in severity to the severity of a listing. Thus, if we were first to consider whether the child's impairment(s) is of listing-level severity, we would also be deciding whether that impairment(s) is disabling. In those instances in which the impairment(s) is found neither to meet nor to be equivalent in severity to any listing, we believe it would be difficult for an adjudicator to then fairly consider the issue of medical improvement, because the adjudicator would already have concluded that the child is not disabled. Section 1614(a)(4)(B) of the Act states that, with some exceptions, disability can be found to have ceased only if there is ''substantial evidence which demonstrates that there has been medical improvement * * * and that [the] impairment or combination of impairments no longer results in marked and severe functional limitations.''

Thus, to ensure proper consideration of the issue of medical improvement, we have placed that issue first in the sequence. If there has been no medical improvement, we will generally find that the child is still disabled. There are exceptions to this rule, set forth in final paragraphs (e) and (f) of this section and discussed below.

Under our prior rules, pursuant to the MIRS provisions in the Act at that time, if there had been medical improvement, we considered whether the improvement was related to the ability to work (which we defined for childhood cases as meaning the medical improvement resulted in an increase in ability to function independently, appropriately, and effectively in an age-appropriate manner.) However, the MIRS as revised by Public Law 104–193 contains no provision for a ''related to the ability to work'' step for children and, thus, limits the application of this provision to individuals age 18 or over. Accordingly, we have deleted that step from our rules (paragraph (d) of our prior rules).

If there has been medical improvement, the next step under these

rules (discussed in detail in paragraph (b)(2)) is to consider whether the impairment(s) that we considered at the time of our most recent favorable determination or decision still meets, or is still equivalent in severity to, the listing that it met or was equivalent in severity to at that time, as that listing then appeared, even if that listing has since been revised or removed from the Listing. If that impairment(s) would still meet or equal in severity that listing, we will find the child still disabled, subject to certain exceptions discussed in paragraphs (e) and (f) of this section and discussed below.

If that impairment(s) would not now meet or equal in severity that listing, we will then consider whether the child is currently disabled, taking into account all current impairments, including any the child did not have or that we did not consider at the time of our most recent favorable determination or decision.

At this step (discussed in detail in paragraph (b)(3)), we first consider whether the child has a severe impairment or combination of impairments considering all current impairments. If the child does not, we will find the child not disabled. If so, we then consider whether the child's current impairment(s) meets, or is medically equivalent or functionally equivalent in severity to, any listing in the Listing of Impairments. If so, the child continues to be disabled; if not, the child is not disabled.

We will not always follow these steps in order. In final paragraph (b), we added language explaining that we may skip steps in the sequence if it is clear this would lead to a more prompt finding that disability continues. We will not skip any steps unless it is clear that a continuance will result. For example, we might not consider the issue of medical improvement if it is obvious on the face of the evidence that a current impairment meets the severity of a listed impairment.

Final paragraph (c) discussed what we mean by ''medical improvement''; i.e., any decrease in the severity of the medical impairment(s) which was present at the time of our most recent favorable determination or decision. This paragraph is largely the same under our prior rules, but we have added language to make it clear that we will disregard minor changes in the individual's signs, symptoms, and laboratory findings that obviously do not represent medical improvement and could not result in a finding that the individual's disability has ended. This is a longstanding procedure we have used in cases in which there is technically medical improvement because there is some very slight improvement in a sign, symptom, or laboratory finding (e.g., a change in IQ from 61 to 62) but it is clear that the outcome will not change.

Final paragraph (d), largely unchanged from prior paragraph (e), explains what we will do if we cannot find the prior file. First, we will determine whether the child is currently disabled. If not, we will decide whether to attempt reconstruction of those portions of the missing file that were relevant to our most recent favorable determination or decision, so as to allow a decision whether there has been medical improvement since that time. If we do not or cannot reconstruct the file, we will not find medical improvement.

Paragraph (e) concerns ''the first group of exceptions to medical improvement.'' The law provides limited situations in which disability can be found to have ended even though medical improvement has not occurred, if the child's impairment(s) no longer results in marked and severe functional limitations. Two of the exceptions in our prior rules—the ''advances in medical or vocational therapy or technology'' exception and the ''vocational therapy'' exception—have been limited by Public Law 104–193 to individuals who have attained age 18. The third exception is still applicable: A child's disability may be found to have ceased if substantial evidence shows that, based on new or improved diagnostic techniques or evaluations, the child's impairment(s) is not as disabling as it was considered to be at the time of the most recent favorable determination or decision. We have revised this exception to conform to the new definition of disability for children.

Final paragraph (f), largely unchanged from prior paragraph (g), concerns ''the second group of exceptions to medical improvement.'' These exceptions include such issues as fraud and failure to cooperate in obtaining evidence. If one of these exceptions applies, we may find that disability ceases without finding medical improvement or that the child is currently disabled. We have revised the language concerning these exceptions to conform to the new definition of disability for children.

Final paragraph (g) (prior paragraph (h)) concerns the month we will find a child no longer disabled. We revised the language slightly to conform to the new definition of disability for children.

Final paragraph (h) (prior paragraph, (i)) provides that, before we stop benefits, we will provide an opportunity for an appeal, and gives a reference to the rules on appeals; it is unchanged from our prior rules.

Final paragraph (i) is new; it implements provisions in Public Law 104–193 requiring that, if a child has a representative payee, that payee must present evidence at the time of a CDR showing that the child is and has been receiving treatment to the extent considered medically necessary and available for the condition(s) that was the basis for providing SSI benefits, unless we determine such evidence would be inappropriate or unnecessary, considering the nature of the child's impairment(s). If the payee refuses without good cause to provide evidence, and it is in the best interests of the child, we will determine if another payee should be selected or if the child should receive benefits directly.

In paragraph (i)(1), we explain that ''medically necessary'' treatment means treatment that is expected to improve or restore the individual's functioning and that was prescribed by a ''treating source'' as defined in § 416.902. If the child does not have a treating source, we will decide whether there is medically necessary treatment that could have been prescribed by a treating source. In paragraph (i)(2), we list some factors we will consider in evaluating whether medically necessary treatment is available; e.g., the location of institutions or facilities that could provide treatment, the availability and cost of transportation to such places, the availability of local community resources that would provide free treatment.

In paragraph (i)(3), we explain that we will not require a payee to show proof of treatment if we decide that the disabling impairment(s) is not amenable to treatment. In paragraph (i)(4), we explain that if the representative payee refuses without good cause to provide evidence of treatment, we will, if it is in the child's best interests, remove the payee and determine if another payee should be selected or if the child should receive benefits directly. We further explain that when we consider whether a representative payee had good cause, we will consider factors such as the acceptable reasons for failure to follow prescribed treatment in § 416.930(c) and other factors similar to those describing good cause for missing deadlines in § 416.1411.

Finally, in paragraph (i)(5) we explain that the requirements of paragraph (i) do not apply to a child who is receiving SSI payments directly. This is because the treatment provision in Public Law 104–193 applies only to children who have representative payees. However, we have also included a reminder that the failure-to-follow-prescribed-treatment rules in § 416.930 continue to apply to

children who do not have representative payees.

Other Changes

Sections that have been changed only so that their language will conform to the new definition of disability for children, or to provide references to new or revised rules, include listings sections 103.00, 104.00, 112.00, and 114.00, and §§ 416.901, 416.912, 416.913, and 416.919a.

Electronic Version

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Regulatory Procedures

Pursuant to section 702(a)(5) of the Act, 42 U.S.C. 902(a)(5), the Social Security Administration follows the Administrative Procedure Act (APA) rulemaking procedures specified in 5 U.S.C. 553 in the development of its regulations. The APA provides exceptions to its Notice of Proposed Rulemaking (NPRM) procedures when an agency finds that there is good cause for dispensing with such procedures on the basis that they are impracticable, unnecessary, or contrary to the public interest. In the case of these interim final rules, we have determined that under 5 U.S.C. 553(b)(B), good cause exists for waiving the NPRM procedures.

Public Law 104–193 was signed into law on August 22, 1996. Sections 211 and 212 of the law were effective upon enactment (or with respect to benefits for months beginning on or after enactment) without regard to whether regulations have been issued. In addition, section 215 requires the Commissioner to issue regulations necessary to carry out the amendments made by sections 211 and 212, which are the subject of these interim final rules, within 3 months after the date of enactment. Accordingly, to issue these rules as an NPRM would have delayed issuance of final rules until well past 3 months after enactment.

In light of the Congressional mandate that we issue regulations needed to carry out these statutory provisions as expeditiously as possible (see H.R. Rep. No. 651, 104th Cong., 2d Sess. 1392 (1996), *reprinted in* 1996 U.S. Code, Cong. and Ad. News 2183, 2451), we believe good cause exists for waiver of the NPRM procedures under the APA since issuance of proposed rules would be impracticable and contrary to Congressional intent. In light of the short statutory deadline in which to prescribe regulations under section 215 of Public Law 104–193, we find that use of the NPRM process is impracticable. Moreover, some of the changes in these rules are technical ones to conform our rules to the new definition of disability for children. The technical changes made by these rules are minor and do not represent discretionary policy. Accordingly, we find that prior notice and comment are unnecessary with respect to these rules. However, even though we are issuing these rules as interim final regulations, we are requesting public comments and will issue revised rules if necessary.

Executive Order 12866

These interim final rules reflect and implement the disability provisions of sections 211 and 212 of Public law 104–193. This is a major rule as defined in section 251 of Public Law 104–121, 5 U.S.C. 804. The Office of Management and Budget (OMB) has reviewed these interim final rules and determined that they meet the criteria for a significant regulatory action under Executive Order 12866. Therefore, we prepared and submitted to OMB, separately from these interim final rules, an assessment of the potential costs and benefits of this regulatory action. This assessment is available for review by members of the public.

The potential costs and benefits for the policies reflected in these interim final rules follow:

Program Savings

It is estimated that due to the legislation there would be reduced program outlays resulting in the following savings (in millions of dollars) to the SSI program (over $4.7 billion total in a 6-year period):

FY1997	FY1998	FY1999	FY2000	FY2001	FY2002	Total
−$120	−$715	−$945	−$1,075	−$905	−$1,010	−$4,775

This is the amount we expect to spend (in millions of dollars) on SSI childhood disability benefits:

FY1997	FY1998	FY1999	FY2000	FY2001	FY2002	Total
$5,425	$5,285	$5,475	$6,300	$5,715	$6,505	$34,705

Note: Annual numbers may not add to total due to rounding.

It is also estimated that there will be reduced Medicaid program outlays (Federal share) resulting in the following savings (in millions of dollars) over a 6-year period:

FY1997	FY1998	FY1999	FY2000	FY2001	FY2002	Total
−10	−85	−110	−125	−125	−135	−590

There will also be reduced Medicaid program outlays for States.

Administrative Costs and Savings

The administrative cost of conducting the medical redeterminations of the children who might be affected by the new childhood disability standards is expected to be $185 million in FY 1997 and $130 million in FY 1998. For this regulation, the administrative cost of redetermining disability in SSI childhood recipients is assumed to be same as the cost of a full medical CDR for these individuals, including the additional appellate costs.

From FYs 1999–2002, the ongoing Federal workyear savings are from fewer recipients on the rolls, i.e., from those children currently receiving benefits who will be terminated and from those children who will be denied under the

stricter standards. There will be net savings of approximately $12 million annually beginning with FY99. These savings will result from fewer income and resource redeterminations, representative payee actions, and maintenance of the rolls activities. The ongoing State workyear costs are for additional hearings, as well as medical reviews from additional reconsiderations, resulting from the stricter childhood disability standard.

Estimated administrative costs ($ in millions, rounded to the nearest $5 million) and workyears (rounded to the nearest 50) are:

	FY1997	FY1998	FY1999	FY2000	FY2001	FY2002	Total
	$185	$130	−$10	−$10	−$10	−$10	$265
	Workyears						
Federal	900	650	−250	−250	−250	−250	550
State	1,200	1,250	150	150	150	150	3,050
Total	2,100	1,900	−100	−100	−100	−100	3,550

Note: Annual numbers may not add to total due to rounding.

Reductions in SSI Recipients (in thousands):

We expect benefit eligibility for a total of 135,000 of those children receiving benefits at date of enactment will be terminated as a result of these changes in the law. The following figures show the estimated annual effect of the legislation on projected numbers of recipients of Federal SSI benefits:

	FY1997	FY1998	FY1999	FY2000	FY2001	FY2002
Current recipients	−10	−95	−110	−95	−80	−70
New awards	−10	−35	−50	−70	−80	−90
Total	−20	−130	−160	−165	−160	−160

With the reductions in SSI recipients shown above, we estimate the average number of disabled children (in thousands) in payment status after implementation of these interim final rules will be:

FY1997	FY1998	FY1999	FY2000	FY2001	FY2002
1,010	950	955	990	1,015	1,040

Note: Annual numbers may not add to total due to rounding.

Regulatory Flexibility Act

We certify that these interim final rules will not have a significant economic impact on a substantial number of small entities since this rule affects only individuals. Therefore, a regulatory flexibility analysis as provided in Public Law 96–354, the Regulatory Flexibility Act, as amended by Public Law 104–121 is not required.

Paperwork Reduction Act

These interim final rules contain a new information collection requirement in Part 416, section 416.924(g). As required by 44 U.S.C. 3507, as amended by section 2 of the Paperwork Reduction Act of 1995, we have requested under emergency procedures, and OMB has approved, under OMB #0960–0568, the information collection requirements contained in section 416.924(g).

(Catalog of Federal Domestic Assistance: Program Nos. 96.001 Social Security-Disability 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 requirements, Supplemental Security Income (SSI).

Dated: February 5, 1997.

Shirley S. Chater,

Commissioner of Social Security.

For the reasons set out in the preamble, 20 CFR chapter III is amended as follows:

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

Subpart P—[Amended]

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

Authority: Secs. 202, 205(a), (b), and (d)–(h), 216(i), 221(a) and (i), 222(c), 223, 225, and 702(a)(5) of the Social Security Act (42 U.S.C. 402, 405(a), (b), and (d)–(h), 416(i), 421(a) and (i), 422(c), 423, 425, and 902(a)(5)); sec. 211(b), Pub. L. 104–193, 110 Stat. 2105, 2189.

Appendix 1 to Subpart P—[Amended]

2. Part B of Appendix 1 (Listing of Impairments) of subpart P to part 404 is amended by revising the third sentence of the second undesignated paragraph of 103.00A, the fourth undesignated paragraph of 103.00A, the fourth sentence of the fifth undesignated paragraph of 104.00A, the sixth undesignated paragraph of 104.00A, the last sentence of the last undesignated paragraph of 104.00C, the first three sentences of the eighth undesignated paragraph of 112.00A, the third sentence of the first paragraph of

112.00C, the first sentence of 112.00C2. introductory text 112.00C2.b., 112.00C2.c., the heading of 112.00C2.d., 112.00C4 and the undesignated paragraph under it, and 112.02B2.c. introductory text to read as follows:

Appendix 1 to Subpart P—Listing of Impairments

* * * * *

Part B

* * * * *

103.00 Respiratory System

A. * * *

* * * * *

* * * Even if a child does not show that his or her impairment meets the criteria of these listings, the child may have an impairment(s) that is medically or functionally equivalent in severity to one of the listed impairments. * * *

* * * * *

It must be remembered that these listings are only examples of common respiratory disorders that are severe enough to find a child disabled. When a child has a medically determinable impairment that is not listed, an impairment that does not meet the requirements of a listing, or a combination of impairments no one of which meets the requirements of a listing, we will make a determination whether the child's impairment(s) is medically or functionally equivalent in severity to the criteria of a listing. (See §§ 404.1526, 416.926, and 416.926a.)

* * * * *

104.00 Cardiovascular System

A. Introduction

* * * * *

* * * Even though a child who does not receive treatment may not be able to show an impairment that meets the criteria of these listings, the child may have an impairment(s) that is medically or functionally equivalent in severity to one of the listed impairments.

Indeed, it must be remembered that these listings are only examples of common cardiovascular disorders that are severe enough to find a child disabled. When a child has a medically determinable impairment that is not listed, an impairment that does not meet the requirements of a listing, or a combination of impairments no one of which meets the requirements of a listing, we will make a determination whether the child's impairment(s) is medically or functionally equivalent in severity to the criteria of a listing. (See §§ 404.1526, 416.926, and 416.926a.)

* * * * *

C. Treatment and Relationship Status

* * * * *

* * * (See § 404.1594 or § 416.994a, as appropriate, for our rules on medical improvement and whether an individual is no longer disabled.)

112.00 Mental Disorders

A. * * *

* * * * *

It must be remembered that these listings are only examples of common mental disorders that are severe enough to find a child disabled. When a child has a medically determinable impairment that is not listed, an impairment that does not meet the requirements of a listing, or a combination of impairments no one of which meets the requirements of a listing, we will make a determination whether the child's impairment(s) is medically or functionally equivalent in severity to the criteria of a listing. (See §§ 404.1526, 416.926, and 416.926a.)

* * *

* * * * *

C. * * * The functional areas that we consider are: Motor function; cognitive/communicative function; social function; personal function; and concentration, persistence, or pace.

* * *

1. * * *

2. *Preschool children (age 3 to attainment of age 6).* For the age groups including preschool children through adolescence, the functional areas used to measure severity are: (a) Cognitive/communicative function, (b) social function, (c) personal function, and (d) deficiencies of concentration, persistence, or pace resulting in frequent failure to complete tasks in a timely manner. * * *

a. * * *

b. *Social function.* Social functioning refers to a child's capacity to form and maintain relationships with parents, other adults, and peers. Social functioning includes the ability to get along with others (e.g., family members, neighborhood friends, classmates, teachers). Impaired social functioning may be caused by inappropriate externalized actions (e.g., running away, physical aggression—but not self-injurious actions, which are evaluated in the personal area of functioning), or inappropriate internalized actions (e.g., social isolation, avoidance of interpersonal activities, mutism). Its severity must be documented in terms of intensity, frequency, and duration, and shown to be beyond what might be reasonably expected for age. Strength in social functioning may be documented by such things as the child's ability to respond to and initiate social interaction with others, to sustain relationships, and to participate in group activities. Cooperative behaviors, consideration for others, awareness of others' feelings, and social maturity, appropriate to a child's age, also need to be considered. Social functioning in play and school may involve interactions with adults, including responding appropriately to persons in authority (e.g., teachers, coaches) or cooperative behaviors involving other children. Social functioning is observed not only at home but also in preschool programs.

c. *Personal function.* Personal functioning in preschool children pertains to self-care; i.e., personal needs, health, and safety (feeding, dressing, toileting, bathing; maintaining personal hygiene, proper nutrition, sleep, health habits; adhering to medication or therapy regimens; following safety precautions). Development of self-care skills is measured in terms of the child's increasing ability to help himself/herself and to cooperate with others in taking care of these needs. Impaired ability in this area is manifested by failure to develop such skills, failure to use them, or self-injurious actions. This function may be documented by a standardized test of adaptive behavior or by a careful description of the full range of self-care activities. These activities are often observed not only at home but also in preschool programs.

d. *Concentration, persistence, or pace.*

* * *

* * * * *

4. *Adolescents (age 12 to attainment of age 18).* Functional criteria parallel to those for primary school children (cognitive/communicative; social; personal; and concentration, persistence, or pace) are the measure of severity for this age group. Testing instruments appropriate to adolescents should be used where indicated. Comparable findings of disruption of social function must consider the capacity to form appropriate, stable, and lasting relationships. If information is available about cooperative working relationships in school or at part-time or full-time work, or about the ability to work as a member of a group, it should be considered when assessing the child's social functioning. Markedly impoverished social contact, isolation, withdrawal, and inappropriate or bizarre behavior under the stress of socializing with others also constitute comparable findings. (Note that self-injurious actions are evaluated in the personal area of functioning.)

a. Personal functioning in adolescents pertains to self-care. It is measured in

the same terms as for younger children, the focus, however, being on the adolescent's ability to take care of his or her own personal needs, health, and safety without assistance. Impaired ability in this area is manifested by failure to take care of these needs or by self-injurious actions. This function may be documented by a standardized test of adaptive behavior or by careful descriptions of the full range of self-care activities.

b. In adolescents, the intent of the functional criterion described in paragraph B2d is the same as in primary school children, However, other evidence of this functional impairment may also be available, such as from evidence of the child's performance in wok or work-like settings.

* * * * *

112.01 Category of Impairments, Mental

112.02 Organic Mental Disorders:

* * * * *

B. * * *

* * * * *

2. * * *

c. Marked impairment in age-appropriate personal functioning, documented by history and medical findings (including consideration of information from parents or other individuals who have knowledge of the child, when such information is needed and available) and including, if necessary, appropriate standardized tests; or

* * * * *

3. Part B of Appendix 1 (Listing of Impairments) of subpart P to part 404 is amended by revising 114.00D6 and removing the last sentence of the second undesignated paragraph under 114.00D6.

114.00 Immune System

* * * * *

D. * * *

6. Evaluation of HIV infection in children. The criteria in 114.08 do not describe the full spectrum of diseases or conditions manifested by children with HIV infection. As in any case, consideration must be given to whether a child's impairment(s) meets, medically equals, or functionally equals the severity of any other listing in appendix 1 of subpart P; e.g., a neoplastic disorder listed in 113.00ff. (See §§ 404.1526, 416.926, and 416.926a.) Although 114.08 includes cross-references to other listings for the more common manifestations of HIV infection, additional listings may also apply.

* * * * *

PART 416—SUPPLEMENTAL SECURITY INCOME FOR THE AGED, BLIND, AND DISABLED

Subpart F—[Amended]

4. The authority citation for subpart F of part 416 continues to read as follows:

Authority: Secs. 702(a)(5), 1631(a)(2) and (d)(1) of the Social Security Act (42 U.S.C. 902(a)(5) and 1383(a)(2) and (d)(1)).

5. Section 416.635 is amended by revising paragraphs (c) and (d) and adding paragraph (e) to read as follows:

§ 416.635 Responsibilities of a representative payee.

* * * * *

(c) Submit to us, upon our request, a written report accounting for the benefits received;

(d) Notify us of any change in his or her circumstances that would affect performance of the payee responsibilities; and

(e) In cases in which the beneficiary is an individual under age 18 (including cases in which the beneficiary is an individual whose low birth weight is a contributing factor material to our determination that the individual is disabled), ensure that the beneficiary is and has been receiving treatment to the extent considered medically necessary and available for the condition that was the basis for providing benefits (See § 416.994a(i).)

Subpart I—[Amended]

6. The authority citation for subpart I of part 416 continues to read as follows:

Authority: Secs. 702(a)(5), 1611, 1614, 1619, 1631(a), (c), and (d)(1), and 1633 of the Social Security Act (42 U.S.C. 902(a)(5), 1382, 1382c, 1382h, 1383(a), (c), and (d)(1), and 1383b); secs. 4(c) and 5, 6(c)–(e), 14(a) and 15, Pub. L. 98–460, 98 Stat. 1794, 1801, 1802, and 1808 (42 U.S.C. 421 note, 423 note, 1382h note).

7. Section 416.901 is amended by revising paragraphs (e), (f)(2), and (f)(6) as follows:

§ 416.901 Scope of subpart.

* * * * *

(e) Our general rules on evaluating disability for children filing new applications are stated in § 416.924.

(f) * * *

* * * * *

(2) What we mean by the terms *medical equivalence* and *functional equivalence* and how we determine medical equivalence (and functional equivalence if you are a child);

* * * * *

(6) The effect on your benefits if you fail to follow treatment that is expected to restore your ability to work or, if you are a child, to reduce your functional limitations to the point that they are no longer marked and severe, and how we apply the rule in § 416.930.

* * * * *

7. Section 416.902 is amended by adding four new definitions between the definitions for ''Child'' and ''Medical sources'' to read as follows:

§ 416.902 General definitions and terms for this subpart.

* * * * *

Commissioner means the Commissioner of Social Security.

Disability redetermination means a redetermination of your eligibility based on disability using the rules for new applicants appropriate to your age, except the rules pertaining to performance of substantial gainful activity. For individuals who are working and for whom a disability redetermination is required, we will apply the rules in §§ 416.260 ff. In conducting a disability redetermination, we will not use the rules for determining whether disability continues set forth in § 416.994 or § 416.994a. (See § 416.987.)

Impairment(s) means a medically determinable physical or mental impairment or a combination of medically determinable physical or mental impairments.

Marked and severe functional limitations, when used as a phrase, means the standard of disability in the Social Security Act for children claiming SSI benefits based on disability and is a level of severity that meets or medically or functionally equals the severity of a listing in the Listing of Impairments in appendix 1 of subpart P of part 404 (the Listing). See §§ 416.906, 416.924, and 416.926a. The words ''marked'' and ''severe'' are also separate terms used throughout this subpart to describe measures of functional limitations; the term ''marked'' is also used in the listings. See §§ 416.924 and 416.926a. The meaning of the words ''marked'' and ''severe'' when used as part of the term *Marked and severe functional limitations* is not the same as the meaning of the separate terms *''marked'' and ''severe'' used elsewhere in 20 CFR 404 and 416. (See §§ 416.924(c) and 416.926a(c).)*

* * * * *

8. Section 416.906 is revised to read as follows:

§ 416.906 Basic definition of disability for children.

If you are under age 18, we will consider you disabled if you have a medically determinable physical or mental impairment or combination of impairments that causes marked and severe functional limitations, and that can be expected to cause death or that has lasted or can be expected to last for a continuous period of not less than 12 months. Notwithstanding the preceding sentence, if you file a new application for benefits and you are engaging in substantial gainful activity, we will not consider you disabled. We discuss our rules for determining disability in children who file new applications in §§ 416.924 through 416.924c and §§ 416.925 through 416.926a.

9. Section 416.911 is revised to read as follows:

§ 416.911 Definition of disabling impairment.

(a) If you are an adult:

(1) A disabling impairment is an impairment (or combination of impairments) which, of itself, is so severe that it meets or equals a set of criteria in the Listing of Impairments in appendix 1 of subpart P of part 404 of this chapter or which, when considered with your age, education and work experience, would result in a finding that you are disabled under § 416.994, unless the disability redetermination rules in § 416.987(b) apply to you.

(2) If the disability redetermination rules in § 416.987 apply to you, a disabling impairment is an impairment or combination of impairments that meets the requirements in §§ 416.920(c) through (f).

(b) If you are a child, a disabling impairment is an impairment (or combination of impairments) that causes marked and severe functional limitations. This means that the impairment or combination of impairments:

(1) Must meet or medically or functionally equal the requirements of a listing in the Listing of Impairments in appendix 1 of subpart P of part 404 of this chapter, or

(2) Would result in a finding that you are disabled under § 416.994a.

(c) In determining whether you have a disabling impairment, earnings are not considered.

10. Section 416.912 is amended by revising paragraphs (a) and (c)(6) to read as follows:

§ 416.912 Evidence of your impairment.

(a) *General.* In general, you have to prove to us that you are blind or disabled. This means that you must furnish medical and other evidence that we can use to reach conclusions about your medical impairment(s). If material to the determination whether you are blind or disabled, medical and other evidence must be furnished about the effects of your impairment(s) on your ability to work, or if you are a child, on your functioning, on a sustained basis. We will consider only impairment(s) you say you have or about which we receive evidence.

* * * * *

(c) * * *

(6) Any other factors showing how your impairment(s) affects your ability to work, or, if you are a child, your functioning. In §§ 416.960 through 416.969, we discuss in more detail the evidence we need when we consider vocational factors.

* * * * *

11. Section 416.913 is amended by revising paragraph (c)(3) to read as follows:

§ 416.913 Medical evidence of your impairment.

* * * * *

(c) * * *

(3) If you are a child, the medical source's opinion about your functional limitations in learning, motor functioning, performing self-care activities, communicating, socializing, and completing tasks (and, if you are a newborn or young infant from birth to age 1, responsiveness to stimuli).

* * * * *

12. Section 416.919a is amended by revising paragraph (b)(5) to read as follows:

§ 416.919a When we will purchase a consultative examination and how we will use it.

* * * * *

(b) * * *

(5) There is an indication of a change in your condition that is likely to affect your ability to work, or, if you are a child, your functioning, but the current severity of your impairment is not established.

13. Section 416.919n is amended by revising the fifth sentence of paragraph (b) and paragraph (c)(6) to read as follows:

§ 416.919n Informing the examining physician or psychologist of examination scheduling, report content, and signature requirements.

* * * * *

(b) * * * The medical report must be complete enough to help us determine the nature, severity, and duration of the impairment, and your residual functional capacity (if you are an adult) or your functioning (if you are a child). * * *

(c) * * *

(6) A statement about what you can still d0 despite your impairment(s), unless the claim is based on statutory blindness. If you are an adult, this statement should describe the opinion of the consultative physician or psychologist about your ability, despite your impairment(s), to do work-related activities such as sitting, standing, walking, lifting, carrying, handling objects, hearing, speaking, and traveling; and, in cases of mental impairment(s), the opinion of the consultative physician or psychologist about your ability to understand, to carry out and remember instructions, and to respond appropriately to supervision, coworkers and work pressures in a work setting. If you are a child, this statement should describe the opinion of the consultative physician or psychologist about your functional limitations in learning, motor functioning, performing self-care activities, communicating, socializing, and completing tasks (and, if you are a newborn or young infant from birth to age 1, responsiveness to stimuli); and

* * * * *

14. Section 416.924 is amended by removing paragraphs (a) and (f), redesignating paragraphs (b) through (e) as (a) through (d), adding new paragraphs (e) and (g), redesignating prior paragraph (g) as paragraph (f), and by revising newly designated paragraphs (a), (c), and (d) to read as follows:

§ 416.924 How we determine disability for children.

(a) *Steps in evaluating disability.* We consider all relevant evidence in your case record when we make a determination or decision whether you are disabled. If you allege more than one impairment, we will evaluate all the impairments for which we have evidence. Thus, we will consider the combined effects of all your impairments upon your overall health and functioning. We will also evaluate any limitations in your functioning that result from your symptoms, including pain (see § 416.929). When you file a new application for benefits, we use the evaluation process set forth in (b) through (d) of this section. We follow a set order to determine whether you are disabled. If you are doing substantial gainful activity, we will determine that you are not disabled and not review your claim further. If you are not doing substantial gainful activity, we will consider your physical or mental impairment(s) first to see if you have an impairment or combination of

impairments that is severe. If your impairment(s) is not severe, we will determine that you are not disabled and not review your claim further. If your impairment(s) is severe, we will review your claim further to see if you have an impairment(s) that meets, medically equals, or functionally equals in severity any impairment that is listed in appendix 1 of subpart P of part 404 of this chapter. If you have such an impairment(s), and it meets the duration requirement, we will find that you are disabled. If you do not have such an impairment(s), or if it does not meet the duration requirement, we will find that you are not disabled.

* * * * *

(c) *You must have a severe impairment(s).* If your impairment(s) is a slight abnormality or a combination of slight abnormalities that causes no more than minimal functional limitations, we will find that you do not have a severe impairment(s) and are, therefore, not disabled.

(d) *Your impairment(s) must meet, medically equal, or functionally equal in severity a listed impairment in appendix 1.* An impairment(s) causes marked and severe functional limitations if it meets or medically equals in severity the set of criteria for an impairment listed in the Listing of Impairments in appendix 1 of subpart P of part 404 of this chapter, or if it is functionally equal in severity to a listed impairment.

(1) Therefore, if you have an impairment(s) that is listed in appendix 1, or is medically or functionally equal in severity to a listed impairment, and that meets the duration requirement, we will find you disabled.

(2) If your impairment(s) does not meet the duration requirement, or does not meet, medically equal, or functionally equal in severity a listed impairment, we will find that you are not disabled.

(3) We explain our rules for deciding whether an impairment(s) meets a listing in § 416.925. Our rules for how we decide whether an impairment(s) medically equals a listing are set forth in § 416.926. Our rules for deciding whether an impairment(s) functionally equals a listing are set forth in § 416.926a.

(e) *If you attain age 18 after you file your disability application but before we make a determination or decision.* For the period during which you are under age 18, we will evaluate whether you are disabled using the rules in this section. For the period starting with the day you attain age 18, we will evaluate whether you are disabled using the disability rules we use for adults filing new claims, in § 416.920.

* * * * *

(g) *How we will explain our findings.* When we make an initial or reconsidered determination whether you are disabled under this section or whether your disability continues under § 416.994a (except when a disability hearing officer makes the reconsideration determination), we will complete a standard form, Form SSA–538, Childhood Disability Evaluation Form. The form outlines the steps of the sequential evaluation process for individuals who have not attained age 18. In these cases, the State agency medical or psychological consultant (see § 416.1016) or other designee of the Commissioner has overall responsibility for the content of the form and must sign the form to attest that it is complete and that he or she is responsible for its content, including the findings of fact and any discussion of supporting evidence. Disability hearing officers, administrative law judges, and the administrative appeals judges on the Appeals Council (when the Appeals Council makes a decision) will not complete the form but will indicate their findings at each step of the sequential evaluation process in their determinations or decisions.

15. Section 416.924a is amended by removing paragraph (a)(4), redesignating paragraph (a)(5) as paragraph (a)(4), removing paragraph (b), redesignating paragraphs (c) and (d) as paragraphs (b) and (c), revising the third sentence of paragraph (a) introductory text, revising paragraph (a)(2), revising the first sentence of paragraph (a)(3), revising the first sentence of redesignated paragraph (b) introductory text, and revising redesignated paragraphs (c)(1) and (c)(4) to read as follows:

§ 416.924a Age as a factor of evaluation in childhood disability.

(a) * * * However, your age is always an important factor when we decide whether your impairment(s) is severe (see § 416.924(c)). * * *

(2) The Listing of Impairments in appendix 1 of subpart P of part 404 of this chapter contains examples of impairments that we consider of such significance that they cause marked and severe functional limitations. Therefore, we will usually decide whether your impairment meets a listing without giving special consideration to your age. However, several listings are divided into age categories. If the listing appropriate for evaluating your impairment includes such age categories, we will evaluate your impairment under the criteria for your age when we decide whether your impairment meets that listing.

(3) When we compare an unlisted impairment with a listed impairment to determine whether you have an impairment(s) that medically or functionally equals the severity of a listing, the way in which we consider your age will depend on the listing we use for comparison. * * *

(b) *Correcting chronological age of premature infants.* We generally use chronological age (that is, a child's age based on birth date) when we decide whether, or the extent to which, a physical or mental impairment or combination of impairments causes functional limitations. * * *

* * * * *

(c) * * *

(1) We recognize that how a particular child adapts to an impairment(s) depends on many factors (e.g., the nature and severity of the impairment(s), the child's temperament, the quality of adult intervention, and the child's age at onset of the impairment(s)). By *adapting to an impairment,* we mean the child's ability to learn those skills, habits, or behaviors that allow the child to compensate for the impairment(s) and, thus, to function as well as possible despite the impairment(s). Therefore, our disability determination will consider how you are adapting to your impairment(s) and the extent to which you are able to function as set forth in this section and §§ 416.924 and 416.924c.

* * * * *

(4) As children approach adulthood—that is, by about age 16—the functional abilities, skills, and behaviors that are appropriate for them are those that are also appropriate for adults. Older adolescents generally also share with the youngest adults the same abilities to adapt to work-related activities despite a severe impairment(s). By the age of adolescence, children have developed basic physical skills and behaviors, so that impairments occurring in adolescence may not have the cumulative interactive effects on functioning that impairments occurring in infancy and early childhood do. (However, as set forth in paragraph (c)(1) of this section, we also recognize that adolescents may experience a variety of impairments with different effects on their functioning. For instance, a child born with a degenerative disorder will experience a worsening of its effects as he or she grows older so that functioning may be more limited for the older child than it is for a younger child with the same illness or disorder.)

16. Section 416.924b is amended by revising paragraph (a), the second sentences in paragraphs (b)(2) and (b)(3), and paragraph (b)(4), and by removing paragraph (b)(5) to read as follows:

§ 416.924b Functioning in children.

(a) *General.* When we evaluate whether your impairment(s) is severe and, if so, whether it causes marked and severe functional limitations, we will consider all of your mental and physical limitations that result from your impairment(s).

(b) * * *

(2) * * * Ordinarily, failures to achieve developmental milestones are most important as indicators of impaired functioning from birth until the attainment of age 3, although they may be used to evaluate older children, especially preschool children.

(3) * * * Ordinarily, activities of daily living are most important as indicators of functional limitations in children aged 3 to attainment of age 16, although they may be used to evaluate children younger than age 3.

(4) *Work-related activities.* The term work-related activities refers to those physical and mental activities that are associated with, or related to, activities in the workplace, as manifested in a person's activities in contexts such as school, work, vocational programs, and organized activities. Ordinarily, inability to perform work-related activities is most important as an indicator of functional limitations in adolescents aged 16 to attainment of age 18.

17. Section 416.924c is revised to read:

§ 416.924c Other factors we will consider.

(a) *General.* When we evaluate whether your impairment(s) is severe, and if so, whether it causes marked and severe functional limitations, we will consider all factors that are relevant to the evaluation of the effects of your impairment(s) on your functioning, such as the effects of your medications, the setting in which you live, your need for assistive devices, and your functioning in school. Therefore, when we assess your functional limitations, we will consider all evidence from medical and nonmedical sources—such as your parents, teachers, and other people who know you—that can help us to understand how your impairment(s) affects your functioning. Some of the factors we will consider include, but are not limited to, the factors in paragraphs (b) through (g) of this section.

(b) *Chronic illness.* If you have a chronic impairment(s) that is characterized by episodes of exacerbation (worsening) or remission (improvement), we will consider the frequency and severity of your episodes of exacerbation and your periods of remission as factors in our determination whether you have a severe impairment(s) and, if so, whether it meets or medically or functionally equals in severity any listing, and is therefore disabling. For instance, if you require repeated hospitalizations, or frequent outpatient care with supportive therapy for a chronic impairment(s), we will consider this need for treatment in our determination. When we determine whether you are disabled, we will consider how the level of treatment you need for your chronic illness affects your functioning. We will consider whether the length and frequency of your hospitalizations or episodes of exacerbation significantly interfere with your functioning on a longitudinal basis, or whether the frequency of your outpatient care affects your functioning.

(c) *Effects of medication.* We will consider the effects of medication on your symptoms, signs, and laboratory findings, including your functioning. Although medications may control the most obvious manifestations of your condition(s), they may or may not affect the functional limitations imposed by your impairment(s). If your symptoms or signs are reduced by medications, we will consider whether any functional limitations which may nevertheless persist are marked and severe, even if there is apparent improvement from the medications. We will also consider whether your medications create any side effects which cause or contribute to your functional limitations.

(d) *Effects of structured or highly supportive settings.* Children with serious impairments may spend much of their time in structured or highly supportive settings. A structured or highly supportive setting may be your own home, in which family members make extraordinary adjustments to accommodate your impairment(s); or your classroom at school, whether a regular class in which you are accommodated or a special classroom; or a residential facility or school where you live for a period of time. Children with chronic impairments also commonly have their lives structured in such a way as to minimize stress and reduce their symptoms or signs of impairment; others may continue to have persistent pain, fatigue, decreased energy, or other symptoms or signs, though at a lesser level of severity. Such children may be more impaired in their overall functioning than their symptoms and signs would indicate. Therefore, if your symptoms or signs are controlled or reduced by the environment in which you live, we will consider your functioning outside of this highly structured setting.

(e) *Adaptations.* We will consider the nature and extent of any other adaptations that are made for you in order to enable you to function. Such adaptations may include assistive devices, appliances, or technology. Some adaptations may enable you to function normally, or almost normally (e.g., eyeglasses, hearing aids). Others may increase your functioning, even though you may still have functional limitations (e.g., ankle-foot orthoses, hand or foot splints, and specially adapted or custom-made tools, utensils, or devices for self-care activities such as bathing, feeding, toileting, and dressing). When we evaluate your overall functioning with an adaptation, we will consider the degree to which the adaptation enables you to function and any functional limitations that nevertheless persist.

(f) *Time spent in therapy.* You may need frequent and ongoing therapy from one or more kinds of health care professionals in order to maintain or improve your functional status. Therapy may include occupational, physical, or speech and language therapy, special nursing services, psychotherapy, or psychosocial counseling. Frequent therapy, although intended to improve your functioning in some ways, may also interfere with your functioning in other ways. If you receive frequent therapy at school during a normal school day, it may or may not interfere significantly with your functioning. If you must frequently interrupt your activities at school or at home for therapy, these interruptions may interfere with your functioning. We will consider the frequency of any therapy that you must have, how long you have needed the therapy or will need the therapy, and whether it interferes with your functioning.

(g) *School attendance.* (1) School records and information from people at school who know you or who have examined you, such as teachers and school psychologists, psychiatrists, or therapists, may be important sources of information about your impairment(s) and its effect on your functioning. If you attend school, we will consider this evidence when it is relevant and available to us.

(2) The fact that you are able to attend school will not, in itself, be an indication that you are not disabled. We will consider the circumstances of your school attendance, such as your functioning in a regular classroom

setting. Likewise, the fact that you are in a special education classroom setting, or that you are not in such a setting, will not in itself establish your actual limitations or abilities. We will consider the fact of such placement or lack of placement in the context of the remainder of the evidence in your case record.

(3) However, if you are unable to attend school on a regular basis because of your impairment(s), we will consider this when we determine whether you are disabled.

(h) *Treatment and intervention, in general.* With adequate treatment or intervention, some children not only have their symptoms and signs reduced, but also maintain, return to or achieve a level of functioning that is not disabling. Treatment or intervention may prevent, eliminate, or reduce functional limitations; if such limitations were disabling in the absence of treatment or intervention, treatment or intervention may eliminate them or reduce them so that they are not disabling. We will, therefore, evaluate the effects of your treatment or intervention to determine the actual outcome of the treatment or intervention in your particular case.

18. Section 416.924d is removed.

19. Section 416.924e is removed.

20. Section 416.925 is amended by revising paragraph (a) and adding five sentences to the end of paragraph (b)(2) to read as follows:

§ 416.925 Listing of Impairments in appendix 1 of subpart P of part 404 of this chapter.

(a) *Purpose of the Listing of Impairments.* The Listing of Impairments describes, for each of the major body systems, impairments that are considered severe enough to prevent an adult from doing any gainful activity or, for a child, that causes marked and severe functional limitations. Most of the listed impairments are permanent or expected to result in death, or a specific statement of duration is made. For all others, the evidence must show that the impairment has lasted or is expected to last for a continuous period of at least 12 months.

(b) * * *

(2) * * * Although the severity criteria in Part B of the Listing of Impairments are expressed in different ways for different impairments, the level of severity for impairments listed in part B is intended to be the same as that expressed in the functional severity criteria of the childhood mental disorders listings. (See listings 112.01 ff. of appendix 1 of subpart P of part 404 of this chapter.) Therefore, in general, a child's impairment(s) is of ''listing-level severity'' if it causes marked limitations in two broad areas of functioning or extreme limitations in one such area. (See § 416.926a for definition of the terms *marked* and *extreme* as they apply to children.) However, when we decide whether your impairment(s) meets the requirements for any listed impairment, we will decide that your impairment is of ''listing-level severity'' even if it does not result in marked limitations in two broad areas of functioning, or extreme limitations in one such area, if the listing that we apply does not require such limitations to establish that an impairment(s) is disabling.

* * * * *

21. Section 416.926 is amended by revising the section heading, paragraph (a), the last sentence of paragraph (b), and the first sentence of paragraph (c), and by adding paragraph (d) to read as follows:

§ 416.926 Medical equivalence for adults and children.

(a) *How medical equivalence is determined.* We will decide that your impairment(s) is medically equivalent to a listed impairment in appendix 1 of subpart P of part 404 of this chapter if the medical findings are at least equal in severity and duration to the listed findings. We will compare the symptoms, signs, and laboratory findings about your impairment(s), as shown in the medical evidence we have about your claim, with the corresponding medical criteria shown for any listed impairment. When we make a finding regarding medical equivalence, we will consider all relevant evidence in your case record. Medical equivalence can be found in two ways:

(1) If you have an impairment that is described in the Listing of Impairments in appendix 1 of subpart P of part 404 of this chapter, but:

(i) You do not exhibit one or more of the medical findings specified in the particular listing, or

(ii) You exhibit all of the medical findings, but one or more of the findings is not as severe as specified in the listing, we will nevertheless find that your impairment is medically equivalent to that listing if you have other medical findings related to your impairment that are at least of equal medical significance.

(2) If you have an impairment that is not described in the Listing of Impairments in appendix 1, or you have a combination of impairments, no one of which meets or is medically equivalent to a listing, we will compare your medical findings with those for closely analogous listed impairments. If the medical findings related to your impairment(s) are at least of equal medical significance to those of a listed impairment, we will find that your impairment(s) is medically equivalent to the analogous listing.

(b) * * * We will also consider the medical opinion given by one or more medical or psychological consultants designated by the Commissioner in deciding medical equivalence. (See § 416.1016.)

(c) *Who is a designated medical or psychological consultant.* A medical or psychological consultant designated by the Commissioner includes any medical or psychological consultant employed or engaged to make medical judgments by the Social Security Administration, the Railroad Retirement Board, or a State agency authorized to make disability determinations. * * *

(d) *Responsibility for determining medical equivalence.* In cases where the State agency or other designee of the Commissioner makes the initial or reconsideration disability determination, a State agency medical or psychological consultant or other designee of the Commissioner (see § 416.1016) has the overall responsibility for determining medical equivalence. For cases in the disability hearing process or otherwise decided by a disability hearing officer, the responsibility for determining medical equivalence rests with either the disability hearing officer or, if the disability hearing officer's reconsideration determination is changed under § 416.1418, with the Associate Commissioner for Disability or his or her delegate. For cases at the Administrative Law Judge or Appeals Council level, the responsibility for deciding medical equivalence rests with the Administrative Law Judge or Appeals Council.

22. Section 416.926a is revised to read as follows:

§ 416.926a Functional equivalence for children

(a) *General.* If your impairment or combination of impairments does not meet, or is not medically equivalent in severity to, any listed impairment in appendix 1 of subpart P of part 404 of this chapter, we will assess all functional limitations caused by your impairment(s), i.e., what you cannot do because of your impairment(s), to determine if your impairment(s) is functionally equivalent in severity to any listed impairment. While all possible impairments are not addressed within the Listing of Impairments, within the listed impairments are all the

physical and mental functional limitations, i.e., what a child cannot do as a result of an impairment, that produce marked and severe functional limitations. If the functional limitation(s) caused by your impairment(s) is the same as the disabling functional limitation(s) caused by a listed impairment, we will find that your impairment(s) is equivalent in severity to that listed impairment, even if your impairment(s) is not medically related to the listed impairment. When we make a determination or decision using this rule, the primary focus will be on whether your functional limitations are disabling, as long as there is a direct, medically determinable cause for these limitations. As with any disabling impairment, the duration requirement must also be met (see §§ 416.909 and 416.924(a)).

(b) *How we determine functional equivalence.* We will compare any functional limitations resulting from your impairment(s) with the disabling functional limitations of any listed impairment in part A or part B of the Listing that includes the same functional limitations. The listing we use for comparison need not be medically related to your impairment(s). In paragraphs (b)(1) through (b)(4) of this section we explain the methods we may use to decide that your impairment(s) is functionally equivalent in severity to a listing. There is no set order in which we must consider these methods and we may not consider them all if we find that your impairment(s) is functionally equivalent in severity to a listed impairment. We will use any method that is appropriate to, or best describes, your impairment(s) and functional limitations. However, we will consider all of the methods before we determine that your impairment(s) is *not* functionally equivalent in severity to any listed impairment. At the initial and reconsideration levels (except when a disability hearing officer makes the reconsideration determination), we will also complete a standard form, Form SSA–538, Childhood Disability Evaluation Form, to show how we determined whether your impairment(s) is functionally equivalent in severity to a listed impairment. (See § 416.924(g).)

(1) *Limitation of specific functions.* We may find that your impairment(s) is functionally equivalent in severity to a listed impairment because of extreme limitation of one specific function, such as walking or talking. (See paragraph (c) of this section for an explanation of the term ''extreme.'') Some listings also include criteria requiring limitation of more than one specific function, such as limitations in walking *and* talking; each limitation in itself is not enough to show disability, but the combination of limitations establishes marked and severe functional limitations. If you have a limitation of a combination of specific functions that are the same as those in such a listed impairment, we will find that your impairment(s) is functionally equivalent in severity to that listing.

(2) *Broad areas of development or functioning.* Instead of looking at limitation of specific functions, we may evaluate the effects of your impairment(s) in broad areas of development or functioning, such as social functioning, motor functioning, or personal functioning (i.e., self-care) and determine if your functional limitations are equivalent in severity to the disabling functional limitations in listing 112.12 or listing 112.02. If you have extreme limitations in one area of functioning or marked limitation in two areas of functioning, we will find that your impairment(s) is functionally equivalent in severity to a listed impairment. We explain the broad areas of development or functioning we consider and what the terms ''extreme'' and ''marked'' mean in paragraph (c) of this section.

(3) *Episodic impairments.* If you have a chronic impairment(s) that is characterized by frequent illnesses or attacks, or be exacerbations and remissions, we may evaluate your functional limitations using the methods in paragraphs (b)(1) and (b)(2) of this section. However, your functional limitations may vary and we may not be able to use the methods in paragraphs (b)(1) and (b)(2) of this section. Instead, we may compare your functional limitation(s) to those in any listing for a chronic impairment with similar episodic criteria to determine if your impairment(s) has such a serious impact on your functioning over time that it is functionally equivalent in severity to one of those listings. Limitations that are characteristic of episodic impairments are not necessarily related to a single, specific function. Episodes of disabling functional limitations may occur with specified frequency despite treatment. If your episodic impairment(s) produces disabling functional limitations that are the same as the disabling functional limitations of a listed impairment with similar episodic criteria, we will find that you are disabled even though you may be able to function adequately between episodes.

(4) *Limitations related to treatment or medication effects.* Some impairments require treatment over a long period of time (i.e., at least a year) and the treatment itself (e.g., multiple surgeries) causes marked and severe functional limitations. Marked and severe functional limitations may also result from the combined effects of limitations caused by ongoing treatment and limitations caused by an impairment(s). In many cases, we will be able to evaluate such limitations using the methods for evaluating specific functions or broad areas of development or functioning in paragraphs (b)(1) and (b)(2) of this section. But we may also compare your functional limitations(s) to criteria in listings based on treatment (including side effects of medication) that is itself disabling or that contributes to functional limitations. If treatment of your impairment(s) produces functional limitations that are the same as the disabling functional limitations of a listed impairment, we will find that your impairment(s) is functionally equivalent in severity to that listing.

(c) *Broad areas of development or functioning.* When we determine functional equivalence based on broad areas of development or functioning, we will evaluate the functional effects of your impairment(s) in several areas of development or functioning to determine if your functional limitations are equivalent in severity to the disabling functional limitations of listing 112.12 or listing 112.02. However, instead of referring to the areas of development or functioning in those listings, we will refer to the areas of development or functioning described in paragraphs (c)(4) and (c)(5) of this section. (We describe the areas in general terms in paragraph (c)(4) and then in detail as they apply to specific age groups in paragraph (c)(5).) If you have marked limitations in two areas of development or functioning, or extreme limitation in one area, we will find that your impairment(s) is functionally equivalent in severity to listing 112.12 or listing 112.02, even if your impairment(s) is a physical impairment(s) or a combination of physical and mental impairments. We explain the meaning of the terms ''marked limitation'' and ''extreme limitation'' in paragraph (c)(3) of this section.

(1) *How we use the areas of development or functioning.* (i) When we make a finding about functional equivalence, we will consider the extent of your functional limitations in the areas affected by your impairment(s). We will also consider how your limitation(s) in one area affects your development or functioning in other areas.

(ii) In some children, some physical impairments will be evaluated most

appropriately only in the areas of motor development or motor functioning. In others, the effects will be more global. If you have a physical impairment(s) that causes a functional limitation(s) not addressed solely in the area of motor development or motor functioning, we will consider the effects of your impairment in all relevant areas in which you have limitations from the impairment(s). A physical impairment(s) may cause limitations in any or all of the areas of development or functioning.

(2) *Other considerations.* When we assess your functioning, we will consider all information in your case record that can help us determine the effect of your impairment(s) on your physical and mental functioning. We will consider the nature of your impairment(s), your age, your ability to be tested given your age, and other relevant factors (see §§ 416.924a through 416.924c). We will consider whether any help that you need from others to enable you to do any particular activity (e.g., dressing) is appropriate to your age.

(3) *Definitions of ''marked'' and ''extreme'' limitations*—(i) *Marked limitation* means—(A) When standardized tests are used as the measure of functional abilities, a valid score that is two standard deviations or more below the norm for the test (but less than three standard deviations); or

(B) For children from birth to attainment of age 3, functioning at more than one-half but not more than two-thirds of chronological age; or

(C) For children from age 3 to attainment of age 18, ''more than moderate'' and ''less than extreme.'' Marked limitation may arise when several activities or functions are limited or even when only one is limited as long as the degree of limitation is such as to interfere seriously with the child's functioning.

(ii) *Extreme limitation* means— (A) When standardized tests are used as the measure of functional abilities, a valid score that is three standard deviations or more below the norm for the test; or

(B) For children from birth to attainment of age 3, functioning at one-half chronological age or less; or

(C) For children from birth to attainment of age 18, no meaningful functioning in a given area. There may be extreme limitation when several activities or functions are limited or even when only one is limited.

(4) *Areas of development or functioning.* The following are the areas of development or functioning that may be addressed in a finding of functional equivalence.

(i) *Cognition/communication:* The ability or inability to learn, understand, and solve problems through intuition, perception, verbal and nonverbal reasoning, and the application of acquired knowledge; the ability to retain and recall information, images, events, and procedures during the process of thinking. The ability or inability to comprehend and produce language (e.g., vocabulary and grammar) in order to communicate (e.g., to respond, as in answering questions, following directions, acknowledging the comments of others; to request, as in demanding action, meeting needs, seeking information, requesting clarification, initiating interaction; to comment, as in sharing information, expressing feelings, and ideas, providing explanations, describing events, maintaining interaction, using hearing that is adequate for conversation, and using speech (articulation, voice, and fluency) that is intelligible.

(ii) *Motor:* The ability or inability to use gross and fine motor skills to relate to the physical environment and serve one's physical purposes. It involves general mobility, balance, and the ability to perform age-appropriate physical activities involved in play, physical education, sports, and physically related daily activities other than self-care (see Personal area).

(iii) *Social:* The ability or inability to form and maintain relationships with other individuals and with groups; e.g., parents, siblings, neighborhood children, classmates, teachers. Ability is manifested in responding to and initiating social interaction with others, sustaining relationships, and participating in group activities. It involves cooperative behaviors, consideration for others, awareness of others' feelings, and social maturity appropriate to a child's age. Ability is also manifested in the absence of inappropriate externalized actions (e.g., running away, physical aggression—but not self-injurious actions, which are evaluated in the personal area of functioning), and the absence of inappropriate internalized actions (e.g., social isolation, avoidance of interpersonal activities, mutism). Social functioning in play, school, and work situations may involve interactions with adults, including responding appropriately to persons in authority (e.g., teachers, coaches, employers) or cooperative behaviors involving other children.

(iv) *Responsiveness to stimuli (birth to age 1 only):* The ability or inability to respond appropriately to stimulation (visual, auditory, tactile, vestibular, proprioceptive).

(v) *Personal (age 3 to age 18 only):* The ability or inability to help yourself and to cooperate with others in taking care of your personal needs, health, and safety (e.g., feeding, dressing, toileting, bathing; maintaining personal hygiene, proper nutrition, sleep, health habits; adhering to medication or therapy regimens; following safety precautions).

(vi) *Concentration, persistence, or pace (age 3 to age 18 only):* The ability or inability to attend to, and sustain concentration on, an activity or task, such as playing, reading, or practicing a sport, and the ability to perform the activity or complete the task at a reasonable pace.

(5) *Descriptions for specific age groups*—(i) *Newborns and young infants (birth to attainment of age 1)* Children in this age group are evaluated in terms of four areas of development. The following are general descriptions of development typical of this age group.

(A) *Cognitive/communicative development (birth to attainment of age 1):* Your ability or inability to show interest in, and actively seek interaction with, your environment, first randomly, then through trial-and-error, and finally with deliberate and purposeful intent. Your ability or inability to first recognize, and then attach meaning to, routine situations and events and gradually to everyday sounds and eventually to familiar words. Your ability or inability to vocalize, both imitatively and spontaneously, using vowels and later consonants, first in isolation, and then in increasingly longer babbling strings.

(B) *Motor development (birth to attainment of age 1):* Your ability or inability to explore and manipulate your environment by moving your body and by using your hands; e.g., by increasingly controlling position and movement of head, sitting with support, creeping or crawling, pulling to standing position, walking with hand held, standing alone briefly, waving small rattle, reaching for or grasping objects, transferring toys, picking up small objects, attempting to scribble.

(C) *Social development (birth to attainment of age 1):* Your ability or inability to form and maintain intimate relationships, and to respond to, and eventually initiate reciprocal interactions with, your primary caregivers (e.g., through games such as pat-a-cake, peek-a-boo, so big). Your ability or inability to begin to regulate the behavior of others through intentional behavior (e.g., gestures, vocalizations). Your ability or inability to recognize and produce a variety of

emotional cues (e.g., facial expressions, vocal tone changes).

(D) *Responsiveness to stimuli (birth to attainment of age 1):* Your ability or inability to form patterns of self-regulation, i.e., to recognize internal cues (e.g., hunger, pain), and to organize external experiences (e.g., light, sound, temperature, movement), and to regulate your reactions to them (e.g., brightening in response to sights and sounds, enjoying being touched or stroked or held, enjoying gentle movement in space (''rock-a-bye-baby'')).

(ii) *Older infants and toddlers (age 1 to attainment of age 3):* Children in this age group are evaluated in terms of three areas of development. The following are general descriptions of development typical of this age group.

(A) *Cognitive/communicative development (age 1 to attainment of age 3):* Your ability or inability to understand by responding to increasingly complex requests, instructions, and questions; to refer to yourself and things around you by pointing and eventually by naming; to form concepts and to solve simple problems through purposeful experimentation (e.g., disassembling toys), imitation (immediate and delayed), and constructive play (e.g., putting things in and out of containers, building with blocks, exploring spaces); to demonstrate your knowledge of objects, actions, and situations you have encountered through pretend play activities; to spontaneously communicate your wishes or needs by using gestures, an increasing number of intelligible words, and eventually grammatically correct simple sentences and questions with increasingly rich and broad vocabulary.

(B) *Motor development (age 1 to attainment of age 3):* Your ability or inability to move in your environment using your body with steadily increasing dexterity and independence from support by others, and your increasing ability to manipulate small objects and to use your hands to do, or to get, something that you want or need.

(C) *Social development (age 1 to attainment of age 3):* Your ability or inability to exhibit normal dependence upon, and intimacy with, your primary caregivers, as well as increasing independence from them; to initiate and respond to a variety of emotional cues; to regulate and organize emotions and behaviors. Your ability or inability to be interested in initiating and maintaining interactions with others, first during brief, yet frequent encounters, and gradually increasing to longer, sustained ones. Your ability or inability to show interest in, initially watch, then play alongside, and eventually interact with similarly aged peers.

(iii) *Preschool children (age 3 to attainment of age 6).* Children in this age group are evaluated in terms of five areas of development. The following are general descriptions of development typical of this age group.

(A) *Cognitive/communicative development (age 3 to attainment of age 6):* Your ability or inability to learn, understand, and solve problems through intuition, perception, verbal and nonverbal reasoning, and the application of acquired knowledge; your ability or inability to retain and recall information, images, events, and procedures during the process of thinking (as in the development of readiness skills for formal learning (e.g., learning letters, shapes, colors) and skills for daily living (e.g., putting toys in proper places)). Your ability or inability to communicate by expressing your needs, feelings, and preferences; by telling, requesting, predicting, and relating information; by describing actions and functions; by providing explanations; by following and giving directions; and by engaging in conversation in a spontaneous, interactive, and increasingly intelligible manner, using increasingly complex vocabulary and grammar.

(B) *Motor development (age 3 to attainment of age 6):* Your ability or inability to move and use your arms and legs in increasingly more intricate and coordinated activity, and your ability or inability to use your hands with increasing coordination to manipulate small objects during play (e.g., drawing, using building blocks, constructing puzzles) and physically related daily activities other than self-care (see Personal area).

(C) *Social development (age 3 to attainment of age 6):* Your ability or inability to initiate social exchanges, to organize and regulate your emotions and behaviors, and to respond to your social environment through appropriate and increasingly complex interactions, such as showing affection, sharing, and helping; your ability to relate to caregivers with increasing independence, to choose your own friends, and to play cooperatively with other children, one-at-a-time or in a group.

(D) *Personal development (age 3 to attainment of age 6):* Your ability or inability to help yourself and to cooperate with others in taking care of your personal needs, health, and safety (e.g., bathing, dressing, maintaining sleep habits, crossing the street with an adult).

(E) *Concentration, persistence, or pace (age 3 to attainment of age 6):* Your ability or inability to engage in an activity, and to sustain the activity for a period of time at a reasonable pace (e.g., playing a simple board game).

(iv) *School-age children (age 6 to attainment of age 12).* Children in this age group are evaluated in terms of five areas of functioning. The following are general descriptions of functioning typical of this age group.

(A) *Cognitive/communicative functioning (age 6 to attainment of age 12):* Your ability or inability to learn, understand, and solve problems through intuition, perception, verbal and nonverbal reasoning, and the application of acquired knowledge; the ability to retain and recall information, images, events, and procedures during the process of thinking, as in formal learning situations (e.g., reading, class discussions) and in daily living (e.g., telling time, making change). Your ability or inability to comprehend and produce language (e.g., vocabulary, grammar) in order to communicate in social conversation (e.g., to express feelings, meet needs, seek information, describe events, share stories), and in learning situations (e.g., to exchange information and ideas with peers and family or with groups such as your school classes) in a spontaneous, interactive, sustained, and intelligible manner, using increasingly complex vocabulary and grammar.

(B) *Motor functioning (age 6 to attainment of age 12):* Your ability or inability to use fine and gross motor skills in order to engage in the physical activities involved in normal mobility, school work, play, physical education, sports, and other physically related daily activities other than self-care (see Personal area).

(C) *Social functioning (age 6 to attainment of age 12):* Your ability or inability to play alone, with another child, and in a group; to initiate and develop friendships; to respond to your social environments through appropriate and increasingly complex interpersonal behaviors, such as empathizing with others and tolerating differences; and to relate appropriately to individuals and in group situations (e.g., siblings, parents or caregivers, peers, teachers, school classes, neighborhood groups).

(D) *Personal functioning (age 6 to attainment of age 12):* Your ability or inability to help yourself and to cooperate with others in taking care of your personal needs, health, and safety (e.g., eating, dressing, maintaining personal hygiene, following safety precautions).

(E) *Concentration, persistence, or pace (age 6 to attainment of age 12):* Your ability or inability to engage in an activity, and to sustain the activity for a period of time and at a reasonable pace.

(v) *Adolescents (age 12 to attainment of age 18):* Children in this age group are evaluated in terms of five areas of functioning. The following are general descriptions of functioning typical of this age group.

(A) *Cognitive/communicative functioning (age 12 to attainment of age 18):* Your ability or inability to learn, understand, and solve problems through intuition, perception, verbal and nonverbal reasoning, and the application of acquired knowledge; the ability or inability to retain and recall information, images, events, and procedures during the process of thinking, as in formal learning situations (e.g., composition, classroom discussion) and in daily living (e.g., using the post office, using public transportation). Your ability or inability to comprehend and produce language (e.g., vocabulary, grammar) in order to communicate in conversation (e.g., to express feelings, meet needs, seek information, describe events, tell stories), and in learning situations (e.g., to obtain and convey information and ideas) both spontaneously and interactively, in all communication environments (e.g., home, classroom, game fields, extra-curricular activities, job), and with all communication partners (e.g., parents, siblings, peers, school classes, teachers, employers).

(B) *Motor functioning (age 12 to attainment of age 18):* Your ability or inability to use fine and gross motor skills in order to engage in the physical activities involved in normal mobility, school work, play, physical education, sports, and other physically related daily activities other than self-care (see Personal area).

(C) *Social functioning (age 12 to attainment of age 18):* Your ability or inability to initiate and develop friendships, to relate appropriately to individual peers and adults and to peer and adult groups, and to reconcile conflicts between yourself and peers or family members or other adults outside your family.

(D) *Personal functioning (age 12 to attainment of age 18):* Your ability or inability to help yourself in taking care of your personal needs, health, and safety (e.g., dressing, bathing, doing laundry, adhering to medication or therapy regiments).

(E) *Concentration, persistence, or pace (age 12 to attainment of age 18):* Your ability or inability to engage in an activity, and to sustain the activity for a period of time and at a reasonable pace.

(d) *Examples of impairments that are functionally equivalent in severity to a listed impairment.* The following are some examples of impairment and limitations that are functionally equivalent to listings. Findings of equivalence based on the disabling functional limits of a child's impairment(s) are not limited to the examples in this paragraph (d), because these examples do not describe all possible effects of impairments that might be found to be functionally equivalent in severity to a listed impairment. As with any disabling impairment, the duration requirement must also be met (see §§ 416.909 and 416.924(a)).

(1) Documented need for major organ transplant (e.g., liver).

(2) Any condition that is disabling at the time of onset, requiring a series of staged surgical procedures within 12 months after onset as a life-saving measure or for salvage or restoration of function, and such major function is not restored or is not expected to be restored within 12 months after onset of the condition.

(3) Frequent need for a life-sustaining device (e.g., central venous alimentatin catheter), at home or elsewhere.

(4) Ambulation possible only with obligatory bilateral upper limb assistance.

(5) Any physical impairment(s) or combination of physical and mental impairments causing marked restriction of age-appropriate personal functioning and marked restriction in motor functioning.

(6) Any physical impairment(s) or combination of physical and mental impairments causing complete inability to function independently outside the area of one's home within age-appropriate norms.

(7) Requirement for 24-hour-a-day supervision for medical (including psychological) reasons.

(8) Infants weighing less than 1200 grams at birth, until attainment of 1 year of age.

(9) Infants weighing at least 1200 but less than 2000 grams at birth, and who are small for gestational age, until attainment of 1 year of age. (*Small for gestational age* means a birth weight that is at or more than 2 standard deviations below the mean or that is below the 3rd growth percentile for the gestational age of the infant.)

(10) In an infant who has not attained age 1 year, and who may be too young to test, any limitations caused by a physical impairment(s) or a combination of physical and mental impairments that causes the same functional limitations in listing 112.12.

(11) Major congenital organ dysfunction which could be expected to result in death within the first year of life without surgical correction, and the impairment is expected to be disabling (because of residual impairment following surgery, or the recovery time required, or both) until attainment of 1 year of age.

(12) Gastrostomy in a child who has not attained age 3.

(e) *Responsibility for determining functional equivalence.* In cases where the State agency or other designee of the Commissioner makes the initial or reconsideration disability determination, a State agency medical or psychological consultant or other designee of the Commissioner (see § 416.1016) has the overall responsibility for determining functional equivalence. For cases in the disability hearing process or otherwise decided by a disability hearing officer, the responsibility for determining functional equivalence rests with either the disability hearing officer or, if the disability hearing officer's reconsideration determination is changed under § 416.1418, with the Associate Commissioner for Disability or his or her delegate. For cases at the Administrative Law Judge or Appeals Council level, the responsibility for deciding functional equivalence rests with the Administrative Law Judge or Appeals Council.

23. Section 416.927 is amended by revising paragraph (a)(1) to read as follows:

§ 416.927 Evaluating medical opinions about your impairment(s) or disability.

(a) *General.* (1) If you are an adult, you can only be found disabled if you are unable to do any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months. (See § 416.905.) If you are a child, you can be found disabled only if you have a medically determinable physical or mental impairment(s) that causes marked and severe functional limitations and that can be expected to result in death or that has lasted or can be expected to last for a continuous period of not less than 12 months. (See § 416.906.)

* * * * *

24. Section 416.929 is amended by revising the fourth, fifth, and last sentences of paragraph (a), the heading

of paragraph (c), the first and last sentences of paragraph (c)(1), the second sentence of paragraph (c)(2), the heading and the first and last sentences of paragraph (c)(4), the reference at the end of paragraph (d)(1), the sixth and ninth sentences of paragraph (d)(3), and paragraph (d)(4) to read as follows:

§ 416.929 How we evaluate symptoms, including pain.

(a) * * * These include statements or reports from you, your treating or examining physician or psychologist, and others about your medical history, diagnosis, prescribed treatment, daily activities, efforts to work, and any other evidence showing how your impairment(s) and any related symptoms affect your ability to work (or if you are a child, your functioning). We will consider all of your statements about your symptoms, such as pain, and any description you, your physician, your psychologist, or other persons may provide about how the symptoms affect your activities of daily living and your ability to work (or if you are a child, your functioning). * * * We will then determine the extent to which your alleged functional limitations and restrictions due to pain or other symptoms can reasonably be accepted as consistent with the medical signs and laboratory findings and other evidence to decide how your symptoms affect your ability to work (or if you are a child, your functioning).

* * * * *

(c) * * * (1) *General.* When the medical signs or laboratory findings show that you have a medically determinable impairment(s) that could reasonably be expected to produce your symptoms, such as pain, we must then evaluate the intensity and persistence of your symptoms so that we can determine how your symptoms limit your capacity for work or, if you are a child, your functioning. * * * Paragraphs (c)(2) through (c)(4) of this section explain further how we evaluate the intensity and persistence of your symptoms and how we determine the extent to which your symptoms limit your capacity for work (or, if you are a child, your functioning) when the medical signs or laboratory findings show that you have a medically determinable impairment(s) that could reasonably be expected to produce your symptoms, such as pain.

(2) * * * Objective medical evidence of this type is a useful indicator to assist us in making reasonable conclusions about the intensity and persistence of your symptoms and the effect those symptoms, such as pain, may have on your ability to work or, if you are a child, your functioning. * * *

* * * * *

(4) *How we determine the extent to which symptoms, such as pain, affect your capacity to perform basic work activities, or, if you are a child, your functioning).* In determining the extent to which your symptoms, such as pain, affect your capacity to perform basic work activities (or if you are a child, your functioning), we consider all of the available evidence described in paragraphs (c)(1) through (c)(3) of this section. * * * Your symptoms, including pain, will be determined to diminish your capacity for basic work activities (or, if you are a child, your functioning) to the extent that your alleged functional limitations and restrictions due to symptoms, such as pain, can reasonably be accepted as consistent with the objective medical evidence and other evidence.

(d) * * *

(1) * * * (See § 416.920(c) for adults and § 416.924(c) for children.)

* * * * *

(3) * * * (If you are a child and we cannot find equivalence based on medical evidence only, we will consider pain and other symptoms under § 416.926(a)(b)(3) in determining whether you have an impairment(s) that causes overall functional limitations that are the same as the disabling limitations of a listed impairment.) * * * If they are not, we will consider the impact of your symptoms on your residual functional capacity if you are an adult.* * *

(4) *Impact of symptoms (including pain) on residual functional capacity or, if you are a child, on your functioning.* If you have a medically determinable severe physical or mental impairment(s), but your impairment(s) does not meet or equal an impairment listed in appendix 1 of subpart P of part 404 of this chapter, we will consider the impact of your impairment(s) and any related symptoms, including pain, or your residual functional capacity, if you are an adult, or, on your functioning if you are a child. (See §§ 416.945 and 416.924a through 416.924e.)

25. Section 416.930 is amended by revising paragraph (a) to read as follows:

§ 416.930 Need to follow prescribed treatment.

(a) *What treatment you must follow.* In order to get benefits, you must follow treatment prescribed by your physician if this treatment can restore your ability to work, or, if you are a child, if the treatment can reduce your functional limitations so that they are no longer marked and severe.

* * * * *

26. Section 416.987 and an undesignated center heading are added to 20 CFR part 416, subpart I to read as follows:

Disability Redeterminations for Individuals Who Attain Age 18

§ 416.987 Disability redeterminations for individuals who attain age 18.

(a)(1) Public Law 104–193, *The Personal Responsibility and Work Opportunity Reconciliation Act of 1996,* requires that the individuals described in paragraph (b) of this section must have their eligibility redetermined.

(2) For these individuals, subject to the provisions of paragraphs (b)(2) and (b)(3) of this section, we will use the rules for new applicants; we will not use the rules for determining whether disability continues set out in § 416.994. If you are an individual affected by the provisions of this section, we may find that you are not now disabled even though we previously found that you were disabled.

(3) Before we begin your disability redetermination, we will notify you that we are redetermining your eligibility for payments, why we are redetermining your eligibility, which disability rules we will apply, that our review could result in a finding that your SSI payments based on disability could be terminated, that you have the right to submit medical and other evidence for our consideration during the redetermination, and that when we make our determination, we will notify you of our determination, your right to appeal the determination, and your right to request continuation of benefits during appeal.

(4) We will notify you in writing of the results of the disability redetermination. The notice will tell you what our determination is, the reasons for our determination and your right to request reconsideration of the determination. If our determination shows that we should stop your SSI payments based on disability, the notice will also tell you of your right to request that your benefits continue during any appeal. The results of an initial disability redetermination are binding unless you request a reconsideration within the stated time period, or we revise the initial determination.

(b)(1) We will redetermine the eligibility of individuals

(i) Who became eligible for SSI benefits by reason of disability prior to attaining age 18, and

(ii) Who also were eligible for such benefits for the month before the month in which they attained age 18.

(2) When we make this determination, we will apply the rules in §§ 416.920(c)–(f); we will not apply the rules in § 416.920(b) or § 416.994.

(3) If you are an individual affected by the provisions of this section, and you are disabled under § 416.920 (d) or (f), and you are working, we will apply the rules in §§ 416.260 ff.

(4) We will initiate this disability redetermination during the 1-year period beginning on your 18th birthday.

(5) If we find that you are not disabled under the rules in § 416.920 (except § 416.920(b)), your eligibility will end. The month in which we will find you not disabled is explained in paragraph (b)(6) of this section; the month your benefits will stop is explained in paragraph (b)(7) of this section.

(6) If the evidence shows that you are not disabled, we will find that your disability ended in the earliest of:

(i) The month the evidence shows that you are not disabled under the rules set out in this section, but not earlier than the month in which we mail you a notice saying that you are not disabled.

(ii) The first month in which you failed without good cause to follow prescribed treatment under the rules in § 416.930.

(iii) The first month in which you failed without good cause to do what we asked. Section 416.1411 explains the factors we will consider and how we will determine generally whether you have good cause for failure to cooperate. In addition, § 416.918 discusses how we determine whether you have good cause for failing to attend a consultative examination.

27. Section 416.990 is amended by revising paragraphs (b)(9) and (b)(10), adding paragraph (b)(11), and revising the first and second sentences of the definition of *Permanent impairment* in paragraph (c) to read as follows:

§ 416.990 When and how often we will conduct a continuing disability review.

* * * * *

(b) * * *

(9) Evidence we receive raises a question whether your disability or blindness continues;

(10) You have been scheduled for a vocational reexamination diary review; or

(11) By your first birthday, if you are a child whose low birth weight was a contributing factor material to our determination that you were disabled; i.e., whether we would have found you disabled if we had not considered your low birth weight.

(c) * * *

Permanent impairment—medical improvement not expected—refers to a case in which any medical improvement in a person's impairment(s) is not expected. This means an extremely severe condition determined on the basis of our experience in administering the disability programs to be at least static, but more likely to be progressively disabling either by itself or by reason of impairment complications, and unlikely to improve so as to permit the individual to engage in substantial gainful activity or, if you are a child, unlikely to improve to the point that you will no longer have marked and severe functional limitations. * * *

* * * * *

28. Section 416.994a is amended by removing paragraphs (b)(4), (b)(5), (c)(4), (d) (f)(1), and (f)(2), redesignating paragraphs (e) through (i) as paragraphs (d) through (h), redesignating paragraphs (f)(3) and (f)(4) as paragraphs (e)(1) and (e)(2), adding paragraph (i), revising the section heading and paragraphs (a)(1), revising the first sentence of the introductory text to paragraph (b), adding two sentences between the first and second sentences of the introductory text to paragraph (b), revising paragraphs (b)(1) through (b)(3), adding one sentence between the first and second sentences of the introductory text to paragraph (c), revising the third and fourth sentences of redesignated paragraph (d), revising the introductory text to redesignated paragraph (e), revising paragraph (e)(1), revising the second sentence of the introductory text to redesignated paragraph (f), and revising paragraphs (f)(4) and (g)(5) to read as follows:

§ 416.994a How we will determine whether your disability continues or ends, and whether you are and have been receiving treatment that is medically necessary and available, disabled children.

(a) * * *

(1) We will first consider whether there has been medical improvement in your impairment(s). We define ''medical improvement'' in paragraph (c) of this section. If there has been no medical improvement, we will find you are still disabled unless one of the exceptions in paragraphs (e) or (f) of this section applies. If there has been medical improvement, we will consider whether the impairments(s) you had at the time of our most recent favorable determination or decision now meets or medically or functionally equals the severity of the listing it met or equalled at that time. If so, we will find you are still disabled, unless one of the exceptions in paragraphs (e) or (f) of this section applies. If not, we will consider whether your current impairment(s) are disabling under the rules in § 416.924. These steps are described in more detail in paragraph (b) of this section. Even where medical improvement or an exception applies, in most cases, we will find that your disability has ended only if we also find that you are not currently disabled.

* * * * *

(b) *Sequence of evaluation.* To ensure that disability reviews are carried out in a uniform manner, that decisions of continuing disability can be made in the most expeditious and administratively efficient way, and that any decisions to stop disability benefits are made objectively, neutrally, and are fully documented, we follow specific steps in determining whether your disability continues. However, we may skip steps in the sequence if it is clear this would lead to a more prompt finding that your disability continues. For example, we might not consider the issue of medical improvement if it is obvious on the face of the evidence that a current impairment meets the severity of a listed impairment. * * *

(1) *Has there been medical improvement in your condition(s)?* We will determine whether there has been medical improvement in the impairment(s) you had at the time of our most recent favorable determination or decision. (The term medical improvement is defined in paragraph (c) of this section.) If there has been no medical improvement, we will find that your disability continues, unless one of the exceptions to medical improvement described in paragraph (e) or (f) of this section applies.

(i) If one of the first group of exceptions to medical improvement applies, we will proceed to step 3.

(ii) If one of the second group of exceptions to medical improvement applies, we may find that your disability has ended.

(2) *Does your impairment(s) still meet or equal the severity of the listed impairment that it met or equaled before?* If there has been medical improvement, we will consider whether the impairment(s) that we considered at the time of our most recent favorable determination or decision still meets or equals the severity of the listed impairment it met or equalled at that time. In making this decision, we will consider the current severity of the impairment(s) present and documented at the time of our most recent favorable determination or decision, and the same listing section used to make that

determination or decision as it was written at that time, even if it has since been revised or removed from the Listing of Impairments. If that impairment(s) does not still meet or equal the severity of that listed impairment, we will proceed to the next step. If that impairment(s) still meets or equals the severity of that listed impairment as it was written at that time, we will find that you are still disabled, unless one of the exceptions to medical improvement described in paragraphs (e) or (f) of this section applies.

(i) If one of the first group of exceptions to medical improvement applies, we will proceed to step 3.

(ii) If one of the second group of exceptions to medical improvement applies, we may find that your disability has ended.

(3) *Are you currently disabled?* If there has been medical improvement in the impairment(s) that we considered at the time of our most recent favorable determination or decision, and if that impairment(s) no longer meets or equals the severity of the listed impairment that it met or equaled at that time, we will consider whether you are disabled under the rules in §§ 416.924(c) and (d). In determining whether you are currently disabled, we will consider all impairments you now have, including you did not have at the time of our most recent favorable determination or decision, or that we did not consider at that time. The steps in determining current disability are summarized as follows:

(i) *Do you have a severe impairment or combination of impairment?* If there has been medical improvement in your impairment(s), or if one of the first group of exceptions applies, we will determine whether your current impairment(s) is severe, as defined in § 416.924(c). If your impairment(s) is not severe, we will find that your disability has ended. If your impairment(s) is severe, we will then consider whether it meets or medically equals the severity of a listed impairment.

(ii) *Does your impairment(s) meet or medically equal the severity of any impairment listed in appendix 1 of subpart P of part 404 of this chapter?* If your current impairment(s) meets or medically equals the severity of any listed impairment, as described in §§ 416.925 and 416.926, we will find that your disability continues. If not, we will consider whether it functionally equals the severity of a listed impairment.

(iii) *Does your impairment(s) functionally equal the severity of any listed impairment?* If your current impairment(s) functionally equals the severity of any listed impairment, as described in § 416.926a, we will find that your disability continues. If not, we will find that your disability has ended.

(c) * * * Although the decrease in severity may be of any quantity or degree, we will disregard minor changes in your signs, symptoms, and laboratory findings that obviously do not represent medical improvement and could not result in a finding that your disability has ended.

* * * * *

(d) * * * If so, your benefits will continue unless one of the second group of exceptions applies (see paragraph (f) of this section). If not, we will determine whether an attempt should be made to reconstruct those portions of the missing file that were relevant to our most recent favorable determination or decision (e.g., school records, medical evidence from treating sources, and the results of consultative examination).

* * *

(e) *First group of exceptions to medical improvement.* The law provides certain limited situations when your disability can be found to have ended even though medical improvement has not occurred, if your impairment(s) no longer results in marked and severe functional limitations. These exceptions to medical improvement are intended to provide a way of finding that a person is no longer disabled in those situations where, even though there has been no decrease in severity of the impairment(s), evidence shows that the person should no longer be considered disabled or never should have been considered disabled. If one of these exceptions applies, we must also show that your impairment(s) does not now result in marked and severe functional limitations, before we can find you are no longer disabled, taking all your current impairments into account, not just those that existed at the time of our most recent favorable determination or decision. The evidence we gather will serve as the basis for the finding that an exception applies.

(1) *Substantial evidence shows that, based on new or improved diagnostic techniques or evaluations, your impairment(s) is not as disabling as it was considered to be at the time of the most recent favorable decision.* Changing methodologies and advances in medical and other diagnostic techniques or evaluations have given rise to, and will continue to give rise to, improved methods for determining the causes of (i.e., diagnosing) and measuring and documenting the effects of various impairment on children and their functioning. Where, by such new or improved methods, substantial evidence shows that your impairment(s) is not as severe as was determined at the time of our most recent favorable decision, such evidence may serve as a basis for a finding that you are no longer disabled, provided that you do not currently have an impairment(s) that meets or equals the severity of any listed impairment, and therefore results in marked and severe functional limitations.

* * * * *

(f) * * * In these situations, the determination or decision will be made without a finding that you have demonstrated medical improvement or that you are currently not disabled under the rules in § 416.924. * * *

(4) *You fail to follow prescribed treatment which would be expected to improve your impairment(s) so that it no longer results in marked and severe functional limitations.* If treatment has been prescribed for you which would be expected to improve your impairment(s) so that it no longer results in marked and severe functional limitations, you must follow that treatment in order to be paid benefits.

(g) * * *

(5) The first month in which you were told by your physician that you could return to normal activities, provided there is no substantial conflict between your physician's and your statements regarding your awareness of your capacity, and the earlier date is supported by substantial evidence; or

* * * * *

(i) *Requirement for treatment that is medically necessary and available.* If you have a representative payee, the representative payee must, at the time of the continuing disability review, present evidence demonstrating that you are and have been receiving treatment, to the extent considered medically necessary and available, for the condition(s) that was the basis for providing you with SSI benefits, unless we determine that requiring your representative payee to provide such evidence would be inappropriate or unnecessary considering the nature of your impairment(s). If your representative payee refuses without good cause to comply with this requirement, and if we decide that it is in your best interests, we may pay your benefits to another representative payee or to you directly.

(1) *What we mean by treatment that is medically necessary.* Treatment that is medically necessary means treatment that is expected to improve or restore

your functioning and that was prescribed by a treating source, as defined in § 416.902. If you do not have a treating source, we will decide whether there is treatment that is medically necessary that could have been prescribed by a treating source. The treatment may include (but is not limited to)—

(i) Medical management;

(ii) Psychiatric, psychological, or psychosocial counseling;

(iii) Physical therapy; and

(iv) Home therapy, such as administering oxygen or giving injections.

(2) *How we will consider whether medically necessary treatment is available.* When we decide whether medically necessary treatment is available, we will consider such things as (but not limited)—

(i) The location of an institution or facility or place where treatment, services, or resources could be provided to you in relationship to where you reside;

(ii) The availability and cost of transportation for you and your payee to the place of treatment;

(iii) Your general health, including your ability to travel for the treatment;

(iv) The capacity of an institution or facility to accept you for appropriate treatment;

(v) The cost of any necessary medications or treatments that are not paid for by Medicaid or another insurer or source; and

(vi) The availability of local community resources (e.g., clinics, charitable organizations, public assistance agencies) that would provide free treatment or funds to cover treatment.

(3) *When we will not require evidence of treatment that is medically necessary and available.* We will not require your representative payee to present evidence that you are and have been receiving treatment if we find that the condition(s) that was the basis for providing you benefits is not amenable to treatment.

(4) *Removal of a payee who does not provide evidence that a child is and has been receiving treatment that is medically necessary and available.* If your representative payee refuses without good cause to provide evidence that you are and have been receiving treatment that is medically necessary and available, we may, if it is in your best interests, suspend payment of benefits to the representative payee, and pay benefits to another payee or to you. When we decide whether your representative payee had good cause, we will consider factors such as the acceptable reasons for failure to follow prescribed treatment in § 416.930(c) and other factors similar to those describing good cause for missing deadlines in § 416.1411.

(5) *If you do not have a representative payee.* If you do not have a representative payee and we make your payments directly to you, the provisions of this paragraph do not apply to you. However, we may still decide that you are failing to follow prescribed treatment under the provisions of § 416.930, if the requirements of that section are met.

29. Section 416.998 is revised to read as follows:

§ 416.998 If you become disabled by another impairment(s).

If a new severe impairment(s) begins in or before the month in which your last impairment(s) ends, we will find that your disability is continuing. The new impairment(s) need not be expected to last 12 months or to result in death, but it must be severe enough to keep you from doing substantial gainful activity, or severe enough so that you are still disabled under § 416.994, or, if you are a child, to result in marked and severe functional limitations.

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Part V

Department of Labor

Occupational Safety and Health Administration

29 CFR Part 1904

Reporting Occupational Injury and Illness Data to OSHA; Final Rule

DEPARTMENT OF LABOR

Occupational Safety and Health Administration

29 CFR Part 1904

[Docket No. R–02]

RIN 1218–AB24

Reporting Occupational Injury and Illness Data to OSHA; Final Rule

AGENCY: Occupational Safety and Health Administration (OSHA), U.S. Department of Labor.

ACTION: Final rule.

SUMMARY: This final rule amends 29 CFR Part 1904 by adding section 1904.17. Section 1904.17 requires employers to report information to OSHA contained in records that employers are required to create and maintain pursuant to Part 1904, and the number of workers they employed and hours their employees worked during designated periods.

Section 1904.17 will clarify OSHA's authority to collect establishment-specific data by mail for use in agency self-evaluation, deployment of agency resources, periodic reassessment of existing regulations and standards, and rulemaking.

Section 1904.17 was proposed (as section 1904.13) as part of a comprehensive proposal to revise Part 1904. 61 FR 4030 (Feb. 2, 1996). OSHA has determined, however, to take final agency action with respect to section 1904.17 at this time, and to take final action on the remaining Part 1904 issues, including other records access issues, at a later date.

DATES: This final regulation will become effective on March 13, 1997. However, affected parties do not have to comply with the information collection requirements until the Department publishes in the Federal Register the control numbers assigned by the Office of Management and Budget (OMB) to these information collection requirements. Publication of the control numbers notifies the public that OMB has approved these information collection requirements under the Paperwork Reduction Act of 1995.

FOR FURTHER INFORMATION CONTACT: Bonne Friedman, U.S. Department of Labor, Occupational Safety and Health Administration, Office of Information and Consumer Affairs, Room N–3647, 200 Constitution Avenue, NW., Washington, DC 20210, phone (202) 219–8148. For electronic copies of documents, contact the Labor News Bulletin Board at (202) 219–4784, or OSHA's WebPage on the Internet at http://www.osha.gov/. For news releases, fact sheets, and other short documents, contact OSHA FAX at (900) 555–3400 at $1.50 per minute.

SUPPLEMENTARY INFORMATION:

I. Background

In 1971, OSHA issued the occupational injury and illness recording and reporting regulation, 29 CFR Part 1904. Part 1904 includes regulations pertaining to criteria for determining whether an occupational injury or illness should be recorded, and provisions that require employers to give employees and OSHA access to such records. It also provides for collection by the Bureau of Labor Statistics (BLS) of data to be used in an occupational injury and illness statistical program administered by BLS. 1904.20, 1904.21, and 1904.22.

In 1990, the Secretary of Labor transferred some of BLS's statistic-gathering functions to OSHA. 55 FR 9033 (Mar. 9, 1990). BLS retains responsibility for conducting its Annual Survey of Occupational Injuries and Illnesses and will continue to issue data that is aggregated by SIC group. But OSHA will also be responsible for administering a national recordkeeping system for occupational injuries and illnesses whose data will be site-specific.

OSHA's February 1996 proposal to revise Part 1904 sought, among other things, to reflect OSHA's new statistics-gathering responsibilities. OSHA proposed to replace sections 1904.20, 1904.21, and 1904.22 with a single reporting provision at 1904.13, which would apply to both BLS and OSHA collections of information by mail or other remote transmittal.

OSHA received 449 written comments and held six days of public meetings. Approximately 124 comments and two oral presentations specifically addressed proposed section 1904.13.

On further consideration, OSHA determined that BLS and OSHA need separate provisions for collection of data by mail. Thus, a single provision applicable to both agencies would not be appropriate, and a new provision specifically addressed to OSHA reporting requirements and procedures should be developed. OSHA further determined to take final action on proposed 1904.13 at this time, and to take final action with respect to the remainder of the proposed revisions of Part 1904 at a later date.

This final rule revises the proposed section 1904.13 and renumbers it as section 1904.17, the next available number in Part 1904. This final rule does not modify or delete the existing regulations at 1904.13, 1904.20, 1904.21, or 1904.22.

II. Explanation of the Final Rule

OSHA has long had in effect rules pertaining to OSHA access to certain information. Section 1904.7 requires employers ''to provide, upon request, records provided for in §§ 1904.2, 1904.4, and 1904.5 [OSHA-required injury and illness logs and forms] for inspection and copying by any representative of the Secretary of Labor. * * *'' Section 1910.1020 requires employers to give OSHA and employees the right and opportunity to examine and copy exposure and medical records. Some standards contain requirements for OSHA and employee access to exposure and monitoring data required to be created and maintained by those particular standards. E.g., 29 CFR 1910.1001(m)(5)(I) and (ii) (requiring that OSHA and employee be given access to asbestos exposure monitoring and medical surveillance records).

Section 1904.17 establishes a procedural mechanism for conduct of an annual survey of ten or more employers by mail or other remote transmittal. Information covered by section 1904.17 is information contained in records required to be created and maintained pursuant to Part 1904, the number of workers the respondent employed and the number of hours worked by its employees during designated periods. The rule also specifies that both the request and the response will be made by mail or other remote transmittal. Thus, it is more limited than existing records-access provisions that use terms such as ''permit access to'' or ''make available'' and therefore permit OSHA to collect information by on-site record reviews as well as via mail response. The mail-in provision also permits OSHA to coordinate its annual survey with the BLS annual survey. In conducting its 1995 and 1996 annual surveys (1995 data was collected in 1996, 1996 data will be collected in 1997) OSHA provided employers with a carbon-pack form that the employer could complete, separate, and return—one copy to BLS and another to OSHA. OSHA intends to continue this practice or an equivalent means of avoiding duplicate reporting burdens for employers.

The requests for data reports may be made directly by OSHA, or may be sent to employers by a designee of the Agency, such as a state governmental agency, a government contractor, or another Federal agency such as the National Institute for Occupational

Safety and Health (NIOSH). Designating others to exercise this authority will permit a variety of collection methods to be used, depending on which method is the most effective, efficient, and cost effective for the government.

Employers who are normally exempt from keeping injury and illness records under 29 CFR 1904.15 and 29 CFR 1904.16 may be notified by OSHA that they will be required to participate in a particular information collection under 1904.17(a). OSHA will notify these employers in writing in advance of the year for which injury and illness records will be required. OSHA does not expect, in the near term, to take action against § 1904.15 and 16 exempt employers based on survey non-response under § 1904.17.

III. Issues

1. Use of Data

As explained above and in the proposal, site-specific data reported pursuant to section 1904.13 (now section 1904.17) will be used for a variety of purposes: injury/illness surveillance; development of information for promulgating, revising or evaluating OSHA's safety and health standards; evaluating the effectiveness of OSHA's enforcement, training and voluntary programs; public information; and for directing OSHA's program activities, including scheduled workplace inspections and non-enforcement programs, such as targeted mailings of safety and health information to employers.

Many commenters acknowledged OSHA's need for a reporting requirement or affirmatively stated they had no objections to it. (Ex. 15: 80, 184, 239, 313, 341, 359, 384, 418, 449)

However, some commenters who had no objection to the principle of a reporting requirement, expressed concern about the uses to which the data would be put. (Ex. 15: 117, 181, 304) The National Federation of Independent Business argued, for example, that the data should be used for compliance efforts only:

> NFIB strongly objects to this provision unless it is expanded to provide adequate safeguards to prevent abuses of written requests, especially for reasons other than OSHA compliance—i.e., research, surveillance, or public information. In fact, NFIB questions the need for OSHA to have access to data for non-compliance reasons at all. This is another instance where it appears as if OSHA has overstepped its legislative bounds and is attempting to transform a recordkeeping/compliance system into a comprehensive research system of occupational safety and health statistics.

(Ex. 15: 304, p. 25)

Others contended that the data should be used for statistical purposes only. See e.g., Heat Transfer Equipment Company (Ex. 15: 117)(''rules must be in place that the information will be used for statistical purposes only and not as a method for determining individual audits and retribution'').

The OSH Act directs OSHA to operate a broad program to assure safe and healthy workplace conditions in the majority of America's workplaces, nearly 6,000,000 individual workplace establishments employing approximately 100,000,000 workers. A vital component of this broad program involves the effective use of information to provide for the purposes discussed in the introduction to the OSH Act: for workplace safety and health enforcement, research, information, education, and training. 29 U.S.C. 651.

Section 24 of the Act, 29 U.S.C. 673, directs the Secretary of Labor, in consultation with the Secretary of Health and Human Services, to develop and maintain a program of collection, compilation, and analysis of occupational safety and health statistics. Section 8(c) also directs the Secretary of Labor, in cooperation with the Secretary of Health and Human Services, to prescribe regulations requiring employers to maintain accurate records of, and to make periodic reports on, work-related deaths, injuries, and illnesses.

Additionally, the Government Performance and Results Act of 1993(GPRA)(31 U.S.C. 1101) requires Federal agencies to implement a program of strategic planning, develop systematic measures of performance to assess the impact of individual government programs, and produce annual performance reports.

OSHA believes that collecting injury, illness and employment data from employers to meet these responsibilities represents the most appropriate policy. OSHA also needs establishment-specific data to better target its program activities, including workplace inspections and non-enforcement information and incentive programs, to the more hazardous workplaces. Given budget and personnel constraints, OSHA and the 23 states with OSHA-approved workplace safety and health plans are unable to work directly with all of these workplaces. In fiscal year 1996, OSHA and the States conducted enforcement inspections at approximately 80,000 workplaces (unpublished OSHA analysis of FY 1996 inspection data). At this rate, 75 years would be needed to inspect all of America's workplaces.

Several independent reports concerning occupational injury and illness recordkeeping and occupational safety and health policy have documented and supported OSHA's need for establishment-specific data. In a 1987 report, Counting Injuries and Illnesses in the Workplace: Proposals for a Better System, published by the National Research Council (NRC), the Panel on Occupational Safety and Health Statistics recognized OSHA's need for access to individual establishment data:

> The Occupational Safety and Health Administration should be able to obtain individual establishment data and that this might be achieved through the development of an administrative data system, such as that maintained, for example, by the Internal Revenue Service.

(Ex. 4, p. 10)

The panel believed that this data could be used to improve OSHA's enforcement program:

> It could provide systematic detailed data that the current program does not now provide; it could give OSHA more effective ways of using its inspection resources to reduce workplace injuries; and it could provide a more systematic bases for monitoring the quality of recordkeeping and reporting.

(Ex. 4, p. 113)

The NRC Panel further suggested that an administrative data system based on the OSHA 200 logs could provide a valuable database for other uses as well, including standard setting, enforcement, program evaluation, and research. (Ex. 4, p. 113)

In a 1989 report, the Keystone National Policy Dialogue on Work-Related Illness and Injury Recordkeeping, a group of industry, labor, government and academic representatives with an interest in occupational injury and illness data stated:

> The Dialogue group agreed that injury and illness statistics from recordkeeping can and should be used to target (prioritize) enforcement/compliance activity at OSHA.
>
> * * * * *
>
> The data should be usable for macro purposes by SIC codes (high risk—low risk) as well as in a performance oriented micro targeting of workplace visits. OSHA needs to conserve its resources and should be able to decide upon which industries and workplaces should receive the most attention. However, statistics alone should not be used to exempt any site from inspection. The records and rates at the site level should be used in decision making in conjunction with a review of site programs and spot check inspections.

(Ex. 5, p. 35)

In a 1990 report, Options for Improving Safety and Health in the

Workplace, the General Accounting Office (GAO) discussed an option for improving the use of inspection resources by targeting inspection activity with the use of establishment-specific injury and illness data:

> OSHA could focus its enforcement, as well as education and training efforts, on employers with high injury and illness rates in industries known to be hazardous.

(Ex. 36, p. 32)

OSHA believes that it can improve the effectiveness and efficiency of its programs by focusing its resources on employers and workplaces that are experiencing serious, ongoing workplace safety and health problems reflected by high rates of workplace injuries and illnesses. At the same time, data that shows workplaces with good safety and health records reflected by low injury and illness rates would allow OSHA to have greater flexibility in working cooperatively and in partnership with safer workplaces. These programs include enforcement programs as well as non-enforcement programs that encourage employers to voluntarily implement effective safety and health programs that protect workers from death, injury and illness.

2. The Use of Alternative Data Sources

Several commenters suggested that the Agency use data from existing data sources, such as state workers' compensation agencies, insurance companies, hospitals or OSHA inspection files instead of collecting information from employers. (Ex. 15: 2, 28, 58, 63, 97, 184, 195, 289, 327, 341, 374, 444) For example, Mr. Alex F. Gimble, CSP observed:

> Since similar data are readily available from other sources, such as the National Safety Council, insurance carriers, etc., why not use these statistics, rather than go through this duplication of effort at taxpayer expense? Another approach would be to utilize data collected by OSHA and State Plan compliance officers during site visits over the past 25 years.

(Ex. 15: 28)

Several commenters suggested that OSHA use injury and illness data from workers' compensation systems. The comments of the American Health Care Association (AHCA) are representative:

> AHCA encourages OSHA to consider the use of workers' compensation data in lieu of proposed OSHA 300 and 301 forms. Pursuing the enactment of legislation that would allow OSHA access to every state's workers' compensation data would eliminate the need for employers to maintain two sets of records, provide OSHA with necessary safety and health data, and ease administrative and cost burdens now associated with recordkeeping for employers in every industry across the country.

(Ex. 15: 341)

Ms. Diantha M. Goo recommended the use of data from treatment facilities:

> The accuracy and usefulness of OSHA's reporting system would be vastly improved if it were to shift responsibility from employers (who have a vested interest in concealment) to the emergency rooms of hospitals and clinics. Hospitals are accustomed to reporting requirements, use the correct terminology in describing the accident and its subsequent treatment and are computerized.

(Ex. 15: 327)

OSHA believes that injury and illness information compiled pursuant to Part 1904, plus employment figures, will be much more reliable and suited to OSHA's needs than any available alternative. While many State workers' compensation programs voluntarily provide injury and illness data to OSHA for various purposes, others do not. And the data vary widely from state to state. Differing workers' compensation laws and administrative systems result in large variations in content, format, accessibility and computerization. Often, workers' compensation databases do not include injury and illness data from employers who elect to self-insure. Additionally, most workers' compensation databases do not include information on the number of workers employed or the number of hours worked by employees, and incidence rates of occupational injury and illness cannot be computed. Workers' compensation data are also based on insurance accounts, and not on the safety and health experience of individual workplaces. As a result, an individual account often reflects the experience of several workplaces involved in differing business activities.

Only a survey of every member of a selected set of employers about a selected set of data gathered in a relatively short time can tell OSHA which members of the group have the highest or lowest illness and injury rates, how the injury and illness rates are distributed over the field, and the types of injuries and illnesses being experienced in that field, etc. As more surveys are conducted over time, a reliable historical record will emerge.

While OSHA does not believe that alternate source data are satisfactory substitutes for the information covered by 1904.17, the agency does recognize they have value. To the extent information from workers' compensation programs, BLS, insurance companies, trade associations, etc., are available and appropriate for OSHA's purposes, OSHA intends to continue to use them to supplement its own data systems and assess the quality of its own data. However, consistent with the Congressional mandate of the OSH Act, OSHA needs to maintain its own recordkeeping system and to gather the data for it through a reporting requirement.

3. Scope Issues

Many commenters objected to the breadth of the proposed regulatory text, arguing that it would give the Secretary unfettered discretion to demand any information related to the Act's purposes, at any time, for virtually any reason. (Ex. 25, 58X, 15: 55, 80, 102, 124, 135, 144, 158, 162, 165, 193, 206, 207, 209, 211, 212, 220, 228, 239, 240, 243, 252, 255, 257, 258, 261, 264, 267, 274, 275, 276, 286, 293, 305, 306, 309, 313, 341, 348, 351, 368, 375, 389, 397, 406, 420, 427) A comment by the National Association of Manufacturers sums up the point of view expressed by many others:

> It is one thing to have an objectively identified set of employers that must make an annual filing of a census-type survey on a non-discriminatory basis; it is another to give an enforcement agency the authority—at its sole whim or discretion—to selectively require one or more employers to file reports that an entire class of employers is required to maintain. It is one thing to have an objectively identified set of information or records that must be included in an annual filing; it is another to give an enforcement agency the authority—at its sole whim or discretion—to selectively require one or more employers to generate and file reports containing whatever information the agency identifies so long as it can be described as ''regarding [the employer's] activities relating to this [OSH] Act.''

(Ex. 25, 15: 305)

It was not OSHA's intention to exercise unfettered discretion to collect any data related to the Act. It was, however, OSHA's intention to create a reliable mechanism for routinized collections, by mail or other remote transmittal, of a limited class of information without unduly burdening employers. Consistent with that goal, and in light of the comments of record, the final reporting rule is carefully circumscribed. The rule authorizes an annual survey—which, because it will go to more than ten employers, will be subject to the Paperwork Reduction Act (PRA) (See 42 U.S.C. 3502 *et seq.* and 5 CFR part 1320)—concerning information contained in records required to be created and maintained by Part 1904 plus employment figures. The rule specifies the time within which responses are to be provided to OSHA. Employers will be able to determine which employers are within the survey group and what information will be collected each year before the

survey begins because that information will be made available to the public under a Federal Register notice pursuant to the PRA. Once a survey has received an OMB control number under the PRA, any substantive or material modification would require a new PRA clearance. As indicated in Section IX of this preamble entitled ''Paperwork Reduction Act of 1995'' the OMB control number for the current annual survey form is 1218–0209. (Section 1904.17 defines the class of information and respondents subject to survey under the rule. The set of employers and information (from within the covered class) to be targeted in each year is fixed as each survey is designed.)

One commenter was concerned that the proposed rule could apply to information dating back ''decades,'' creating substantial burdens for employers. (Ex: 15:395, p. 67) Since the final rule establishes an annual survey of information in Part 1904 records, which are required to be kept no more than five years, plus employment information, it presents no issues about ''decades-long'' records.

A number of commenters argued that as proposed, section 1904.13 violated Fourth Amendment guarantees against unreasonable searches. (Ex. 15:154, 174, 193, 215, 258, 305, 318, 346, 375, 390, 395, 397) Most of these commenters referred to *Marshall* v. *Barlow's, Inc.,* 436 U.S. 305 (1978), *McLaughlin* v. *Kings Island,* 849 F.2d 990 (6th Cir. 1988), and *Brock* v. *Emerson Electric Co,* 834 F.2d 994 (11th Cir. 1987).

Barlow's concerned the question whether OSHA must have a warrant to inspect a work site if the employer does not give consent. *Kings Island* and *Emerson Electric* concerned on-site records inspections by compliance officers. Section 1904.17 is a reporting requirement; no entry of premises or compliance officer decision making is involved. Thus, these decisions provide little if any support to the commenter's sweeping Fourth Amendment objections. *See, Donovan* v. *Lone Steer, Inc.,* 464 U.S. 408, 414 (1984) (reasonableness of a subpoena is not to be determined on the basis of physical entry law, because subpoena requests for information involve no entry into nonpublic areas).

Moreover, in its final form the rule is extremely narrow in scope and leaves the agency with limited discretion. Section 1904.17 is restricted to a limited class of information. This information is highly relevant to accomplishment of OSHA's mission. The reporting is done by mail or other remote transmittal, without any intrusion into the employer's premises by OSHA, and is not unduly burdensome. Much of the injury and illness information to be reported is taken from records employers are already required to create, maintain, post, and provide to workers and government officials on request, which means that the employer has a reduced expectation of privacy in the information. Employment figures are critical to OSHA's ability to evaluate the injury and illness data, whereas they are not information that employers may expect to keep secret from the government. In addition, as explained earlier, there is no substitute for a large body of site-specific information gathered by the survey method. The results of the surveys will be uniquely useful to OSHA in meeting Congress' mandate to use reporting requirements and build an effective statistical program around them.

Some commenters argued that the Fourth Amendment requires OSHA to use a subpoena or warrant to get information from employers who do not provide it voluntarily. Since the proposed reporting rule made no explicit provision for enforcement via subpoena or warrant, they contended that the rule was constitutionally deficient. ''Production may not be compelled without a search warrant, administrative subpoena or other appropriate vehicle.'' (National Beer Wholesalers Association. Ex. 15:215.) ''The Fourth Amendment * * * requires OSHA to obtain a subpoena or warrant prior to obtaining access to any of the information identified in proposed * * * 1904.13.'' (The Fertilizer Institute. Ex. 15: 154.) ''The proposed rules make no provision for a subpoena or warrant and appear to contemplate that OSHA will use neither. * * * These provisions, to the extent they purport to authorize inspections of records without a warrant or subpoena, violate the Fourth Amendment.'' (American Iron and Steel Institute. Ex. 15:395.)

Certainly, under many circumstances employers can force OSHA to secure a warrant or subpoena enforcement order before giving OSHA access to workplace injury and illness data. These commenters, however, appear to be arguing that including a subpoena or warrant enforcement mechanism in the text of the rule is necessary to adequately protect their Fourth Amendment right to privacy. This is not so. The Fourth Amendment protects against ''unreasonable'' intrusions by the government into private places and things. Reporting rules that do not incorporate subpoena or warrant procedures are not ''unreasonable'' per se. *See* e.g., *California Bankers Ass'n* v. *Shultz,* 416 U.S. 21, 67 (1974) (upholding reporting regulation issued under the Bank Secrecy Act of 1970 that did not provide for subpoenas or warrants where the ''information was sufficiently described and limited in nature and sufficiently related to a tenable Congressional determination'' that the information would have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings). For example, OSHA has long required employers to report promptly all fatal workplace accidents.

The totality of circumstances surrounding a warrantless or ''subpoena-less'' reporting requirement or administrative investigation determines its reasonableness. For example, in *McLaughlin* v. *A.B. Chance,* 842 F.2d at 727 (4th Cir. 1988), the Fourth Circuit upheld a records access citation against an employer who refused an OSHA inspector access to its OSHA Logs and Forms on the ground that it had a right to insist on a warrant or subpoena. The court upheld the citation because a summary of the information was posted annually on the employee bulletin board, thus diminishing the employer's argument that it has a reasonable expectation of privacy in the information, and the inspector was lawfully on the premises to investigate a safety complaint. In *New York* v. *Burger,* 482 U.S. 691, 702–703 (1987), the Supreme Court noted that agencies may gather information without a warrant, subpoena, or consent if the information would serve a substantial governmental interest, a warrantless (or subpoena-less) inspection is necessary to further the regulatory scheme, and the agency acts pursuant to an inspection program that is limited in time, place, and scope. The *Burger* court went on to uphold a warrantless inspection of records during an administrative inspection of business premises. Consider also the *Kings Island* and *Emerson Electric* decisions' concern about the inspector's broad field discretion. *Kings Island* (noting that under *Burger* a warrantless or subpoena-less inspection of records might be reasonable, but concluding that the facts of the case did not satisfy *Burger* analysis); *Emerson Electric* (noting that under *California Bankers* an agency may gain access to information without a subpoena or warrant but concluding that facts of that case were not comparable to those reviewed in *California Bankers*).

It is not OSHA's intention to resolve, in this rulemaking, the question of the procedures the Fourth Amendment may require to enforce the regulatory obligation. Not only are Fourth Ammendment issues ultimately for

courts, not agencies to resolve, such issues are rarely suitable for judgement in the abstract. If for example, OSHA were at some future time to issue a citation for nonresponse to a survey questionaire, the Fourth Amendment evaluation would depend on all the particulars of the case. (While the participation in the OSHA Data Collection Initiative is mandatory, OSHA has made a policy decision that it will not issue citations for the failure to respond to the first survey conducted under authority of this rule, which will collect data for calendar year 1996; nor does OSHA intend to issue citations for the 1995 survey already conducted. OSHA will take into consideration its experience with the Data Collection Initiatives when developing policy for future years. However, the nonrespondents to the 1995 and 1996 survey instrument may be subject to an on-site records inspection by an OSHA compliance officer or issued an administrative subpoena.)

Further analysis under the principles set forth in the Burger decision must await a specific application of 1904.17 when the particulars of the information request are known. OSHA has, however, structured the final rule to respond to concerns expressed in the case law and to limit its own discretion and eliminate discretion of officials in the field. Section 1904.17 surveys are constrained first by the regulatory text—the surveys occur no more than once per year, they involve ten or more employers covered by the Act, they are limited to injury and illness information contained in records created and maintained pursuant to Part 1904 and to employment and hours worked, they are accomplished by mail or other remote transmittal, and respondents have at least thirty days to respond. The data from within the covered field and the set of employers or establishments to be canvassed for each survey are definitively fixed during the Paperwork Reduction Act clearance process and are available to the public in connection with Federal Register notices published during the clearance process.

Employers will have ample opportunity to test the Fourth Amendment reasonableness of any survey with which they are faced. Under any follow-up scenario—warrant records inspection, subpoena demand or notice of a 1904.17 violation—employers would have advance notice that a response was required, and would have an opportunity to provide the survey data in order to avoid legal process. Employers faced with a survey that they consider an infringement of Fourth Amendment rights of privacy may refuse to respond and raise objections in a warrant enforcement or subpoena proceeding or as a defense if they are issued citations by OSHA. Under the Act, employers are entitled to contest citations and receive an administrative hearing, administrative review of the hearing officer's decision, and federal court of appeals review. 29 U.S.C. 659(c), 660(a).

Some commenters asserted that using reported information for enforcement targeting would violate their privilege against self-incrimination. (Ex. 15:203, 397) These commenters did not explain how the privilege against self-incrimination would be implicated in the reporting requirement or cite any supporting authorities. OSHA would point out, that the privilege against self-incrimination derives from the Fifth Amendment and pertains to criminal proceedings. It has long been settled that the privilege cannot be invoked to resist the disclosure needed for a regulatory purpose unrelated to the enforcement of criminal laws even if a criminal proceeding is a possible consequence of an administrative investigation. See, for example, *Shapiro* v. *United States*, 335 U.S. 1, 32–33 (1948) (Fifth Amendment not violated by regulation requiring individuals to keep and produce records ''of transactions which are the appropriate subjects of governmental regulation'').

4. OSHA's Statutory Authority To Collect Data With a Reporting Rule

Some commenters argued that the proposed reporting rule was not consistent with Sections 8(c) and 24(e) of the Act. Sections 8(c)(2) directs that ''the Secretary of Labor * * * shall prescribe regulations requiring employers to maintain accurate records of, and to make periodic reports on, work-related deaths, injuries and illnesses other than minor injuries * * *.'' 29 U.S.C. 657(c)(2). Section 24(e) provides that ''[o]n the basis of the records made and kept pursuant to section 8(c) of this Act, employers shall file such reports with the Secretary as he shall prescribe by regulation * * *.'' 29 U.S.C. 673(e).

These commenters argued that the proposed rule merely reiterated the Secretary's entire range of statutory authority to collect information and did not itself prescribe anything, much less limit itself to the injury and illness records mentioned in section 8(c)(2). Moreover, some claimed, it left the compliance officer in the field with unfettered discretion to decide what information to demand. (Ex. 15: 154, 313, 352, 353, 358, 375, 397.)

There are several responses to be made on this point. First, OSHA has had the ability to access injury and illness records for many years and is simply clarifying its authority to collect the information through the mail. Second is the fact that the final rule is extremely narrow and specific about the information it covers and how that information is to be gathered. Third, compliance officers do not implement the rule; the agency implements it by conducting large annual surveys, by mail, requesting information within the scope of the rule from employer or establishment groups whose responses the agency judges to be necessary in meeting its multiple responsibilities. Finally, the final rule fits within the terms of Section 8(c).

5. Time Allowed for Employers To File Reports

The proposed rule would have required employers to submit data to OSHA, when OSHA sends them a written request for records, within 21 calendar days of receiving the request. Several commenters provided remarks on the 21 calendar day limitation. (Ex. 15: 65, 127, 347, 405)

Some comments supported the 21 day time frame as a reasonable time for employers to comply with a request for information. (Ex. 15: 347, 405) For example, the Westinghouse Company (Ex. 15: 405, P. 4) stated: ''This change is acceptable and the time limitations appear reasonable.'

OSHA also received comments stating that 21 calendar days is too short a time frame for reporting, and that longer times should be adopted in the final rule. (Ex. 15: 65, 127) For example, the Aluminum Company of America (Alcoa) remarked:

> Alcoa believes this is too short and restrictive a time frame given current staff levels and resource demands on employers and their health and safety professionals. * * * OSHA should provide 30 days advanced notification (for planning purposes) and 21 days for response following the advanced notification to the specific employers to be surveyed.

(Ex. 15: 65)

The Laboratory Corporation of America stated:

> Reports to be required of employers mentioned in 29 CFR 1904.13 should be handled in one of two ways. The content of the reports needs to be established in advance and a specific date for a deadline for submission provided. Alternatively, if the report content has not yet been established, then a period of time longer than 21 days is needed for response. A period of 45 to 60 days is suggested. Unless the information requested is known in advance to employers, it will take time to communicate and collect

this data in a multi-state, multi-location operation. Either of these two options would give more appropriate time for more accurate information to be compiled for these types of employers.

(Ex. 15:127 P. 2)

Other comments supported the 21 day requirement, but suggested that the Secretary maintain some flexibility and discretion to provide more than 21 days for a specific request.

The American Petroleum Institute (API), for example, observed:

> Twenty-one days should be the minimum time allowed for employers to respond to such requests.
>
> Recommended language: The employer shall file the requested reports with the Secretary within 21 calendar days of receipt of the request, unless the Secretary allows more than 21 days.

(Ex. 15:375 P. b25)

In light of these comments, OSHA has increased the reporting time to 30 calendar days in this final rule. OSHA believes that the 21 day time frame may be too short for some employers to comply with the request, but believes that 45 or 60 days is too long a time frame for a relatively simple request for summary information contained in existing records. A longer deadline would make it more difficult for OSHA to collect data in a timely fashion, or to conduct quality control measures such as follow-up mailings and phone calls to verify questionable or erroneous data.

Additionally, OSHA agrees that the time frame in the rule should be a minimum time that can be lengthened at the discretion of OSHA. In other words, the final rule requires employers to file reports within 30 calendar days of receipt of the request, unless the written instructions contained in the request specifically allow more than 30 calendar days.

6. Reporting With Computers

OSHA received several comments on the potential role of computers in reporting data to OSHA. (Ex. 15: 011, 163, 184, 390, 402) The OSHA Data Company (Ex. 15: 011) suggested that computer reporting should be a mandatory feature of the data collection system, remarking: ''We suggest that recordkeeping in computer readable format should be mandatory and data should be submitted to OSHA in that format.''

Other commenters suggested that computer reporting be allowed and encouraged (Ex. 15: 163, 184, 390, 402). The comments of US West Inc. are representative of these comments:

> US West requests that OSHA move to implement systems that will allow employers to electronically provide data, such as the data requested in the BLS Survey of Occupational Injuries and Illnesses. Such a method will be more effective, in terms of receiving consistently formatted data, and will be more cost efficient for both employers and the Department of Labor.

(Ex. 15–184)

OSHA believes that there is enormous potential for reducing collection burden on both employers and the government, while improving data quality and consistency, by allowing employers to submit data through computerized reporting systems. However, OSHA does not believe that computerized reporting systems should be mandatory for all employers. Mandatory computer systems could actually increase the burden on those employers who do not have computer systems and on those employers who have computer systems that do not provide simple electronic communications options.

OSHA intends to implement, as soon as possible, options for individual data collection projects that will allow employers to submit data either electronically or through paper forms. For those data collections where computerized submission of data is an option, OSHA will include instructions for computerized submissions in the instructions accompanying the request for information.

7. Miscellaneous Issues

OSHA also received comments on a variety of issues that the Agency believes are worthy of discussion, as follows.

A. The Ability of OSHA To Designate its Collection Authority to Another Entity. The Proposed Rule Did Not Indicate That a Designee Could Collect Information for the Agency

Often, OSHA and the Bureau of Labor Statistics have used grants to the states and independent government contractors to collect data on behalf of the Department of Labor. These arrangements allow the Department to collect information using a variety of administrative options that are advantageous to the Federal government and do not increase the burden on respondents. One commenter suggested: ''Data should continue to be collected through state agencies.'' (Ex. 15: 41)

In order to maintain the Agency's flexibility to collect data via grants to the states, or to use government contractors, and to be able to collect data through cooperative interagency efforts with the Department of Health and Human Services, OSHA has modified the final rule to require employers to submit information to either OSHA or OSHA's designee.

B. Unfair Effect on Specific Industry Sectors

Several commenters raised concerns over what they regarded as potentially unfair effects of the data collection on smaller employers, small establishments, and employers who rely heavily on part time employees (Ex. 15: 304, 384, 424, 449). Another commenter was concerned that OSHA would attempt to compare data from the longshoring industry to that of other industries and argued that such comparisons would be invalid because longshoring is subject to a different workers' compensation insurance system than other industry sectors (Ex. 15: 95).

Several commenters expressed concern over a perceived and potentially unfair effect of data collections on smaller employers, arguing that the same small number of cases would result in a higher incidence rate for a smaller employer than for a larger employer, or that a small employer may have a high rate for only one year and may have had no cases for many years before and after the year for which the information is collected. (Ex. 15: 304, 384, 449) For example, the Akzo Nobel Corporation observed:

> We support this concept, but caution OSHA about using data from only one year, especially for small sites where a single medical case in a plant of 20 employees will give a total recordable rate of about 5. We would consider that a ''high'' rate, possibly targetable by OSHA, but it might be the first OSHA recordable incident in 3 or 5 years. Caution is advised.

(Ex. 15: 384)

United Parcel Service (UPS) (Ex. 15: 424, p. 9) expressed a concern about the possible effect on firms who rely heavily on part-time labor, stating:

> The agency's current practice of determining injury rates as a ratio to hours worked, rather than to employees, has the consequence of inflating injury and illness rates for companies with more workers per hour worked: at least when an outside limit of an 8-hour workday is established, the likelihood, per hour, of injury decreases when more hours are worked. To put it another way, the more workers who work per 8-hour day, the more likely those hours will generate discrete employee complaints. Therefore, OSHA's current practices already distort the apparent safety of workplaces relying heavily on part-time labor.

The Pacific Maritime Association (Ex. 15: 95, p. 10) expressed a concern that injury and illness reports would not provide an accurate comparison with other industries because the longshoring industry is covered by a separate workers' compensation system, stating:

Another very important recommendation concerns the inequities of comparing an industry covered by the Long Shore and Harbor Workers Act compensation program with those covered by Workers' Compensation. Compensation provided by the Long shore program is much more generous than Workers' Compensation and may encourage individuals to remain on compensation longer. This disparity between the two systems is not often acknowledged particularly when injury incident and severity rates are used to identify high hazard industries. It is recommended that OSHA recognize the impact of the Long shore compensation by establishing a specific category for employees who are covered by the Long shore Act. For an example, SIC 4491, Long shoring, may be used as a specific category where employer incident and severity rates may be compared.

These objections are premature, as they relate to certain possible uses of data, not to usefulness for all purposes, and not to the Agency's authority to collect the data in the first instance. Moreover, as the comments themselves made clear, when the time comes for using survey data, it will be possible to factor in special circumstances for subgroups of employers. For example, small employer data could be adjusted to omit smaller employers with only one injury from any analysis of the data.

In regards to the longshoring industry, OSHA has traditionally performed separate analyses of broader databases to prepare employer lists specific to the longshoring industry. OSHA recognizes the unique qualities of this industry, has developed separate standards for maritime industries, including longshoring, and normally performs specialized investigations for longshoring facilities. The problems with data from the longshoring industry can be solved by continuing to look at this industry in a way that does not compare these employers to employers in other industries.

In general, OSHA believes that different approaches to the use of data can effectively deal with differences among different subpopulations of employers, depending on the unique qualities of those subpopulations. OSHA will continue to tailor its analysis of data when these unique situations are encountered.

C. Data Quality Issues

Several commenters discussed the possible adverse impacts on the quality of the data if reporting is required. (Ex. 15: 50, 122, 176, 273, 301, 310, 374, 401, 414). Mr. George R. Cook, CCC-A (Ex. 15: 50) remarked:

> If the OSHA Form 300 is to be used to prioritize compliance visits, it is felt this policy will add undue pressure for companies to keep entries off the Form.

The Laborers' Health & Safety Fund of North America (Ex. 15: 310) observed:

> The premise of employers self-reporting injuries and illnesses to an agency which may inspect them based on that data is a prescription for mis-reporting.

The Chemical Manufacturers Association (CMA) remarked:

> CMA supports targeting of inspections in order for OSHA to better use its resources, but cautions OSHA to carefully consider its approach. CMA is concerned that OSHA carefully consider the relationship between targeting and OSHA's ability to collect accurate and credible data. Valid data collection and analysis are the cornerstone of effective targeting.
>
> CMA recognizes that currently OSHA is not collecting adequate data to target effectively. It is important that OSHA review existing data sources, examine existing targeting programs (e.g. Maine 200) and revise its data collection mechanisms. However, the Administration must carefully evaluate the context in which that data has been collected, as well as identify characteristic flaws in such programs.

(Ex. 15: 301, p. 16)

The quality of any data collected from employers is an ongoing concern for the Agency. OSHA agrees that misreporting, whether intentional or unintentional, can affect the value of the collected data and any conclusions drawn from that data. Misreporting is not, however, an insoluble problem. Controls are available for assuring a reasonable quality of data for use by OSHA, as well as employers and workers. For example, OSHA is implementing a quality control initiative for the current collection of injury and illness records data required by Part 1904 that will include three components; outreach and training for the regulated community to reduce unintentional errors, error screening and follow-back procedures to correct or verify questionable data reported to the agency, and, under certain circumstances, on-site records inspections. OSHA is also planning to use other sources of data, e.g., workers' compensation records and inspection histories, when available, for comparison purposes as an external check on records validity.

D. Effect on Existing Authority

Nothing in Section 1904.17 affects the Secretary's general investigatory authority under Section 8 of the Act or his broad rulemaking authority under Section 8(g)(2).

IV. Economic Analysis

Section 1904.17 applies to all employers within OSHA jurisdiction, including those in general industry, construction, shipyard employment, long shoring, marine terminals, and agriculture. OSHA has determined that the Section 1904.17 regulation does not require the Agency to develop a Final Economic Analysis because it is not a ''significant regulatory action'' as defined by section 3(f)(1) of Executive Order (E.O.) 12866. This provision of the E.O. covers a regulatory action that is likely to result in a rule that may:

(1) Have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities.

Pursuant to this section 1904.17 individual data collections conducted under this regulation will require employers to assemble data and file reports to OSHA. To provide employers with examples illustrative of the kinds of costs and paperwork burdens potentially associated with such data collections, the following paragraphs describe the costs and burden hours associated with two recent Agency data collection efforts. The examples chosen include the two recent data collection initiatives undertaken by OSHA in 1995 and 1996.

The impact analyses developed for the 1995 and 1996 data collections initiatives were published in the Federal Register (60 FR 35231; 61 FR 38227, respectively). OSHA estimated that employers responding to those data collection efforts would be required to spend an estimated $6.95 per response, based on 30 minutes of clerical time at $13.90 per hour. OSHA believes that most firms will assign the survey form to a personnel or payroll clerk with an average wage of $13.90 per hour. This figure is based on a wage rate with benefits for a secretary-typist from Employment and Earnings, January 1996, U.S. Department of Labor, Bureau of Labor Statistics (OSHA has recently updated its wage rate data with more current statistics). The information collected from employers in the 1995 and 1996 data collection initiatives was summary information from the establishment's OSHA Log and Form 200, in addition to information on the number of workers employed and the number of hours worked by these employees in the applicable calendar year. Approximately 70,000 employers were targeted in each of these data

collection initiatives, for a total burden estimate of 35,000 hours, or $486,500. OSHA anticipates that future data collection initiatives conducted under section 1904.17 will impose similar burdens—approximately 30 minutes of clerical time per respondent—and will therefore not impose a substantial burden on any employer.

The record contains many comments about the burden of recording employment and hours worked information on the OSHA Log—some favorable but more unfavorable. However, the negative commenters provided no empirical basis by which their burden claims could be quantified. In the absence of such data, OSHA turned to the long experience BLS has accumulated while collecting these same types of data for statistical purposes. For over 25 years, until the BLS injury and illness survey was revised to collect additional data from employers, the BLS collected data identical to the data collected by OSHA in 1996. BLS estimated that completion of its pre-1992 surveys required one half hour of time. A 1992 BLS test conducted on 92 respondents completing only part 1 of the BLS survey form (equivalent to the OSHA form) measured the average respondents completion time at 30.55 minutes.

The occupational injury and illness information from the OSHA records is required by regulation and is easily transferred to the OSHA survey form. The information on employment and hours worked by employees is generally easy to obtain from payroll systems for employees who are paid on an hourly basis, and can be estimated for salaried employees. The survey forms used by OSHA provide the employer with instructions and worksheets to make the calculations as easy as possible. In many cases, the employment and hours worked data are already being reported to unemployment insurance and workers' compensation agencies and can easily be transferred to the OSHA survey form.

As discussed above, OSHA has concluded that promulgation of this regulation, in and of itself, imposes few if any economic costs on potentially affected firms. Individual data collections conducted under this regulation will be subject to OMB review under the procedures specified by the Paperwork Reduction Act of 1995. Employers will thus have an opportunity to comment on any burdens imposed by such data collections when they are carried out in the future.

OSHA has determined that this rule is a significant regulatory action as defined by 3(f)(4) of E.O. 12866. This provision of the E.O. covers a regulatory action that is likely to result in a rule that may:

(4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

V. Regulatory Flexibility Act

OSHA is required by the Regulatory Flexibility Act, as amended in 1996, to assess whether its regulations will have a significant impact on a substantial number of small entities. As explained in the Economic Analysis section of this preamble, above, this regulation (section 1904.17, Annual OSHA Injury and Illness Survey of Ten or More Employers) imposes few, if any costs on affected employers, although future data collection efforts conducted under this regulation may impose minimal cost and paperwork burdens on those employers affected by a given data collection effort. OSHA will carefully assess the impacts of individual data collections on employers, including small employers, at the time such efforts are initiated. Pursuant to the Regulatory Flexibility Act, OSHA thus certifies that section 1904.17 will not have a significant impact on a substantial number of small entities.

VI. Environmental Impacts

The provisions of this final regulation have been reviewed in accordance with the requirements of the National Environmental Policy Act (NEPA) of 1969 (42 U.S.C. 432, *et seq.*), the Council on Environmental Quality (CEQ) NEPA regulations [40 CFR part 1500], and OSHA's DOL Procedures [29 CFR part 11]. As a result of this review, OSHA has determined that this final rule will have no significant effect on air, water, or soil quality, plant or animal life, use of land, or other aspects of the environment.

VII. Federalism

This rule has been reviewed in accordance with Executive Order 12612 (52 FR 41685), regarding Federalism. Because this rulemaking action involves a ''regulation'' issued under § 8 of the OSH Act, and not a ''standard'' issued under § 6 of the Act, the rule does not preempt State law, see 29 U.S.C. 667 (a).

VIII. State Plans

The 25 States and territories with their own OSHA approved occupational safety and health plans are: Alaska, Arizona, California, Hawaii, Indiana, Iowa, Kentucky, Maryland, Michigan, Minnesota, Nevada, New Mexico, North Carolina, Oregon, Puerto Rico, South Carolina, Tennessee, Utah, Vermont, Virginia, Virgin Islands, Washington, and Wyoming; Connecticut and New York have state plans covering state and local Government employees only.

Section 18(c)(7) of the OSH Act requires employers in state plan states to ''make reports to the Secretary in the same manner and to the same extent as if the plan were not in effect.'' Today's amendment to 29 CFR part 1904 relates to periodic data surveys which federal OSHA will conduct in all states, including those which administer approved state plans; accordingly, states with state plans are not required to adopt a comparable regulation. In state plan states, the data collected by the federal OSHA survey will be shared with the states for use in administering their plans, and also provide relevant information for OSHA's use in monitoring the state plan as required by section 18(f). Because OSHA's nationwide data survey is not an issue currently addressed by any of the state plans, OSHA's authority to implement the survey is not affected either by operational agreements with state plan states or by the granting of final approval under section 18(e). OSHA's authority under the Act, to take appropriate enforcement action when necessary to compel responses to the survey and to assure the accuracy of the data submitted by employers, will be exercised in consultation with the state in state plan states. The states may also exercise such authority under state law or regulation.

IX. Paperwork Reduction Act of 1995

This final regulation contains information collection requirements. As required by the Paperwork Reduction Act of 1995, the U.S. Department of Labor has submitted a copy of these sections to OMB for its review. (44 U.S.C. 3501 *et seq.*, and 5 CFR part 1320.

Separately, the Department of Labor has received renewed approval for the Annual Survey Form under the Paperwork Reduction Act (OMB number 1218–0209)

List of Subjects in 29 CFR Part 1904

Reports by employers, occupational injuries and illnesses, Occupational Safety and Health, Occupational Safety and Health Administration, Recordkeeping, Reporting.

Authority

This document was prepared under the direction of Greg Watchman, Acting Assistant Secretary of Labor for Occupational Safety and Health, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210.

Accordingly, pursuant to sections 8 and 24 of the Occupational Safety and Health Act of 1970 (29 U.S.C. 657, 673), Secretary of Labor's Order No. 1–90 (55 FR 9033), and 5 U.S.C. 553, 29 CFR part 1904 is hereby amended by adding § 1904.17 as set forth below.

Signed in Washington, D.C., this 7th day of 1997.

Greg Watchman,

Acting Assistant Secretary of Labor.

PART 1904—[AMENDED]

1. The authority citation for Part 1904 is revised to read as follows:

Authority: Secs. 8, 24, Occupational Safety and Health Act of 1970 (29 U.S.C. 657, 673), Secretary of Labor's Order No. 12–71 (36 FR 8754), 8–76 (41 FR 25059), 9–83 (48 FR 35736), 1–90 (55 FR 9033) or 6–96 (62 FR 111), as applicable.

Section 1904.7, 1904.8 and 1904.17 are also issued under 5 U.S.C. 553.

2. Section 1904.17 immediately following 1904.16 is added to read as follows:

§ 1904.17 Annual OSHA Injury and Illness Survey of Ten or More Employers.

(a) Each employer shall, upon receipt of OSHA's Annual Survey Form, report to OSHA or OSHA's designee the number of workers it employed and number of hours worked by its employees for periods designated in the Survey Form and such information as OSHA may request from records required to be created and maintained pursuant to 29 CFR part 1904.

(b) Survey reports shall be sent to OSHA by mail or other means described in the Survey Form within 30 calendar days, or the time stated in the Survey Form, whichever is longer.

(c) Employers exempted from keeping injury and illness records under §§ 1904.15 and 1904.16 shall maintain injury and illness records required by §§ 1904.2 and 1904.4, and make Survey Reports pursuant to this Section, upon being notified in writing by OSHA, in advance of the year for which injury and illness records will be required, that the employer has been selected to participate in an information collection.

(d) Nothing in any State plan approved under Section 18 of the Act shall affect the duties of employers to comply with this section.

(e) Nothing in this section shall affect OSHA's exercise of its statutory authorities to investigate conditions related to occupational safety and health.

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